



SCHOOL BOARD ACTION REPORT

DATE: July 3, 2018
FROM: Denise Juneau, Superintendent
LEAD STAFF: Dr. Lester Herndon, Associate Superintendent, Facilities and Operations
206-252-0644, lherndon@seattleschools.org

Introduction: July 11, 2018
Action: July 11, 2018

1. TITLE

Approval of Settlement Agreement with Lydig Construction, Inc. and Elcon Corporation, Inc. regarding the Cascadia Elementary, Licton Springs K-8 and Robert Eagle Staff Middle Schools project

2. PURPOSE

This action approves a settlement agreement with Lydig Construction and Elcon Corporation.

3. RECOMMENDED MOTION

I move that the School Board approve the Settlement Agreement with Lydig Construction, Inc. and Elcon Corporation, Inc. in the form 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 including payment in the amount of \$556,275.50. Immediate action is in the best interest of the district.

4. BACKGROUND INFORMATION

a. Background

In 2015, the District contracted with Lydig Construction as the General Contractor/ Construction Manager (GC/CM) to construct the new Cascadia Elementary, Licton Springs K-8 and Robert Eagle Staff Middle Schools, previously known as Wilson Pacific Elementary and Middle Schools (the "Project"). Lydig subcontracted with Elcon for the electrical and lighting work on the project.

During the project, disputes arose and Elcon asserted claims and a request for equitable adjustment. On June 12, 2018, Lydig, Elcon 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 claims by Lydig, Elcon, and any other subcontractor or suppliers of any tier on the project.

b. **Alternatives**

Do not approve the agreement. This is not recommended. 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 is the project budget, which includes sufficient contingency remaining to fund these costs. The fiscal impact is the payment of \$556,275.50 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

N/A

12. TIMELINE FOR IMPLEMENTATION

Upon approval of this motion, a change order will be executed and payment will be made by July 31, 2018.

13. ATTACHMENTS

- Settlement Agreement and Release (for approval)



Settlement Agreement with Lydig Construction, Inc. and Elcon Corporation, Inc.
regarding the Cascadia Elementary, Licton Springs K-8 and Robert Eagle Staff Middle
Schools project

Settlement Agreement and Release

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For questions and more information about this document, please contact the following:

Seattle Public Schools
Capital Projects
capitalprojects@seattleschools.org

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

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“Agreement”) is entered into as of June 12, 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 Elcon Corporation (“Elcon”). Collectively these are the “Parties.”

Recitals

a. The School District contracted with Lydig as general contractor to construct the Cascadia Elementary, Licton Springs K-8 and Robert Eagle Staff Middle School Project, previously known as New Elementary and Middle School at Wilson Pacific, Contract No. P5034 (the “Project”).

b. Lydig subcontracted with Elcon for Elcon to perform the electrical work on the Project.

c. Elcon asserted claims and a request for equitable adjustment on the Project regarding additional costs incurred because of changes, delays, and impacts to its work on the Project in the amount of \$5,750,336 (the “Request for Equitable Adjustment”).

d. The Parties negotiated the claims at a mediation on June 12, 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, the Request for Equitable Adjustment, 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 Elcon 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, 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 July 31, 2018, the School District shall pay Lydig Five Hundred Fifty-Six Thousand Two Hundred Seventy-Five Dollars and Fifty Cents

(\$556,275.50) plus sales tax to settle all remaining disputes related to the Project, including but not limited to the Request for Equitable Adjustment and all claims by Lydig, Elcon, and all of their respective subcontractors or suppliers of any tier on the Project. This amount is made up of \$200,000 to resolve all outstanding change order requests and \$356,275.50 to resolve the Request for Equitable Adjustment and all other claims. 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 COPs unrelated to Elcon. There shall be no further Change Orders on the Project between any of the Parties except to pay the amounts under this Agreement. The 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 Architect's Punchlist, 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 Elcon One Million Six Hundred Seventy-Eight Thousand Seven Hundred Twenty-Five Dollars (\$1,678,725.00) (which is made up of \$716,174 for change orders, contract balance, and retainage plus \$962,551 for the Request for Equitable Adjustment) to settle all remaining disputes related to the Project, including but not limited to the Request for Equitable Adjustment and all claims by Elcon and all of its respective subcontractors or suppliers of any tier on the Project, and which is inclusive of all subcontract balance, retainage, outstanding change orders and change order proposals, and any other matter which constitutes any further payment from Lydig to Elcon with regard to the Project. (Thus Lydig is paying \$606,275.50 and the School District is paying \$356,275.50 for settlement of the REA, and Lydig is paying \$516,174 for change orders, retainage, and contract balance and the School District is paying \$200,000 for change orders.) This amount shall not be due and owing until (a) 5 days after Lydig receives payment of the \$556,275.50 from the School District, (b) Elcon presents to Lydig full and final lien releases demonstrating full payment to all of Elcon's subcontractors and suppliers, and (c) Elcon completes all of its Punchlist work (for punchlists that Lydig has provided to Elcon as of the date of this Agreement).

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 Elcon, 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, including without limitation claims for quantum meruit and claims arising from alleged acts, error or omissions in the rendering of professional construction management services, 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, including Lydig's back-charge against Elcon in the amount of \$1,382,816.18. The Parties each reserve their rights and claims for any unexpired warranty obligations, any latent defects, and to indemnity 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 Architect's Punchlist or Contractor Warranty Log. Lydig and Elcon release any claim it may have, under subrogation rights, third party beneficiary rights, or otherwise, against the School District's consultants and Mahlum 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. Elcon 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 Elcon's subcontractors or suppliers of any tier, or made on behalf of Elcon, including its employees.

7. As further consideration of the amounts paid by the School District under this Agreement, Elcon agrees that it will not assert and hereby releases any requests for equitable adjust (but not change order requests) on either the Olympic Hills Elementary School or the Loyal Heights Elementary School Projects.

8. 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.

9. 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 any other Party or its agents.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

[The remainder of this page is intentionally blank.]

16. The individuals executing this Agreement below have authority to bind their principals and do bind them by executing this document (subject only to the School District's approval by its Board of Directors). 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.

By 
Andrew Johnson
President
Date: 6/12/18

Seattle Public Schools No. 1

By 
Richard Best
Director of Capital Projects and Planning
Date: 6-12-18

Elcon Corporation

By 
Peter Williams
President
Date: 6-12-18