



Office of the City Manager

INFORMATION CALENDAR

December 12, 2023

Info

To: Honorable Mayor and Members of the City Council  
 From: Dee Williams-Ridley, City Manager  
 Submitted by: Farimah Brown, City Attorney  
 Subject: Settlement of Claim of D.L. Falk Construction Inc.  
 (North Berkeley Senior Center)

INTRODUCTION

Under Berkeley Municipal Code section 2.06.120G, all settlements that are not announced at the conclusion of a closed session are provided to the Council and the public via an information report.

CURRENT SITUATION AND ITS EFFECTS

Pursuant to the Council's authorization on September 26, 2023, the City has entered into the attached Settlement and Release.

BACKGROUND

On May 17, 2019, Council approved a Construction Agreement between the City and D.L. Falk Construction Inc. ("DLF") for a project at the North Berkeley Senior Center which included seismic retrofitting, deferred maintenance upgrades, and various improvements ("Project"). The initial approved contract amount was not to exceed \$8,320,400 (Resolution No. 68,303-N.S.). On April 27, 2021, Council approved a contract amendment raising the not to exceed amount to \$8,670,400 (Resolution No. 69,828-N.S.).

The Project incurred significant construction challenges which resulted in delays in project completion and claimed cost overruns. On October 3, 2022, DLF submitted a Claim to the City asserting that it was owed an additional \$3.38 million in connection with the Project.

Prior to litigation of claims on a public construction project, parties are required to engage in a mediation process. Over the course of the following year, the parties engaged in mediation and settlement discussions.

On September 26, 2023, Council convened in closed session and provided direction regarding a potential settlement.

On October 23, 2023, the parties executed the attached Settlement Agreement. The Settlement Agreement provides that DLF will release all claims against the city relating to the Project in exchange for a payment of \$1.25 million. The Settlement Agreement reflects the terms reached by the parties consistent with the Council's Approval.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

Not applicable.

POSSIBLE FUTURE ACTION

None considered.

FISCAL IMPACTS OF POSSIBLE FUTURE ACTION

Not applicable (no possible future actions considered).

CONTACT PERSON

Farimah Brown, City Attorney, 510-981-6950

Attachments:

1: Settlement Agreement and Release

## SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is made and entered into by and between D.L. Falk Construction Inc. (“DLF”) and City of Berkeley (“Berkeley”). DLF and Berkeley each may be referenced as a “Party,” and DLF and Berkeley collectively may be referenced as the “Parties.” Upon execution of this Agreement, it shall be effective as of September 26, 2023 (“Effective Date”).

### RECITALS

A. Berkeley is the owner of the public works project generally described as the North Berkeley Senior Center Seismic Upgrades and Renovations at 1901 Hearst Ave., Berkeley CA 94709, Project No. 19-11268-C (“Project”).

B. On or about March 29, 2019, DLF and Berkeley entered into a written contract in which DLF was to perform construction work on Project (“Contract”).

C. The initial Contract time was 210 calendar days for substantial completion (January 1, 2020) and 260 calendar days for final completion (February 20, 2020).

D. The City issued Notice of Completion on August 31, 2022, 735 days later than the contract final completion date.

E. On or about October 7, 2022, DLF transmitted an “omnibus” claim pursuant to Article 12 of the Contract seeking additional compensation in the amount of \$3,381,228.83 in connection with numerous change order requests (CORs). DLF’s omnibus claim included COR #61.7 in the amount of \$1,420,380.17 pertaining to DLF’s claim for extended general conditions and a contract extension of 752 working days for the performance of additional work DLF contends was required by the City.

F. In addition, DLF submitted its final Payment Application No. 31 seeking \$93,417.64, and its retention Payment Application No. 32 seeking \$427,823.25. The City paid only the undisputed portion of Payment Application No. 31 and did not pay Payment Application No. 32 due to disputes arising from defective work the City believed needed to be corrected. The City disputed the amount DLF claimed it was owed for retention because the City valued the retention at \$413,821.64.

G. The Contract provides for liquidated damages of \$2,000 per day for late completion of the Project. Accordingly, the City has asserted entitlement to \$1,470,000 in liquidated damages from DLF.

H. The respective claims and counterclaims by the Parties related to and arising out of the Project and Contract, including claims that could have been asserted but were not, are hereinafter referred to as the “Dispute”.

I. Between February 9, 2023, and July 13, 2023, the Parties engaged in various mediation proceedings with JAMS, in satisfaction of their obligations under the Contract and pursuant to Public Contract Code section 9204.

J. DLF and Berkeley now seek to avoid the expense and risk of future litigation and to settle and compromise fully and forever, the Dispute via this Agreement, which has been negotiated at arms' length and has been agreed to by the Parties in good faith.

### **AGREEMENT**

NOW, THEREFORE, in consideration of the mutual promises and covenants contained in this Agreement, and for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged by DLF and Berkeley, and intending to be legally bound by the terms of this Agreement, the Parties agree as follows:

1. **Recitals**. The Recitals above are incorporated herein as terms of this Agreement and are not mere recitals.

2. **Payment to DLF**. Within thirty (30) calendar days of execution of this Agreement, Berkeley shall pay to DLF the sum of One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00) ("Settlement Payment") as full accord and satisfaction of the Dispute, including but not limited to any claims for interest, costs, or attorneys' fees.

3. **Condition of Approval**. This Agreement is expressly conditioned upon ratification of the key terms of this Agreement by the Berkeley City Council, which Berkeley's signatory below certifies occurred at the September 26, 2023, meeting of the City Council.

4. **Berkeley Waiver of Accrued Delay Damages**. Berkeley agrees to waive its claims for costs for accrued Liquidated Damages and/or delay damages and/or defective work arising through Project completion.

5. **No Admission of Liability**. The Agreement involves the settlement and compromise of disputed claims and does not constitute an admission of liability by any of the Parties to this Agreement.

6. **Fees and Costs**. DLF and Berkeley shall each bear their own attorneys' fees and costs in connection with the Project and the Dispute and the negotiation and creation of this Agreement. If any action is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and costs in addition to any other relief to which the Party may be entitled.

7. **Mutual General Release**. Except for Ongoing Rights and Obligations arising from the Contract described in Section 8 below, the Claims Not Released described in Section 11 below, and the obligations and rights created or confirmed by this Agreement, DLF and Berkeley, on behalf of themselves and their respective past, present, and future members, partners, shareholders, and insurers, and each of their respective predecessors, successors, and assigns, hereby releases the other Party and each of their respective predecessors, successors, and assigns, past or present, indirect or direct, partners, members, investors, parents, subsidiaries, heirs, executors, administrators, affiliated entities, insurers, attorneys, employees, and sureties from and against any and all causes of action, claims, demands, damages, obligations, liabilities, or judgments of whatever kind and character, whether known or unknown, suspected or unsuspected, accrued or unaccrued, in law, equity, or otherwise, that each currently owns or which may arise in the future

relating to or arising from any and all past, present, or future claims in connection with the Dispute, the Project, or the Contract.

8. **Ongoing Rights and Obligations.** Except as specifically stated herein, the Agreement shall not be construed as creating, altering, extending, or abridging the ongoing rights and obligations of the Parties under the Contract, including but not limited to DLF's obligation to indemnify, hold harmless, and defend the City. All warranties and guarantees specified in the Contract shall remain in full force and effect. Any change to the Contract required by this Agreement will be accomplished in accordance with the Change Order provisions of the Contract. In particular, all warranties and guarantees under the Contract are to remain in full force and effect, except as modified by Contract Change Order.

9. **Claims by DLF Subcontractors and Suppliers.** Notwithstanding any other provision in this Agreement, DLF agrees to defend, indemnify, and hold harmless Berkeley from any and all mechanics liens, stop notices, payment bond claims, or other claims or demands for payment by any subcontractor, supplier, or materialman of any tier, or other materialmen or laborers providing work, services, or materials to the Project at the request or direction of DLF.

10. **California Civil Code Section 1542 Waiver.** The Parties expressly acknowledge and agree that the release(s) contained in this Agreement include a waiver of all rights under Section 1542 of the California Civil Code. This statute reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

The Parties acknowledge that the foregoing waiver of the provisions of Section 1542 of the California Civil Code was bargained for separately. Accordingly, Section 1542 of the California Civil Code, and any similar law, statute, provision, or policy of this or any other state, is hereby expressly waived by DLF and Berkeley as to the claims that are released by this Agreement.

11. **Claims Not Released.** The Release set forth in Paragraph 7 above shall not release the Parties from the claims described herein. The Parties expressly reserve against one another all claims and defenses based on latent deficiencies (as that term is defined in California Code of Civil Procedure section 337.15, hereinafter collectively referred to as "Latent Deficiencies") in the Project construction not known as of the Execution Date.

12. **Third-Party Beneficiaries.** Except as otherwise expressly provided herein, nothing in this Agreement is intended to confer upon any person or entity other than the Parties and their respective successors and assigns any rights, remedies, obligations, or liabilities by reason of this Agreement.



disclose any information in connection with the execution of this Agreement or its preparation; and (g) it has carefully read and understands the contents of this Agreement and freely signs it of its own free act, without any constraint or undue influence, and it is the intention of each Party to be legally bound by this Agreement. Further, it is expressly understood that no Party shall ever assert any failure to disclose information by any other Party as a ground for challenging this Agreement.

17. **After-Acquired Facts.** The Parties acknowledge that they might hereafter discover facts different from or in addition to those they now know or believe to be true with respect to a claim or claims released herein, and they expressly agree to assume the risk of possible discovery of additional or different facts, and agree that this Agreement shall be and remain effective in all respects regardless of such additional or different discovered facts, or any change in circumstances.

18. **Prohibition of Use.** Neither this Agreement nor any of its Recitals, terms, or provisions, nor any of the negotiations connected with it, nor any other action taken to carry out this Agreement, shall be offered by either Party as evidence in any pending or future civil proceeding against the other Party, except in a proceeding to enforce or interpret any of the terms of this Agreement, including but not limited to as a defense to any claims released herein.

19. **Construction of Agreement.** Should any of the provisions or terms of this Agreement require judicial interpretation, it is agreed that the Court or other trier of fact interpreting or construing this Agreement, shall not apply a presumption that such provision(s) or term(s) shall be more strictly construed against one Party by reason of the rule of construction that a document is to be construed more strictly against the Party who prepared it. It is agreed that all Parties have participated in the preparation and review of this Agreement.

20. **Complete Agreement.** The Parties agree, declare, and represent that, other than the express terms of this Agreement and Exhibits hereto, no promise, inducement, representation, or agreement has been made to any Party by anyone to cause them to enter this Agreement, and each Party further agrees, declares, and represents that it has not relied on any representation, oral or written, by any other Party in making the decision to enter into this Agreement. The Agreement contains the entire agreement between the Parties, and the terms of the Agreement are contractual and not a mere recital. This is a fully integrated Agreement, and it may not be altered or modified by oral agreement, representation, or otherwise except by a writing of subsequent date hereto signed by all Parties.

21. **Governing Law.** This Agreement shall in all respects be interpreted, enforced, and governed by the laws of the State of California.

22. **Further Documents.** Each Party will cooperate and diligently perform any further acts, deeds, and things and execute and deliver any documents that may from time to time be reasonably necessary or otherwise reasonably required to consummate, evidence, confirm, and/or carry out the intent and provisions of this Agreement, all without undue delay or expense and without further consideration.

23. **Mutual and Binding Agreement.** The Parties represent that they have fully read and understood this Agreement and acknowledge that this Agreement is mutual, final, and binding on them and on their respective agents, employees, legal representatives, successors, assigns, heirs, estates, executors, and all others claiming by or through the Parties and otherwise as described in this Agreement.

24. **Authority.** Each signatory for each respective Party hereunder represents and warrants that they have all due authority necessary to execute this Agreement on behalf of such Party.

25. **Counterparts.** This Agreement may be executed in any number of counterparts, with the same effect as if all of the Parties hereto had signed the same document. All counterparts shall be construed together and shall constitute one agreement.


26. **Severability.** The paragraphs of this Agreement are severable. So long as the essential purpose of this Agreement may be accomplished, a finding that any particular paragraph of this Agreement is invalid and/or unenforceable shall not affect the validity or enforceability of the remaining provisions of the Agreement.

27. **Public Contract Code.** This Agreement concludes the Parties' dispute resolution process under the Contract and pursuant to Public Contract Code section 9204. The Parties acknowledge they have no further obligations under Public Contract Code section 9204 related to the Dispute.

**IN WITNESS WHEREOF**, D.L. Falk Construction Inc. and the City of Berkeley have executed this Agreement.

Date: October 23, 2023

**D.L. Falk Construction Inc.**

By:   
Name: David Falk  
Its: Director of Operations/Owner

Date: \_\_\_\_\_, 2023

**City of Berkeley**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_



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**D.L. Falk Construction Inc.**

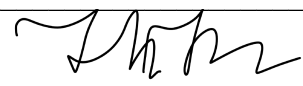
By: \_\_\_\_\_

Name:

Its: \_\_\_\_\_

Date: 10/23 \_\_\_\_\_, 2023

**City of Berkeley**



By: Farimah Brown

Name:

Its: \_\_\_\_\_ City Attorney

