

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release ("Agreement") is made and entered into this ____ day of October, 2014 ("Effective Date"), by and among **CAPITAL IMPROVEMENTS, LLC, and THE GUARANTEE COMPANY OF NORTH AMERICA, USA**, on the one hand, and **CITY OF FLAGSTAFF** on the other hand. The above-named parties are also sometimes referred to collectively herein as the "Parties," or individually as a "Party."

RECITALS

A. On or about May 9, 2013, Capital Improvements, LLC, ("CI") and the City of Flagstaff ("City") entered into a contract (the "Contract") in connection with certain improvements that were to be made on the West Street and Arrowhead Avenue Improvements Phase II Project No. 03-10020 (the "Project").

B. In connection with the Contract, The Guarantee Company of North America ("GCNA") issued statutory performance and payment bonds pursuant to A.R.S. § 34-222 (the "Bonds").

C. On or about May 14, 2013, the City issued a notice to proceed stating that work was to commence on May 20, 2013. Because the performance period under the Contract was 200 calendar days, the completion date was established as December 5, 2013.

D. On or about October 31, 2013, the City issued a Notice of Forfeiture and Default of Contract Under MAG Section 108.10 and Notice of Contract Violations Under Section 13 ("Notice of Default").

E. After issuance of the Notice of Default, the City withheld progress and/or final payments from CI under the terms of the Contract.

F. On January 30, 2014, CI served Elizabeth A. Burke, Flagstaff City Clerk, with a Notice of Claim Pursuant to A.R.S. § 12-821 *et seq.* ("Notice of Claim"). The City never responded to the Notice of Claim.

G. On May 1, 2014, CI served Elizabeth A. Burke, Flagstaff City Clerk, with an Amended Notice of Claim Pursuant to A.R.S. § 12-821 *et seq.* ("Amended Notice of Claim"). The City never responded to the Amended Notice of Claim.

H. On July 3, 2014, CI filed a lawsuit against the City in the Maricopa County Superior Court, Case No. CV2014-053783 (the "Complaint").

I. On July 23, 2014, the City filed its Answer to the Complaint and it also filed its Counterclaim against CI and Third-Party Complaint against GCNA (the "Counterclaim and Third-Party Complaint").

J. On or about September 30, 2014, CI answered the Counterclaim and GCNA answered the Third-Party Complaint.

K. In order to avoid the expense and uncertainty of litigation, the Parties now desire to enter into this Agreement to effect a full settlement and discharge of all existing and potential claims between them with respect to the Contract, Bonds, Notice of Default, Notice of Claim, Amended Notice of Claim, Complaint, Counterclaim, Third-Party Complaint, and all related matters, upon those terms and conditions set forth below.

AGREEMENT

In consideration of the mutual covenants and agreements of the Parties and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. **Settlement Terms:**

- a) City shall pay to CI the sum of **FIVE HUNDRED FIFTY THOUSAND DOLLARS** (\$550,000) ("Settlement Amount") in certified funds on or before October 31, 2014 ("Settlement Payment");
- b) Effective as of the date of this Agreement the City hereby unconditionally retracts the Notice of Default;
- c) Prior to and as a condition precedent to the payment set forth in ¶ 1(a) above, CI will provide City with a W-9 for CI and an Unconditional Waiver and Release on Final Payment Pursuant to A.R.S. § 33-1008 executed by itself and, within seven (7) days of receipt of the Settlement Payment, executed by all materialmen, suppliers, and subcontractors for the Project;
- d) Prior to and as a condition precedent to the payment set forth in ¶ 1(a) above, CI will provide the City with all documentation produced by CI and its subcontractors on the Project (if any), which has not previously been provided to the City by CI, including but not limited to: engineering plan redlines, field notes, field documents, and ADEQ Notice of Termination;
- e) Upon full execution of this Agreement and performance by the parties hereunder, the Contract will be deemed terminated pursuant to MAG Specification 108.11; and
- f) The date of formal acceptance and completion of the work performed by CI under the Contract shall be October 31, 2013.

2. **Dismissal of the Litigation.** The Parties shall cause their attorneys to file a stipulation to dismiss the Complaint, Counterclaim and Third-Party Complaint, with prejudice, with each party to bear its own attorneys' fees, costs, and litigation expenses.

3. **Mutual Release and Discharge.** In consideration of the covenants set forth in this Agreement, the Parties (and, as applicable, their respective members, managers, subsidiaries, affiliates, agents, officers, directors, council members, employees, insurers, indemnitors, predecessors, partners, shareholders, successors, sureties, assigns, attorneys, spouses, representatives, and all related entities) hereby release and forever discharge one another (and, as applicable, their respective members, managers, subsidiaries, affiliates, agents, officers,

directors, council members, employees, insurers, indemnitors, predecessors, partners, shareholders, successors, sureties, assigns, attorneys, representatives, and all related entities) of and from all causes of action, claims, liens, suits, debts, sums of money, covenants, contracts, controversies, agreements, promises, damages, judgments, interest, executions, claims for attorneys' fees and costs or disbursements, liabilities, obligations, rights or demands of any kind whatsoever, whether or not well-founded in fact or in law, whether known or unknown, arising out of, or related to, the Contract, Bonds, Notice of Claim, Amended Notice of Claim, Notice of Default, Complaint, Counterclaim, and Third-Party Complaint; except, however, indemnities, warranties, responsibilities for and/or applicable to completed work and surety obligations arising out of the work performed under the Contract and/or the Bonds, which shall remain in full force and effect, including as provided under MAG Spec. 108.11.

4. **Certification and Indemnification Regarding Payment.** CI certifies that all lawful claims for materials, rental of equipment and labor used in connection with the construction of the above project, whether by subcontractors or claimant in person, have been duly discharged, and further agrees to defend, indemnify and save harmless the City from and against any and all liens, claims of liens, suits, actions, damages, charges and expenses whatsoever, which said City may suffer arising out of the failure of CI to pay for all labor performance and materials furnished for the performance of the Contract and/or arising from the Project.

5. **Assignment of Warranties.** To the extent CI has not already done so, CI hereby assigns to the City any and all warranties, if any, by subcontractors, manufacturers, materialmen and/or suppliers for the Work. CI shall execute any additional documentation required to effectuate such assignments.

6. **Consent of Surety.** GCNA, as Surety under the Bonds for the Contract and the Project, hereby consents to and approves: (a) the payment to CI set forth herein as final payment to CI as Contractor under the Contract; and (b) this Agreement.

7. **No Admission of Liability.** It is understood and agreed to by the Parties that this settlement is a compromise of disputed claims, and is not to be construed as an admission of liability by any Party.

8. **Attorneys' Fees and Costs.** In the event any action or proceeding is commenced to enforce or declare the rights of the Parties under this Agreement, the prevailing party or parties shall be entitled to recover its costs, expenses, expert fees and reasonable attorneys' fees in addition to any other available relief.

9. **Representation of Comprehension of Document.** In entering into this Agreement, the Parties represent that they have relied upon the advice of their respective attorneys, or have had a reasonable opportunity to seek legal counsel, concerning the consequences of this Agreement, that the terms of this Agreement have been completely read, and that the terms of this Agreement are fully understood and voluntarily accepted by the Parties.

10. **Warranty of Capacity to Execute Agreement.** The Parties represent and warrant that they have the sole right and exclusive authority to execute this Agreement. The Parties have not sold, assigned, transferred, conveyed, or otherwise disposed of any of the claims, demands, obligations, or causes of action referred to in this Agreement.

11. **Counterparts.** This Agreement may be signed in counterparts. Each executed counterpart shall for all purposes be deemed an original, but all of which together shall constitute in the aggregate one and the same instrument. A photocopy, digital image, or facsimile shall have the same effect as an original.

12. **Entire Agreement; Successor-in-Interest.** This Agreement contains the entire agreement between the Parties with regard to the matters set forth in it, and shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, successors, and assigns of each Party.

13. **Captions.** The headings or captions in this Agreement are for convenience and reference only and do not control or affect the meaning or construction of any of the provisions hereof.

14. **Modification.** This Agreement shall not be modified or amended except in a writing executed by all Parties.

15. **Effectiveness.** This Agreement shall become effective on the date it is fully executed by all Parties, which shall be the Effective Date referred to on first page of this Agreement.

16. **Choice of Law; Forum.** The validity, performance, construction, interpretation, enforcement, and effect of this Agreement shall be governed by and enforced in accordance with the substantive laws of the State of Arizona. Any action to enforce this Agreement, or that otherwise arises out of or relates to the Agreement, must be instituted and maintained in a state or federal court sitting in Maricopa County, Arizona. These courts shall have sole and exclusive jurisdiction over any such disputes, and the Parties irrevocably consent to the personal jurisdiction of these courts.

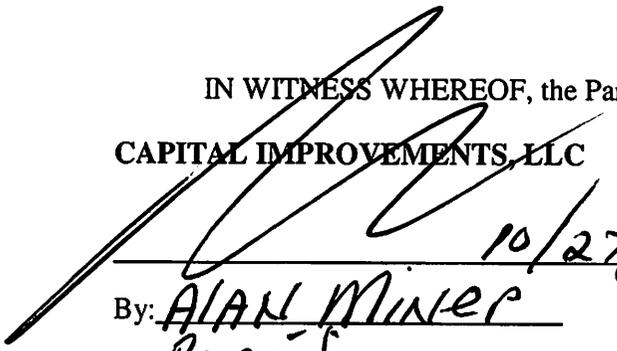
17. **Additional Documents.** The parties agree to execute and deliver any additional documents, if any, as may be reasonably necessary to carry out or fulfill the terms of this Agreement.

[The remainder of this page intentionally left blank – signatures on next page]

IN WITNESS WHEREOF, the Parties hereto execute this Agreement:

CAPITAL IMPROVEMENTS, LLC

CITY OF FLAGSTAFF


10/27/14
By: ALAN MINER
Its: PRESIDENT

By: _____
Its: _____

Attest: _____

City Clerk

Approved as to Form:

City Attorney

**THE GUARANTEE COMPANY OF
NORTH AMERICA**

By: _____
Its: _____

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10/27/2014