

CITY COUNCIL AGENDA ITEM COVER MEMO

Agenda Item Number: _____

Meeting Type: Regular

Meeting Date: Apr 28, 2016

Action Requested By: Legal

Agenda Type: Resolution

Subject Matter:

Exact Wording for the Agenda:

Resolution authorizing the Mayor to execute a Settlement Agreement and Release among the City of Huntsville, the Public Building Authority of the City of Huntsville, American Pan & Engineering Co., Inc., n/k/a American Pan Enterprises Co., Inc., and Dawson Building Contractors, Inc., in that lawsuit styled "Dawson General Contractors, Inc. v. The Public Building Authority of the City of Huntsville, et. al," in the Circuit Court of Madison County, Alabama.

Note: If amendment, Please state title and number of the original

Item to be considered for: Action

Unanimous Consent Required: No

Briefly state why the action is required; why it is recommended; what council action will provide, allow and accomplish and; any other information that might be helpful.

Associated Cost: _____

Budgeted Item: Not Applicable

MAYOR RECOMMENDS OR CONCURS: Yes

Department Head: _____

Date: Apr 25, 2016

ROUTING SLIP CONTRACTS AND AGREEMENTS

Originating Department: Legal Council Meeting Date: 4/28/2016

Department Contact: Trey Riley Phone # 427-5026

Contract or Agreement: Settlement Agreement and Release (APEC)

Document Name: Jail Lawsuit Settlement Agreement and Release

City Obligation Amount: 0

Total Project Budget: \$700,000

Uncommitted Account Balance:

Account Number:

Procurement Agreements

Not Applicable

Not Applicable

Grant-Funded Agreements

Not Applicable

Grant Name:

Department	Signature	Date
1) Originating	<i>Mary C. Cates</i>	<i>4-25-2016</i>
2) Legal	<i>Mary C. Cates</i>	<i>4-25-2016</i>
3) Finance	<i>M Sargol</i>	<i>4-27-16</i>
4) Originating		
5) Copy Distribution		
a. Mayor's office (1 copies)		
b. Clerk-Treasurer (Original & 2 copies)		

RESOLUTION NO. 16-_____

BE IT RESOLVED by the City Council of the City of Huntsville, Alabama, that the Mayor is hereby authorized to execute a Settlement Agreement and Release, on behalf of the City of Huntsville, a municipal corporation in the State of Alabama, which said document is substantially in words and figures similar to that certain document attached hereto and identified as a "Settlement Agreement and Release Among the Public Building Authority of the City of Huntsville, American Pan & Engineering Co., Inc., n/k/a American Pan Enterprises Co., Inc., and Dawson Building Contractors, Inc.," consisting of Thirteen (13) pages, and the date of April 28, 2016 appearing on the margin of the first page, together with the signature of the President or President Pro Tem of the City Council, an executed copy of said document being permanently kept on file in the Office of the City Clerk-Treasurer of the City of Huntsville, Alabama.

ADOPTED this the 28th day of April, 2016.

President of the City Council of
the City of Huntsville, Alabama

ADOPTED this the 28th day of April, 2016.

Mayor of the City of
Huntsville, Alabama

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

DAWSON BUILDING CONTRACTORS, INC.,)

)

)

Plaintiff,)

)

v.)

Civil Action No.: 2006-1887-DSP

)

THE PUBLIC BUILDING AUTHORITY OF)

THE CITY OF HUNTSVILLE, ALABAMA, *et*)

al.,)

Defendants.)

Consolidated With

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

THE PUBLIC BUILDING AUTHORITY OF)

THE CITY OF HUNTSVILLE, ALABAMA,)

)

Plaintiff,)

)

v.)

Civil Action No.: 2006-1943-KKH

)

DAWSON BUILDING CONTRACTORS, INC.,)

et al.,)

)

Defendants.)

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“Agreement”), consisting of thirteen (13) pages, including signature pages, is lawfully created and executed by and between American Pan & Engineering Co., Inc., n/k/a American Pan Enterprises Co., Inc. (“APEC”), The Public Building Authority of the City of Huntsville, Alabama (“PBA”), and Dawson Building Contractors, Inc. (“Dawson”) (collectively “Parties”), the effective date of which shall be the latest date appearing on the signature pages of this Agreement (“Effective Date”).

RECITALS

A. WHEREAS, the PBA undertook to build a detention facility in Huntsville, Alabama (the “Project”); and

B. WHEREAS, Dawson served as the general contractor on the Project for a portion of time; and

C. WHEREAS, APEC was one of the suppliers of goods and services to Dawson on the Project; and

D. WHEREAS, a dispute arose regarding the Project among the Parties; and

E. WHEREAS, the dispute resulted in the filing of claims; one lawsuit in Jefferson County Alabama styled as *American Pan & Engineering Company, Inc., v. St. Paul Fire & Marine Insurance Company, et al.*, CV-2007-521 (no longer pending); two lawsuits in Madison County Circuit Court styled as *Dawson Building Contractors, Inc., v. The Public Building Authority of the City of Huntsville, et al.*, Case No. CV-2006-1887, and *The Public Building Authority of the City of Huntsville, Alabama, v. 2 WR/Homes-Wilkins Architects, Inc., et al.*, Case No. CV-2006-1943; and one lawsuit filed in the Superior Court of Fulton County, *Dawson Building Contractors, Inc., v. American Pan Enterprises, Inc., f/k/a American Pan & Engineering Company, Inc.*, Case No. 2015-CV-267105 (“Georgia Litigation”) (collectively the “Project Litigation”); and

F. WHEREAS, the PBA sought significant damages from APEC related to its work on the Project in the Project Litigation; and

G. WHEREAS, APEC sought to recover significant damages allegedly related to the PBA’s termination for convenience, as well as other causes, in the Project Litigation; and

H. WHEREAS, APEC further filed a motion for leave to file a counterclaim against the PBA (“Motion for Leave”), which the PBA opposed, and attached its proposed counterclaim to the Motion for Leave; and

I. WHEREAS, in the Georgia Litigation, Dawson sought significant damages from APEC for breach of its obligation to provide Dawson with a defense and to provide indemnification as a result of APEC’s Work on the Project; and

J. WHEREAS, the Parties dispute liability to one another; and

K. WHEREAS, the Parties intend to bring all claims that might exist between and among them to a close through this Agreement; and

L. WHEREAS, the Parties agree that the PBA’s opposition to the Motion for Leave will be withdrawn; and

M. WHEREAS, the parties further agree that the Motion for Leave is due to be granted, by separate order, and the counterclaim, attached to the Motion for Leave, be deemed filed and included in the definition of “Project Litigation”; and

N. WHEREAS, considering APEC’s claims against the PBA, the PBA’s claims against APEC, and Dawson’s claims against APEC, it is the opinion of all counsel that this Agreement is in the best interest of the Parties; and

O. WHEREAS, the values of all of the competing claims, made or unmade, against and among the Parties were considered and taken into account in ultimately reaching this Agreement; and

P. WHEREAS, the Parties wish to, and hereby do, resolve all of the PBA’s and Dawson’s claims against APEC and all of APEC’s claims against the PBA and Dawson.

W I T N E S S E T H:

NOW, THEREFORE, in consideration of the premises and covenants contained in this Agreement, and other good and valuable consideration, the Parties agree as follows:

1. **Recitals.** The Parties acknowledge, represent, and declare that the recitals set forth above are true and correct to the best of their knowledge and belief.

2. **Payment of Settlement Funds.** In consideration of the release by the PBA and Dawson, and other good and valuable consideration as set forth in this Agreement, the total sum of **SEVEN HUNDRED THOUSAND DOLLARS** and 00/100 (\$700,000.00) (“the Settlement Funds”), the sufficiency of which is expressly acknowledged by the PBA and Dawson, will be paid on behalf of APEC. Payment of the Settlement Funds shall be made within a reasonable time not to exceed 30 days after approval by the City Council (“Council”) of the City of Huntsville, Alabama (“COH”), the PBA, and execution of the required release. Such payment shall be by check or wire transfer made payable to Upchurch, Watson, White and Max, to be held in its trust fund (“Trust Fund”) for the benefit of the PBA and Dawson, to be distributed between the PBA and Dawson, pursuant to the terms of their prior agreement.

3. **Council and PBA Approval Required.** The settlement between and among the Parties memorialized by this Agreement is expressly subject to, and contingent upon, approval by the PBA and by the Council at a regularly-scheduled public meeting. As such, the Parties’ obligations under this Agreement shall not be deemed final, operative, binding, or enforceable until such time as the PBA and Council, by majority vote, pass a resolution approving this Agreement. In the event the PBA or Council declines to approve the settlement, the Agreement is null and void in all respects.

4. Denial of Liability or Wrongdoing. The Parties understand and agree that this is a settlement and compromise of doubtful and disputed claims and is not to be considered an admission of liability by any of them. To the contrary, it is understood and agreed that each of the Parties generally denies any and all liability to any other of the Parties and specifically denies the validity of all adverse claims in the Project Litigation.

5. Release.

a. The **PBA** and the **COH** (collectively “PBA parties”), in consideration of the Settlement Funds, and other good and valuable consideration, hereby release, remise, acquit, and forever discharge APEC, and, as applicable, each of its parent, subsidiary, and affiliated companies; each of its predecessors, successors, officers, directors, partners, employees, co-employees, agents, representatives, attorneys, and their liability insurers (but only with respect to insurance policies issued to APEC); and each of its sureties on any bond on behalf of APEC, and any other person or entity acting by or through APEC (collectively “APEC”), of and from any and all claims, damages, demands, costs, expenses, liabilities, attorneys’ fees, actions, causes of action, or suits of any nature whatsoever, whether legal or equitable, that the PBA parties have, or may have, in any of their individual or representative or official capacities, whether known or unknown, concealed or hidden, suspected or unsuspected, against APEC, arising out of or relating to any matter, transaction, practice, policy, event, act, or failure to act that occurred at any time in the past through and including the Effective Date, including, but not limited to, any and all claims and requests for relief that were asserted or could have been asserted in the Project Litigation. However, in the event APEC seeks to set aside this Agreement or seeks to pursue any claim against any of the PBA parties

after approval of this Agreement by the Council or the PBA, then any release provided by any of the PBA parties to APEC shall be immediately deemed revoked.

b. **Dawson**, in consideration of the Settlement Funds, and other good and valuable consideration, hereby releases, remises, acquits, and forever discharges APEC, and, as applicable, each of their parent, subsidiary, and affiliated companies; each of its predecessors, successors, officers, directors, partners, employees, co-employees, agents, representatives, attorneys, and its liability insurers (but only with respect to insurance policies issued to APEC) and each of its sureties on any bond on behalf of APEC, and any other person or entity acting by or through APEC (collectively "APEC"), of and from any and all claims, damages, demands, costs, expenses, liabilities, attorneys' fees, actions, causes of action, or suits of any nature whatsoever, whether legal or equitable, that Dawson has, or may have, in its individual or representative or official capacities, whether known or unknown, concealed or hidden, suspected or unsuspected, against APEC arising out of or relating to any matter, transaction, practice, policy, event, act, or failure to act that occurred at any time in the past through and including the Effective Date, including, but not limited to, any and all claims and requests for relief, whether claims for defense and indemnification or otherwise, that were asserted or could have been asserted in the Project Litigation. However, in the event APEC seeks to set aside this Agreement, or seeks to pursue any claim against Dawson after Dawson has signed this Agreement, then any release provided by Dawson to APEC shall be immediately deemed revoked.

6. No Assignment of Claims. The Parties expressly represent and warrant that no claims released in this Agreement have previously been assigned to any other person or entity.

7. **Dismissal of Claims on a *Pro Tanto* Basis.** As soon as practicable, the Parties will take all actions necessary to effect the terms of this Agreement and the prompt dismissal, with prejudice, of their claims against each other in the Project Litigation, with costs (including attorneys' fees) taxed as paid.

8. **Attorneys' Fees.** If it becomes reasonably necessary for any party to this Agreement to retain counsel for the purpose of enforcing or preventing the breach of any provision of this Agreement, including, but not limited to, instituting any action or proceeding to enforce any of its provisions for damages by reason of any alleged breach of any of its provisions, or for a declaration of rights or obligations under it, or for any other judicial remedy, then, if this matter is settled in favor of such party by judicial determination (which term includes arbitration judicially affirmed), whether at trial or on appeal, such party shall be entitled, in addition to such other relief as may be granted, to be reimbursed by the breaching party for all costs and expenses incurred by it or them, including, but not limited to, reasonable attorneys' fees.

9. **Applicable Law.** This Agreement is deemed created and executed within the state of Alabama, and is to be governed, construed, interpreted, and enforced in accordance with the laws of the state of Alabama.

10. **Binding Agreement.** This Agreement shall be binding upon, and shall inure to the benefit of, the Parties, and, as applicable, their respective heirs, representatives, successors, agents, employees, and/or assigns.

11. **Voluntary Agreement.** The Parties represent and warrant that they have each carefully read this Agreement and completely understand its terms, conditions, and effect. Additionally, each of the Parties represents and warrants that it has signed this Agreement freely and

voluntarily, and that in executing same, it has not been influenced by any person or entity to any extent whatsoever.

12. Independent Advice of Counsel. Each of the Parties represents and warrants that it is deliberately executing this Agreement, and that, in doing so, it is relying solely upon its own judgment, belief, and knowledge, as well as upon the advice and recommendations of its own independently-selected counsel, concerning the terms of this Agreement, as well as its rights and duties under it.

13. Interpretation of Agreement. The Parties agree that this Agreement shall be interpreted according to the plain and ordinary meaning of its terms. Additionally, the Parties agree that each of them participated equally in the negotiation and drafting of this Agreement, and consequently, no inference shall be drawn that this Agreement was prepared by any particular party, and no ambiguity shall be construed against any particular party.

14. Entire Agreement. This Agreement constitutes the entire agreement between APEC and Dawson and APEC and the PBA, and it supersedes any prior understandings, agreements, or representations by or among the Parties to the Agreement, written or oral, to the extent they relate in any way to the subject matter of this Agreement. This Agreement does not affect or alter the previously-executed settlement agreement between Dawson and the PBA.

15. Nonseverability. If any provision of this Agreement is deemed to be invalid or unenforceable under applicable law, the entire Agreement, including, but not limited to, any release provided by the PBA parties to APEC or by Dawson to APEC, shall not be considered divisible, and the Agreement, including, but not limited to, any and all releases provided by Dawson and/or the PBA parties shall be deemed revoked, and Dawson and the PBA parties shall be entitled to pursue

their claims against APEC. In that event, the statute of limitations will be deemed tolled, from the effective date of the Agreement until the date on which the provision is deemed invalid or Agreement is deemed revoked, whichever happens last.

16. Modification. No oral modification of this Agreement shall be deemed valid or enforceable under any circumstances. Instead, all modifications of this Agreement shall be in writing and signed by each of the Parties, or by their respective attorneys.

17. Counterparts. This Agreement may be executed in one or more counterparts. In this event, this Agreement shall not become effective and binding upon the Parties until such time as all of the signatories have signed a counterpart.

18. Further Assurances. The Parties shall execute and deliver any other documents and/or instruments and shall take any other actions as may be reasonably required or appropriate to evidence or carry out the intent and purposes of this Agreement.

19. Paragraph Headings. The paragraph headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

SIGNATURES ON SEPARATE PAGES BELOW

IN WITNESS WHEREOF, the PBA has executed this Agreement and caused its name to be subscribed as of the date indicated below.

**THE PUBLIC BUILDING AUTHORITY OF
THE CITY OF HUNTSVILLE, ALABAMA**

By: _____

Its: _____

STATE OF ALABAMA)
COUNTY OF _____)

On this the _____ day of _____, 2016, before me, a notary public, in and for said county and state, personally appeared _____, who being placed under oath, acknowledged to me that he has read and understood the foregoing release; he has the authority to bind the Public Building Authority of the City of Huntsville, Alabama; and he is executing same voluntarily as his own free act.

Notary Public
My Commission Expires: _____

IN WITNESS WHEREOF, the COH has executed this Agreement and caused its name to be subscribed as of the date indicated below.

THE CITY OF HUNTSVILLE, ALABAMA

By: _____

Its: Mayor

STATE OF ALABAMA)
COUNTY OF MADISON)

On this the 28th day of April, 2016, before me, a notary public, in and for said county and state, personally appeared Tommy Battle, Mayor of the City of Huntsville, Alabama, who being placed under oath, acknowledged to me that he has read and understood the foregoing release; he has the authority to bind the City of Huntsville, Alabama; and he is executing same voluntarily as his own free act.

Notary Public
My Commission Expires: _____

IN WITNESS WHEREOF, Dawson has executed this Agreement and caused its name to be subscribed as of the date indicated below.

DAWSON BUILDING CONTRACTORS, INC.

By: _____

Its: _____

STATE OF _____)
COUNTY OF _____)

On this the _____ day of _____, 2016, before me, a notary public, in and for said county and state, personally appeared _____, who being placed under oath, acknowledged to me that he has read and understood the foregoing release; he has the authority to bind Dawson Building Contractors, Inc.; and he is executing same voluntarily as his own free act.

Notary Public
My Commission Expires: _____

Approved By:

A. Joe Peddy (PED002)
Thomas M. Little (LIT017)

*Attorneys for American Pan & Engineering Co., Inc.,
n/k/a American Pan Enterprises Co., Inc.*

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