



To: Dr. Mike Riggle
Board of Education

From: Kim Ptak

Date: Monday, May 8, 2017

Re: Approval of Settlement Agreement and Mutual Release

Recommendation

It is recommended that the Board of Education approve the attached Settlement Agreement and Mutual Release as it relates to the lawsuit initiated by Hartford Fire Insurance Company (Hartford) against Henry Brothers Construction Management Services, LLC (Henry Brothers) and ARCON Associates, Inc. (Arcon).

District 225 was not a party in the lawsuit and the Settlement Agreement and Mutual Release does not have any financial impact to the District.

Background

All District construction projects require bidders to submit a Bid Bond in the amount of 10% of their bid at the time the bid is submitted and a Performance Bond for the full amount of the bid once the contract is awarded.

A Bid Bond provides a guarantee that the winning bidder will undertake the contract under the terms at which they bid. Should the low bidder withdraw its contract, the Bid Bond can be exercised by the District to ideally bridge the gap between the low bidder and the second lowest bidder.

A Performance Bond is a surety bond issued by an insurance company or a bank to guarantee satisfactory completion of a project by a contractor. Should the contractor not complete its contractual duties, the Performance Bond can be exercised by the District and the insurance company who issued the bond is responsible for hiring a qualified contractor to complete the work in compliance with the bid specifications.

As part of the 2007 referendum work at Glenbrook South High School, a contract for electrical work was awarded to Grace Electric (Grace) in the amount of \$1,120,000. By August of 2007, it was apparent Grace would not be able to successfully complete the job due to both financial and performance issues. As such the District exercised Grace's performance bond which was with Hartford Fire Insurance Group (Hartford) and signed a Takeover Agreement with Hartford acknowledging Hartford would take responsibility to remedy and complete the work specified under Grace's contract. As such, Hartford hired a new electrical contractor, Divane Brothers, to complete the work in accordance with our bid specifications. Subsequently, in an effort to recoup its cost, Hartford filed a lawsuit against our construction management company (Henry Brothers) as well as our architect (ARCON) claiming they did not provide proper oversight to Grace Electric.

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE (the "Agreement") is made and entered into as of the last date of the signatures of the parties hereto appearing below ("Effective Date"), by and between Hartford Fire Insurance Company ("Hartford"), Henry Brothers Construction Management Services, LLC ("HBCM"), Arcon Associates, Inc. ("Arcon") and Northfield Township High School District #225 ("SD225"). Hartford, HBCM, Arcon and SD225 are each hereby referred to individually as a "Party" and collectively as the "Parties."

RECITALS

WHEREAS, on or about February 15, 2007, HBCM entered into a construction management contract ("HBCM Contract") with Northfield Township High School District #225 ("SD225"), to provide construction management services for the public construction project known as Glenbook South High School – 2007 Additions and Remodeling (the "Project") located in Glenview, IL;

WHEREAS, on or about February 26, 2007, Arcon entered into a written contract with SD225 ("Arcon Contract") to provide professional services, including architectural and engineering design and construction administration services, as is more fully set forth therein for the Project;

WHEREAS, on or about May 17, 2007, Grace Electrical Construction Corporation ("Grace Electric") entered into a prime contract with SD225 ("Grace Electric Contract") to provide contracting and construction services for the Project, and more specifically, to furnish and/or install all labor, material, equipment, supplies, housekeeping, bonds and insurance to perform electrical work on the Project. Grace in turn utilized subcontractors, laborers, and material suppliers in furtherance of its performance of the Grace Electric Contract;

WHEREAS, on or about May 29, 2007, Hartford issued Performance and Payment Bond No. 83BCSEJ1947 ("Bond," "Bonds," "Performance Bond" and/or "Payment Bond"), as surety, on behalf of Grace Electric, as bond principal, for obligee SD225 in connection with the Project;

WHEREAS, on or about the fall of 2007, due to financial hardship, Grace Electric ceased work on the Project;

WHEREAS, after Grace Electric's rights were terminated under the Grace Electric Contract, SD225 asserted a claim against Hartford under the Performance Bond, and various unpaid subcontractors/suppliers of Grace Electric asserted claims against Hartford under the Payment Bond;

WHEREAS, following Hartford's investigation of SD225's claim under the Performance Bond, and in order for Hartford to discharge its obligations under its Performance Bond, SD225 and Hartford entered into a takeover agreement ("Takeover Agreement"), whereby Hartford agreed to complete Grace's performance of the Grace Electric Contract. Hartford also entered into contracts with various contractors to remedy and complete Grace Electric's scope of work under the Grace Electric Contract. Additionally, SD225 and Hartford contemplated that to any

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extent Hartford was to bring claims against the Project's construction manager, architect and/or engineer, it would do so via subrogation;

WHEREAS, Hartford also entered into a Release, Assignment and Settlement Agreement with SD 225 in June, 2009 ("June 2009 Settlement Agreement"), whereby Hartford and SD 225 agreed that Hartford, as SD 225's subrogee, intended to initiate a legal action against Arcon and/or HBCM for damages allegedly arising out of Arcon and/or HBCM's services on the Project. As part of the June 2009 Settlement Agreement, Hartford and SD 225 agreed that Hartford would bring its suit as SD's 225 subrogee but that, if necessary, Hartford could sue Arcon and HBCM as SD 225's assignee.

WHEREAS, Hartford in 2010, filed suit against HBCM under Case No. 10-cv-04746, in the United States District Court for the Northern District of Illinois, Eastern Division (the "Litigation") asserting claims in connection with the Project as is more specifically detailed in the pleading filed by Hartford.

WHEREAS, in the Litigation, Hartford filed its First Amended Complaint on March 27, 2013, at which time Arcon was first named as a party defendant. Hartford asserted a claim for breach of contract against Arcon in its capacity as SD225's duly authorized subrogee. Arcon filed an answer and affirmative defenses denying liability for Hartford claims and claiming that the suit against it was time-barred by 735 ILCS 5/12-214.

WHEREAS, in the Litigation, HBCM filed an answer and affirmative defenses in response to Hartford's claims denying liability and claiming that the suit against it was barred by the doctrines of estoppel and waiver and that Hartford and SD225 failed to mitigate the alleged damages.

WHEREAS, the Parties desire to fully and finally adjust, compromise, settle and release all disputes and claims that they have against the other as asserted within and relating to the Litigation;

NOW, THEREFORE, in consideration of the mutual promises, representations, and covenants set forth herein, and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

AGREEMENT

1. **Recitals.** The recitals set forth above are true and accurate, constitute material and integral parts of this Agreement, and are incorporated herein by reference.

2. **Settlement Payment, Stipulation to Dismiss with Prejudice and Dismissal with Prejudice Order.**

a. Within ten (10) calendar days after the Effective Date, HBCM and/or its insurer shall deliver to Hartford a check payable to the order of Hartford Fire Insurance Company in the amount of \$290,000.00 (two hundred and ninety thousand dollars), and

Arcon and/or its insurer shall deliver to Hartford a check payable to the order of Hartford Fire Insurance Company in the amount of \$35,000.00 (thirty-five thousand dollars) Delivery of the aforementioned checks to Hartford's counsel Watt, Tieder, Hoffar & Fitzgerald, LLP at 10 S. Wacker Drive, Chicago, IL 60606 shall constitute delivery to Hartford.

b. Within seven (7) calendar days after the Effective Date, the Parties shall file a stipulation to dismiss the Litigation with prejudice and cause to be entered an order dismissing the Litigation with prejudice and without costs.

c. The Parties agree to the remaining provisions of this Agreement.

3. Mutual Releases.

a. Upon the satisfaction of all conditions of settlement set forth herein, including but not limited to Subparagraphs 2a through 2c inclusive, Hartford and SD225, for themselves and their respective predecessors, successors, officers, directors, employees, agents, assigns, insurers and representatives, hereby completely and unconditionally release and discharge HBCM and its respective predecessors, successors, officers, directors, employees, agents, assigns, and representatives, from all causes of action, suits, claims, debts, sums of money, demands, liabilities and other obligations whatsoever, statutory or otherwise, in law or equity arising in any way out of the Project, each of the contracts described in this instant Agreement and/or the Litigation, whether accruing in the past, present or future. Provided, however, nothing in this release shall operate to release HBCM of its obligations under this Agreement, including its obligation to make the settlement payment referenced in Paragraph 2a.

b. Upon the satisfaction of all conditions of settlement set forth herein, including but not limited to Subparagraphs 2a through 2c inclusive, Hartford and SD225, for themselves and their respective predecessors, successors, board members, officers, directors, employees, agents, assigns, and representatives, hereby completely and unconditionally release and discharge Arcon and its predecessors, successors, officers, directors, employees, agents, assigns, insurers and representatives, from all causes of action, suits, claims, debts, sums of money, demands, liabilities and other obligations whatsoever, statutory or otherwise, in law or equity arising in any way out of the Project, each of the contracts described in this instant Agreement and/or the Litigation, whether accruing in the past, present or future. Provided, however, nothing in this release shall operate to release Arcon of its obligations under this Agreement, including its obligation to make the settlement payment referenced in Paragraph 2a.

c. Upon the satisfaction of all conditions of settlement set forth herein, including but not limited to Subparagraphs 2a through 2c inclusive, HBCM and Arcon, for themselves and their respective predecessors, successors, officers, directors, employees, agents, assigns, and representatives, hereby completely and unconditionally release and discharge Hartford and SD225 and their respective predecessors, successors,

board members, officers, directors, employees, agents, assigns, insurers and representatives, from all causes of action, suits, claims, debts, sums of money, demands, liabilities and other obligations whatsoever, statutory or otherwise, in law or equity arising in any way out of the Project, each of the contracts described in this instant Agreement and/or the Litigation, whether accruing in the past, present or future. Provided, however, nothing in this release shall operate to release Hartford and/or SD225 of their obligations under this Agreement.

4. **No Prior Assignment; Representation of Claim Ownership.** Each Party represents and warrants that it has not heretofore assigned or transferred to any person or entity any of the matters released under this Agreement. Each party covenants not to sue or voluntarily participate in any suit or charge, against the other Party for any of the matters released under this Agreement.

5. **Indemnification.** If any Party to this Agreement is determined to have breached this Agreement, said breaching Party agrees to indemnify, hold harmless, and pay for reasonable costs, including, but not limited to, attorneys' fees, expert witness' fees and other costs incurred by any other Party to this Agreement which arise out of the breaching Party's breach of this Agreement.

6. **No Admission of Liability.** The Parties acknowledge and agree that this Agreement is being entered into for the purposes of avoiding the expense, delay and uncertainty of litigation and nothing contained herein shall constitute an admission of liability or fact.

7. **Entire Agreement; Modification.** This Agreement constitutes the entire agreement among the Parties hereto with respect to the subject matter hereof and all prior agreements between the Parties with respect thereto are superseded and replaced by this Agreement. This Agreement may not be modified, supplemented or amended except by a subsequent written instrument executed by all of the Parties hereto.

8. **Successors, Assigns; Third Party Beneficiaries.** The Parties agree that this Agreement shall inure to the benefit of, and be binding upon, the Parties hereto and their respective successors, assigns, directors, officers, employees, affiliates, heirs, estates, administrators, executors, legatees, representatives and third party beneficiaries.

9. **Severability.** Whenever possible, each provision of this Agreement shall be construed so as to be interpreted in such manner as to be effective and valid under applicable law. If any provision of this Agreement or the application thereof to any party or circumstances shall be prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition without invalidating the remainder of such provision or any other provision of this Agreement or the application of such provision to the other parties or circumstances.

10. **Governing Law.** This Agreement and the rights and obligations of the Parties hereunder shall be construed in accordance with and governed by the laws of the State of Illinois

without regard to any conflicts of laws principles. The Parties consent to the jurisdiction and venue of the state courts in the County of Cook, State of Illinois and/or the United States District Court for the Northern District of Illinois for all purposes in connection with the enforcement of this Agreement.

11. Construction of Agreement. The Parties acknowledge that this Agreement was the product of mutual negotiation and for purpose of construing this Agreement, no individual Party shall be deemed to have drafted the Agreement. The language used in this Agreement shall be deemed to be the language chosen by the Parties hereto to express their mutual intent, and no rule of strict construction shall be applied against any Party. The headings in this Agreement are for purposes of reference only and shall not limit or define the meaning herein. The recitals set forth at the beginning of this Agreement are, and shall be construed to be, an integral part of this Agreement.

12. Counterparts. The Parties agree that this Agreement may be executed in counterparts, each of which shall be deemed an original, and all counterparts so executed shall constitute one agreement that is binding upon all of the Parties, notwithstanding that all of the Parties may not be a signatory to the same counterpart. This Agreement may be executed by facsimile or executed via Portable Document Format (PDF) and such signatures shall be binding upon the Parties and deemed original for purposes of enforcing this Agreement.

13. Representative Capacity. Each person executing this Agreement in a representative capacity warrants and represents that he/she is empowered to do so.

14. Acknowledgement. The Parties hereto acknowledge that they have fully read, understood, and unconditionally execute this Agreement after having had complete opportunity for consultation with an attorney, and acknowledge that this Agreement is final and binding upon the Parties hereto, regardless of the adequacy of the consideration hereof, and regardless of the extent of damages allegedly suffered by any of the Parties. The Parties hereby waive and release any claim or challenge they have or may have to the efficacy, enforceability or validity of any provision of this Agreement. Each Party executing this Agreement acknowledges that they are signing this Agreement voluntarily, without duress and intend to be bound by this Agreement and each of its term

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date(s) referenced below.

**HARTFORD FIRE INSURANCE
COMPANY**

By: _____

Its: _____

Date: _____

**HENRY BROS. CONSTRUCTION
MANAGEMENT SERVICES, LLC**

By: _____

Its: _____

Date: _____

ARCON ASSOCIATES, INC.

By: _____

Its: _____

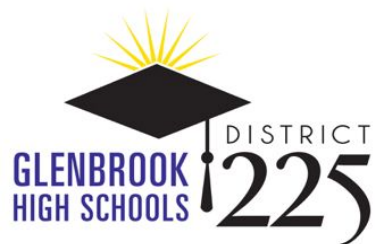
Date: _____

**NORTHFIELD TOWNSHIP HIGH
SCHOOL DISTRICT #225**

By: _____

Its: _____

Date: _____



The case is being settled out of court. Henry Brothers has agreed to pay Hartford \$290,000 and Arcon has agreed to pay Hartford Insurance \$35,000.

The District has been asked to sign the attached settlement agreement by the attorneys for Henry Brothers and Arcon, limiting the District from filing any future, independent claims related to this case.

The document was drafted and reviewed by Chris Petrarca of Hauser Izzo, LLC on our behalf, in conjunction with the attorneys for Hartford, Henry Brothers and Arcon.