



SCHOOL BOARD ACTION REPORT

DATE: May 14, 2018
FROM: Dr. Larry Nyland, Superintendent
LEAD STAFF: Dr. Lester Herndon, Associate Superintendent, Facilities and Operations, (206) 252-0644, ltherndon@seattleschools.org

For Introduction and Action: May 23, 2018

1. TITLE

Approval of Settlement Agreement with Lydig Construction, Inc. and Seahurst Electric, Inc. regarding the Hazel Wolf K-8 Project, and transfer of \$325,000 plus Washington State Sales Tax from the Building Excellence (BEX) IV Levy Contingency fund for the Project

2. PURPOSE

This action approves a settlement agreement with Lydig Construction and Seahurst Electric in the amount of \$325,000 plus Washington State Sales Tax, and approves a budget transfer from BEX IV Levy program contingency to pay the settlement.

3. RECOMMENDED MOTION

I move that the School Board approve the Settlement Agreement and Release with Lydig Construction, Inc. and Seahurst Electric, Inc. in the form of the agreement attached to the Board Action Report, with any minor additions, deletions, and modifications deemed necessary by the Superintendent, and to take any necessary action to implement the Agreement. I further move that the Superintendent be authorized to transfer \$325,000 plus Washington State Sales Tax from the BEX IV Program Contingency to fund payment under the Agreement. Immediate action is in the best interest of the District.

4. BACKGROUND INFORMATION

a. Background

In 2015, the District contracted with Lydig as the general contractor to construct the new Hazel Wolf K-8 School, previously known as Pinehurst School (the "Project"). Lydig subcontracted with Seahurst Electric for the electrical work on the Project.

During the Project, disputes arose as to the additional compensation owed to Seahurst Electric. On April 25, 2018, Lydig, Seahurst and Seattle Public Schools convened in mediation to resolve the disputed claims. The parties reached a tentative settlement subject to School Board approval. Legal counsel, including outside construction counsel, advise that this is a prudent resolution to the parties' dispute.

The settlement, if approved, will settle all remaining disputes related to the Project, including but not limited to, all delay and impact claims by Lydig, Seahurst Electric, and any other subcontractor or suppliers of any tier on the Project.

b. **Alternatives**

Do not approve the agreement. If the motion is denied, the claim will move forward and the District could be forced to participate in extensive litigation and be exposed to the risk of a more significant damage award.

c. **Research**

N/A

5. **FISCAL IMPACT/REVENUE SOURCE**

The revenue source for this motion the BEX IV Contingency fund. The fiscal impact is the payment of \$325,000 plus sales tax.

Expenditure: One-time Annual Multi-Year N/A

Revenue: One-time Annual Multi-Year N/A

6. **COMMUNITY ENGAGEMENT**

With guidance from the District's Community Engagement tool, this action was determined to merit the following tier of community engagement:

Not applicable

Tier 1: Inform

Tier 2: Consult/Involve

Tier 3: Collaborate

7. **EQUITY ANALYSIS**

This motion was not put through the process of a full racial equity analysis.

8. **STUDENT BENEFIT**

This action allows the District to move forward with project closeout which will allow district staff to focus on ongoing construction projects designed to provide safe and improved facilities for our students.

9. **WHY BOARD ACTION IS NECESSARY**

Amount of contract initial value or contract amendment exceeds \$250,000 (Policy No. 6220)

Amount of grant exceeds \$250,000 in a single fiscal year (Policy No. 6114)

- Adopting, amending, or repealing a Board policy
- Formally accepting the completion of a public works project and closing out the contract
- Legal requirement for the School Board to take action on this matter
- Board Policy No. _____, [TITLE], provides the Board shall approve this item
- Other: _____

10. POLICY IMPLICATION

Per Board Policy No. 6220, Procurement, any contract over \$250,000 must be brought before the Board for approval.

11. BOARD COMMITTEE RECOMMENDATION

This motion was discussed at the Executive Committee meeting on May 17. The Committee reviewed the motion and moved it forward to the full Board with a recommendation for approval.

12. TIMELINE FOR IMPLEMENTATION

Upon Board approval of this motion, the contingency in the Agreement is satisfied and payment will be made by June 6, 2018.

13. ATTACHMENTS

- Settlement Agreement and Release (for approval)

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“Agreement”) is entered into as of May ___, 2018, by and among the Seattle School District No. 1, also known as Seattle Public Schools, a Washington school district (“School District”), Lydig Construction, Inc. (“Lydig”), and Seahurst Electric, Inc. (“Seahurst”). Collectively these are the “Parties.”

Recitals

- a. The School District contracted with Lydig as general contractor to construct the Hazel Wolf K-8 Project, previously known as Pinehurst School Project Phase II, Contract No. P5045 (the “Project”).*
- b. Lydig subcontracted with Seahurst for Seahurst to perform the electrical work on the Project.*
- c. Seahurst asserted claims on the Project regarding additional costs incurred because of changes, delays, and impacts to its work on the Project.*
- d. The Parties negotiated the claims at a mediation on April 25, 2018. The Parties have reached an agreement expressed herein to resolve any and all claims arising from or related to the Project.*

Agreement

1. By this Agreement and in consideration of the respective agreements of the Parties, and except as specifically reserved in this Agreement, the Parties intend to achieve a full and complete settlement and compromise of all claims, disputes and controversies among them arising out of the work performed on the Project, and any and all claims by or against any of the Parties that relates in any manner to the Project, including all claims that either Lydig or Seahurst presented or could have presented on behalf of themselves, their employees, subcontractors, and suppliers of any tier. This Agreement is contingent upon formal ratification by the School District’s Board of Directors. This Agreement shall be null and void, strictly confidential, and subject to ER 408 and Chapter 7.07 RCW, unless all Parties sign this Agreement and the School District’s Board of Directors ratifies the Agreement in an open public meeting.

2. No later than June 6, 2018, the School District shall pay Lydig Three Hundred Twenty-Five Thousand Dollars (\$325,000.00) plus sales tax to settle all remaining disputes related to the Project, including but not limited to all claims by Lydig, Seahurst, and all of their respective subcontractors or suppliers of any tier on the Project. This amount shall be submitted as the final Change Order on the Project

and shall be due and payable through the normal Change Order approval and payment process. The only remaining payment from the School District to Lydig for the Project is the contract balance and sales tax on the contract balance, plus Owner Change Order 019 in the sum of \$198,169 and Owner Change Order 021 in the sum of \$7,700. There shall be no further Change Orders on the Project between any of the Parties except to pay the amounts under this Agreement. This contract balance shall not be due and owing until after Lydig completes all of its obligations under its contract with the School District including completion of all of the Work identified on the Warranty Log, submission of all remaining project close-out documentation, and Lydig submits a payment application in this amount. Any late payments under this Agreement shall be subject to interest at the Bank of America prime rate plus two percent per annum.

3. Lydig shall pay Seahurst Four Hundred Thousand Dollars (\$400,000.00) (which consists of the \$325,000 from the School District noted in paragraph 2 plus another \$75,000 from Lydig) to settle all remaining disputes related to the Project, including but not limited to all claims by Seahurst and all of its respective subcontractors or suppliers of any tier on the Project. This amount shall not be due and owing until both (a) 5 days after Lydig receives payment of the \$325,000 from the School District and (b) Seahurst presents to Lydig full and final lien releases demonstrating full payment to all of Seahurst's subcontractors and suppliers, including without limitation System Tech Washington Inc., Dimensional Communications Inc., Redhawk Fire & Security and Chown, Inc. In lieu of full and final lien releases demonstrating full payment to System Tech Washington Inc., Dimensional Communications Inc., Redhawk Fire & Security and Chown, Inc., Lydig will upon Seahurst request issue checks payable jointly to Seahurst and each of these four entities (after receipt of the funds specified in Paragraph 2 funds) upon receipt of conditional final lien and claim releases from each of the four specified entities.

4. Except for the obligations under this Agreement and as specifically reserved in this paragraph, the School District, on behalf of itself, its officers, directors, employees, assigns, and agents, past and present, and anyone acting on its behalf, Lydig, on behalf of itself, its officers, directors, subsidiaries, employees, assigns, and agents, past and present, and anyone acting on its behalf, and Seahurst, on behalf of itself, its officers, directors, subsidiaries, employees, assigns, and agents, past and present, and anyone acting on its behalf, hereby fully and mutually release and discharge one another from any and all debts, obligations, promises, agreements, contracts, actions, causes of action, claims, and demands of any and every nature whatsoever, known or unknown, asserted or unasserted, vested or contingent, which exist, have existed or may have existed, or which hereafter can, shall or may exist, that relate to the Project, and all claims that the Parties have or could have made on behalf of themselves, their employees, insurers, contractors, subcontractors and

suppliers of any tier for the Project. The Parties each reserve their rights and claims for any unexpired warranty obligations, any latent defects, and to indemnify or contribution as provided in the Contract Documents. Each Party represents that it is not presently aware of any indemnity or contribution claims, and the School District represents that it is not aware of any latent defects that are not disclosed on the current Contractor Warranty Log. Lydig and Seahurst release any claim it may have, under subrogation rights, third party beneficiary rights, or otherwise, against the School District's consultants and NAC Architects and its consultants to the extent that such claims relate to the Project. The Parties reserve claims for breach of this Agreement.

5. Lydig agrees to defend, indemnify and hold harmless the School District and its officers, directors, employees, assigns, and agents, past and present, and anyone acting on its behalf from and against any and all claims arising out of the Project, including costs and attorneys' fees, whether known or unknown, by Lydig's subcontractors or suppliers of any tier, or made on behalf of Lydig, including its employees.

6. Seahurst agrees to defend, indemnify and hold harmless Lydig and the School District and their officers, directors, employees, assigns, and agents, past and present, and anyone acting on its behalf from and against any and all claims arising out of the Project, including costs and attorneys' fees, whether known or unknown, by Seahurst's subcontractors or suppliers of any tier, or made on behalf of Seahurst, including its employees.

7. This Agreement is entered into to avoid the expense, inconvenience and uncertainty of legal proceedings between the Parties related to the Project. Execution of this Agreement shall not constitute an admission by any Party of any liability of any kind.

8. This Agreement contains all of the promises and covenants made by the Parties. In executing this Agreement, each Party warrants that it is relying solely upon its own judgment and knowledge, and that it is not relying on any statement or representation made by the other Party or its agents.

9. All costs and attorneys' fees incurred by the Parties shall be borne by the Party incurring them, except that the prevailing Party shall be entitled to any and all costs and expenses, including attorneys' fees, incurred in enforcing this Agreement.

10. This Agreement shall bind the heirs, successors, representatives and assigns of each Party. Each of the Parties warrant that they have not assigned their claims to any other entity.

11. The Parties acknowledge that they have been represented by counsel in the negotiations of this Agreement and, being fully advised as to the legal effect of this Agreement, have executed this instrument freely and voluntarily. This Agreement has been mutually drafted by the Parties.

12. The provisions of this Agreement are severable and, if any part of it is found to be unenforceable, the other paragraphs shall remain fully valid and enforceable. This Agreement shall survive the termination of any arrangements contained herein. This Agreement may be executed in counterparts and by facsimile.

13. All questions with respect to construction of this Agreement and the rights and liabilities incurred hereto shall be decided by Chris Soelling acting as arbitrator pursuant to RCW 7.04A. This Agreement shall be governed by the laws of the State of Washington without regard to its choice of law provisions, and any arbitration shall be conducted in accordance with the laws of the State of Washington.

14. If any one of the Parties fails to execute this Agreement, then this Agreement shall be null and void, of no effect, and subject to Evidence Rule 408 and RCW 7.07.030.

15. The individuals executing this Agreement below have authority to bind their principals and do bind them by executing this document. The terms and conditions set forth above are agreed upon and effective as of the date of the last signature entered below.

Lydig Construction, Inc.

Seattle Public Schools No. 1

By _____

Date: _____

By _____
Dr. Larry Nyland
Superintendent
Date: _____

Seahurst Electric, Inc.

By

Jack Southwick

President

Date:
