



REGIONAL TRANSPORTATION COMMISSION

Metropolitan Planning • Public Transportation & Operations • Engineering & Construction

Metropolitan Planning Organization of Washoe County, Nevada

November 20, 2020

AGENDA ITEM 3.18

TO: Regional Transportation Commission

FROM: Adam Spear
General Counsel



Bill Thomas, AICP
Executive Director

SUBJECT: Settlement Agreement

RECOMMENDATION

Approve a Settlement Agreement with Granite Construction Co. to settle all claims in *Granite Construction Co. v. Regional Transportation Commission of Washoe County* and to close-out the Agreement for Construction Work for Phase 2 of the Southeast Connector Project; authorize the RTC Executive Director to execute the agreement.

SUMMARY

RTC chose the construction manager-at-risk project delivery method for Phase 2 of the Southeast Connector Project. In April 2015, RTC and Granite entered into an Agreement for Construction Work for Granite to serve as the construction manager-at-risk (the “Contract”).

During construction, certain contractual disputes arose between the parties. In 2019, Granite filed a complaint against RTC in the Second District Judicial Court of the State of Nevada in and for the County of Washoe (“Court”) styled as *Granite Construction Co. v. Regional Transportation Commission of Washoe County*, Case No. CV 18 – 01945 (the “Lawsuit”). RTC filed an answer.

The parties have negotiated the attached Settlement Agreement to resolve the Lawsuit and close-out the Contract. As part of the settlement, the parties have negotiated a final change order (Change Order No. 12). Under the terms of the Settlement Agreement, RTC will accept the assignment of a contract between Granite and Soiltech, Inc. to complete certain wetlands maintenance and monitoring. Upon execution of the Settlement Agreement, all conditions for close-out of the Contract will have been satisfied and the parties will release all actual or potential claims against each other. The parties will then submit an order to the court to dismiss the Lawsuit.

FISCAL IMPACT

The net fiscal impact of Change Order No. 12 will be \$2,613,563.48. RTC will release the retention amount that was withheld pursuant to the Contract.

PREVIOUS ACTIONS BY BOARD

None.

ADVISORY COMMITTEE(S) RECOMMENDATION

There are no advisory committee recommendations pertaining to this agenda item.

Attachment

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is made this ___ day of November, 2020, (“Effective Date”) and entered into by and between Regional Transportation Commission of Washoe County (“RTC”) and Granite Construction Co. (“Granite”). RTC and Granite are sometimes referred to collectively herein as the “Parties” and individually as a “Party.”

WHEREAS, on or about April 16, 2015, the RTC and Granite entered into that certain Agreement for Construction Work for the provision of Construction Manager at Risk/General Contractor Services (the “CMAR Contract”) for Phase 2 Southeast Connector Clean Water Way to South Meadows Parkway (the “Project”);

WHEREAS, during the course of Granite’s construction of the Project certain disputes arose between Granite and the RTC;

WHEREAS, on March 12, 2019, Granite filed a complaint against RTC in the Second District Judicial Court of the State of Nevada in and for the County of Washoe (“Court”) styled as *Granite Construction Co. v. Regional Transportation Commission of Washoe County*, Case No. CV 18 - 01945 (the “Lawsuit”);

WHEREAS, RTC and Granite desire to enter into this Agreement to settle all claims between them in the Lawsuit and to close-out the CMAR Contract pursuant to its terms;

NOW THEREFORE, for and in consideration of the terms and conditions set forth herein, the Parties hereby agree as follows:

1. Incorporation. The foregoing recitals are true and correct and incorporated herein by reference.

2. Change Order. The Parties agree to Change Order No. 12 as approved by the RTC Board of Commissioners at its meeting on November 20, 2020. The amount set forth in Change Order No. 12 will be paid to Granite upon execution of this Agreement.

3. Assignment of Soiltech Subcontract. Granite hereby transfers and assigns to RTC, its successors and assigns, and RTC hereby assumes, its rights and obligations in that certain subcontract agreement by and between Granite and Soiltech, Inc. dated April 24, 2015 (the "Soiltech Subcontract"). Granite represents and warrants that it has not previously assigned or released the Soiltech Subcontract to any third party, in whole or in part. As a result of the above assumption by RTC, RTC will defend, indemnify and hold harmless Granite for any claims for non-payment related to the Soiltech Subcontract arising after the date of this Agreement. Granite will be responsible for payment to Soiltech of retention earned up to the date of this Agreement and will make payment to Soiltech upon execution of this Agreement. Granite will defend, indemnify and hold harmless RTC for any claims for non-payment related to the Soiltech Subcontract arising prior to the date of this Agreement.

4. CMAR Contract Close-out. The Parties agree and acknowledge that all conditions for close-out of the CMAR Contract and final acceptance of the Project have been satisfied or will be satisfied pursuant to this Agreement. Granite has submitted all documents required for close-out of the CMAR Contract to the RTC, including all documents required by Sections 7(G), 7(H), and 19(C) of the CMAR Contract. Execution of this Agreement shall release all claims or potential claims described in Section 7(H) of the CMAR Contract, and payments under this Agreement shall constitute the final payment required under Section 7(G) of the CMAR Contract. The "Request for Final Acceptance" under the CMAR Agreement shall be deemed to have been given, and RTC acknowledges receipt of the affidavit required under Section 19(C)(2) of the CMAR Contract.

This Agreement shall serve as the “Notice of Completion” and “Notice of Final Acceptance” under the CMAR Contract. The Parties agree that for purposes of any warranty or maintenance obligations in the CMAR Contract, Substantial Completion (as defined in the CMAR Contract) occurred on September 4, 2018 and the road opened for traffic on July 6, 2018.

5. Retention and Payment. The Parties agree and acknowledge that RTC withheld retention under the CMAR Contract (“Retention”). The Retention will be paid to Granite upon execution of this Agreement.

6. RTC’s Release of Granite. In consideration of the mutual covenants and agreements herein, RTC, on its own behalf and on behalf of its agents, servants, employees, attorneys, insurers, heirs, assigns, and other representatives, forever releases and discharges Granite, and its respective affiliated business entities, subsidiaries, parent corporations, predecessors, successors, insurers, assigns, trustees, shareholders, partners, directors, officers, employees, agents, attorneys, and other representatives from all actual or potential claims, complaints, demands, causes of action, damages, costs, expenses, fees, and other liabilities of every sort and description, direct or indirect, fixed or contingent, known or unknown, and whether or not liquidated, that it may have had or may now have against Granite, that arise out of, or relate to, the Project, the CMAR Contract or the Lawsuit, except that RTC’s release shall not apply to, prevent RTC from enforcing, or otherwise restrict the RTC’s rights under the CMAR Contract for: (A) any warranties provided for in the CMAR Contract provided that such warranties have not expired (which Granite contends they have) and further provided that such warranties shall not include any warranties related to landscaping, vegetation, plants or plant establishment (since that work relates to the Soiltech Subcontract that is being assigned and assumed as set out in paragraph 3 above); and (B) any insurance or indemnification requirements that exist under the CMAR

Contract and for which obligations extend beyond Final Acceptance by RTC and Final Completion of the Work. RTC's Final Acceptance of the Work does not modify the exceptions to RTC's release that are set out in subpart (A) and (B) in the proceeding sentence.

7. Granite's Release of RTC. In consideration of the mutual covenants and agreements herein, Granite, on its own behalf and on behalf of its agents, servants, employees, attorneys, insurers, heirs, assigns, and other representatives, forever releases and discharges RTC, and its respective affiliated business entities, subsidiaries, parent corporations, predecessors, successors, insurers, assigns, trustees, shareholders, partners, directors, officers, employees, agents, attorneys, and other representatives from all actual or potential claims, complaints, demands, causes of action, damages, costs, expenses, fees, and other liabilities of every sort and description, direct or indirect, fixed or contingent, known or unknown, and whether or not liquidated, that it may have had or may now have against the RTC, that arise out of, or relate to, the Project, the CMAR Contract or the Lawsuit. This release shall not prevent Granite from enforcing its rights specifically described in this Agreement and the foregoing releases in favor of RTC shall not place any limitation on RTC's obligations under this Agreement or Granite's ability to bring suit for breach of this Agreement.

8. Off-Hauled Soil. During its performance of work on the Project, Granite transported soil (the "Off-hauled Soil") from the Project to Granite's Lockwood Facility located at 10600 I80 East, Exit 22, Lockwood, Nevada 89434. After extensive testing by Granite, on December 4, 2019 the Nevada Division of Environmental Protection issued a letter providing a "no further action determination for [Granite's Lockwood Facility] where spoils removed from the [Project] containing elevated levels of mercury were used to reclaim the open pit excavation at the above-referenced facility and applies to other places contaminants related to this release have come

to be located (NAC 445A.3452). In addition to the release of all claims against RTC with respect to the Off-hauled Soil pursuant to paragraph 7 above and any continuing insurance and indemnification requirements pursuant to paragraph 6 above, Granite specifically agrees to defend and indemnify the RTC from all complaints, demands, causes of action, damages, costs, expenses, fees, and other liabilities of every sort and description from property owners owning property adjacent to Granite's Lockwood Facility relating in any way to the Off-hauled Soil and for any claims resulting from Granite's disturbance of the Off-hauled Soil after the issuance of the no further action determination by the Nevada Department of Environmental Protection, and Granite further agrees not to bring any lawsuit, arbitration or other claim against RTC for any affirmative claim seeking compensation for Granite relating to the Off-hauled Soil. Notwithstanding anything to the contrary herein, this Agreement does not affect the rights and obligations with respect to Hazardous Materials (as such term is defined in the CMAR Contract) set forth in the CMAR Contract, including, without limitation, Section 17.

9. Dismissal of the Lawsuit. Within fourteen (14) days of the Effective Date, the Parties shall submit the Agreed Order attached hereto as **Exhibit A** to the Court.

10. No Assignment. The Parties expressly represent and agree that they have not assigned or transferred any of the released claims in this Agreement (or any portion of or interest in them) to any third person or entity, except as stated in this Agreement.

11. Joint Drafting. In the event that a dispute arises between the Parties regarding the construction of this Agreement, they represent and agree that this Agreement was drafted jointly, and the terms of this Agreement shall not be construed in favor or against either of them based on any rule of law that ambiguities shall be construed against the drafter.

12. Entire Agreement. The terms of this Agreement contain the entire agreement between the parties relating to the subject matter contained herein. The Parties executing this Agreement do so freely and voluntarily, solely relying upon their own judgment and that of their respective attorneys and not as a result of any fraud, duress or coercion. This Agreement supersedes any and all prior agreements, negotiations, correspondence, undertakings, promises, covenants, arrangements communications, representations and warranties, whether oral or written (together the “Prior Communications”), of any party to this Agreement, and no party may rely, or shall be deemed to have relied upon, any such Prior Communications.

13. Miscellaneous. The Parties hereby represent and warrant to each other that they have access to adequate information regarding the scope and effect of this Agreement to make an informed and knowledgeable decision with regard to entering into this Agreement. The Parties hereby acknowledge that they have investigated to their complete satisfaction all facts and potential claims that relate to or arise out of the matters referred to above, and that there is a risk that, after the execution of this Agreement, a Party will discover, incur or suffer claims that were unknown or unanticipated at the time this Agreement was executed, and which if known on the date of execution and delivery hereof may have materially affected its decision to enter into this Agreement. The Parties further acknowledge and agree that by reason of the covenants to each other provided for above, they are assuming the risk of such unknown claims, and agree that this Agreement, apply thereto.

14. Choice of Law. This Agreement will be governed by and construed in accordance with the laws of the State of Nevada, without giving effect to conflict of laws principles thereof. The Parties agree that the Second Judicial District Court of the State of Nevada in and for the County of Washoe Nevada shall have exclusive jurisdiction over all disputes, actions or

proceedings that in any way arise out of or relate to this Agreement. The Parties waive any claim that any of the forum set forth in this paragraph is an inconvenient forum or improper forum based on lack of venue.

15. Binding Effect. Unless otherwise specifically provided herein, this Agreement shall be binding upon and inure to the benefit of the Parties, their affiliated business entities, subsidiaries, parent corporations, predecessors, successors, insurers, heirs, assigns, trustees, shareholders, partners, directors, officers, employees, agents, attorneys, and other representatives.

16. Severability. If any provision of this Agreement is for any reason held to be invalid or unenforceable, such provision shall not affect any other provision, and this Agreement shall be construed as if such invalid and/or unenforceable provision had never been contained in this Agreement.

17. Waiver. Failure by any Party to enforce any of the remedies available to it in this Agreement shall not be deemed a waiver of those rights.

18. Notices. All notices and other communications hereunder shall be in writing and shall be personally delivered or mailed by first-class registered or certified mail, postage prepaid, or sent by Federal Express or another nationally recognized overnight courier service that guarantees next day delivery and provides a receipt, addressed to the respective party as the case may be at the respective addresses set forth below, or at such other address as either party shall have furnished to the other in writing as herein set forth:

If to Granite:

1900 Glendale Ave.,
Sparks, NV 89431

with a copy to:

Joseph S. Guarino
VARELA, LEE, METZ & GUARINO, LLP
1600 Tysons Blvd., Suite 900
Tysons Corner, VA 22102

If to RTC: 1105 Terminal Way
Reno, NV 89502

with a copy to: Todd Rowden
James Oakley
Taft Stettinius & Hollister LLP
111 East Wacker Drive, Suite 2800
Chicago, IL 60601

19. Signatures. Each Party represents that it and, if applicable, its undersigned representative, are duly authorized and empowered to sign this Agreement.

20. Counterparts. Counterpart Agreements, signed separately by the Parties, are permitted will be treated and read as one original Agreement. The Parties shall accept facsimile or electronic signatures to this Release with original signature pages to follow by ordinary mail.

IN WITNESS WHEREOF, the Parties have set forth respective hands below.

**REGIONAL TRANSPORTATION
COMMISSION OF WASHOE COUNTY**

By: _____

Its: _____

Print Name _____

**GRANITE CONSTRUCTION
COMPANY**

By: _____

Its: _____

Print Name _____