

MEMORANDUM

TO: Mark Berman
FROM: Brian Accardo ^{BA}
Laura Donaldson
RE: Offer to Settle the City's Claims Related to Breach of the City's Sewer Force Main in January 2019
DATE: March 16, 2021

Introduction

This memorandum presents for the City's consideration a mediated, pre-lawsuit offer to settle City claims for \$2,400,000 and includes our recommendation that the City accept the settlement offer. If accepted, the settlement will resolve the City's claims against Arc Electric, Inc., SICE, Inc., Prince Contracting, Inc., and the Florida Department of Transportation ("FDOT") arising from Arc Electric's breach of the City's sewer force main in January 2019. The settlement would recover more than 85 percent of contractor and vendor expenses the City incurred as emergency response to the incident (approximately \$2,765,000).

The settlement offer constitutes Arc Electric, SICE, and Prince Contracting's best and final offer to settle the City's claims without litigating the matter. FDOT has supported the City during settlement negotiations with the contractors but makes no offer to directly settle the City's claims because FDOT contractors must indemnify the agency for any contractor negligence. The City's acceptance of this settlement offer will avoid the time and expense of litigation, which could exceed two years and several hundred thousand dollars. Your direction to pursue mediation of the City's claims pre-suit, and our recommendation to settle this matter on the attached terms, recognize the potential for litigation costs to significantly, if not completely, offset an increased award to the City obtained as a successful litigation judgment. Moreover, in litigating the matter the City risks obtaining a judgment for less than the offered amount or a judgment against only Arc Electric, which could be largely unrecoverable.

The Incident

Arc Electric breached the City's force main on January 4, 2019, while installing conduit for fiber optic cables under NW 15th Street at the Interstate 95 overpass. Arc Electric performed this work as part of an FDOT project to widen and add toll lanes to Interstate 95 in Broward County. Arc Electric is a Broward County-based contractor and was working at the incident site as a subcontractor to SICE. SICE is a larger firm that specializes in intelligent transportation systems, such as tolling systems. SICE was working on the project as a subcontractor, performing work for Prince Contracting. Prince Contracting is a Florida-based construction firm specializing in highway construction and site development. FDOT contracted with Prince Contracting to design and build the project.

The force main breach caused significant quantities of sewage to spill onto ground and into a drainage canal adjacent to the incident site (the Broward Water Control District's "C-1 canal"). Through the C-1 canal, sewage entered a South Florida Water Management District canal and ultimately the intracoastal waterway. Environmental impacts caused Broward County and the Florida Department of Environmental Protection ("FDEP") to investigate the incident. Public health concerns informed the City's decision to immediately undertake emergency response efforts and to not rely on the contractors or FDOT to satisfactorily repair the City's infrastructure or remediate the City's waterways.

The City understood at the time that the cost of emergency response would be substantial and that it would need to recover those costs from the contractors after the fact. Emergency response efforts included removal of sewage from canals by vacuum truck and remediation of bacterial pollution in the City's waterways by deploying portable aerators. Aerators increase oxygen levels in water to promote biodegradation of organic material and removal of bacteria. Aeration commenced on January 9 and concluded on January 31, 2019. At the peak of its remediation efforts, the City's emergency response contractor operated 54 aerators, 24 hours per day. In total, the City spent over \$1.5 million contracting for vacuum trucks, aerators, and water quality testing.

Efforts to Recover Costs

The City notified Arc Electric's insurers of a forthcoming claim on January 16, 2019, and submitted its formal claim with cost documentation on May 2, 2019. Two insurance policies covered Arc Electric's work on the FDOT project. Arc Electric held a general liability policy for a covered claim up to \$1,000,000 and a commercial umbrella policy for a covered claim up to \$5,000,000.

Arc Electric's insurers would not settle the City's claims, however, while Broward County and FDEP regulatory investigations into the matter were ongoing. Those investigations did not conclude until December 2019, at which time Prince Contracting settled regulatory liability on behalf of all contractors by agreeing to pay \$199,990 in fines and agreeing to restore the C-1 canal bottom to its original elevation (the canal bank had eroded into the canal due to the force main breach). Upon resolution of the regulatory investigation, you directed us to demand the contractors immediately settle the City's claims.

We demanded settlement of the City's claims under threat of lawsuit on January 13, 2020. After receipt of responses to our demand, on March 12, 2020, we offered to mediate our claims in an attempt to avoid the expense of litigation. The contractors accepted our offer but scheduling mediation due to the number of participants and developing pandemic protocols proved challenging. Ultimately, the parties agreed to a two-step mediation where we would address issues regarding liability on May 28, 2020, and issues regarding damages on June 30, 2020.

At mediation on June 30, 2020, we concluded that the contractors would not proffer an acceptable pre-suit settlement. We perceived that Prince Contracting and SICE expected the City to settle its claims through negotiation only with Arc Electric's insurers, and that the contractors did not intend to contribute funds to settlement. It became obvious to us that the City would not reach settlement solely with the insurers due to Arc Electric's insurance coverage exclusions, namely exclusions for damages related to pollution. The insurers took the position that approximately two-thirds of the City's expenses were related to pollution.

Following the unsuccessful mediation, we prepared to litigate the matter while working with you and the City Manager to encourage FDOT to engage Prince Contracting on the City's behalf. This effort caused the contractors to propose additional mediation on October 16, 2020. At that mediation, the contractors appeared to negotiate among themselves to pool funds to make the City a reasonable settlement offer.

The October 2020 mediation resulted in the offer to settle the City's claims for \$2,400,000 but required the parties to further negotiate specific releases of claims. Negotiations of releases between the contractors and their insurers lasted three months. We subsequently negotiated the terms of the attached agreement, which we now present for the City's consideration.

Mediated Settlement

The settlement offer provides for a single lump-sum payment to the City in the amount of \$2,400,000. Payment is to be made within 45 days after the City executes the settlement agreement. The contractors' respective contributions to the settlement payment are unknown, but we expect that each of the three contractors and both of Arc Electric's insurers would contribute to the payment under separate agreements. The settlement agreement recognizes that the contractors offer the payment to avoid the uncertainty of litigation and associated, significant expense. The contractors do not admit liability for the City's claims.

In exchange for payment, the settlement agreement would release Arc Electric, SICE, Prince Contracting, and FDOT from the City's claims and liability for the City's damages. The City would be unable to pursue a cause of action to recover the balance of the City's expenses related to the incident from those entities or Arc Electric's insurers. But the settlement provides that if a non-party to the settlement files suit for recovery of damages relating to the incident, and if the City is a party to that lawsuit, the City can defend itself, if necessary, by asserting the contractors' negligence. No non-party, however, has contacted the City regarding damages arising from the incident.

Litigation Cost and Risks

Acceptance of the proposal would recover approximately 87 percent of the City's contractor and vendor expenses for emergency response activities. Litigating the matter to achieve a more favorable award of damages likely would last several years and cost on average between \$10,000 and \$15,000 a month in attorney fees. As you are aware, a prevailing party's recovery of attorney fees at the conclusion of litigation is exceptional and not the rule in Florida. If the City decides to litigate this matter, the City should expect that its attorney fees will not be recoverable, although we will make legal arguments to the contrary.

Litigation costs alone could net the City less than the settlement offered, but a jury also could award the City less than full recovery of its expenses as a judgment for damages. The City's actual expenses are well documented, but the contractors will attack both the reasonableness of those expenses and the recoverability of those expenses as damages. For the latter, the contractors will attempt to parse from the City's emergency response costs potentially non-recoverable expenses for claims recovery, for example.

Regarding reasonableness of the City's emergency response expenses, the contractors will attack the amount of individual expenditures as well as the necessity for certain expenses. For example, the contractors allege the City operated aerators at least one week longer than "necessary" to restore canal water quality to pre-incident conditions. Obviously, the City's concern for the safety and well-being of the public would lead the City to conservatively address any environmental or public health uncertainty. Nonetheless, the contractors will challenge as unreasonable the City's decision to continue aeration at a cost of approximately \$380,000 for the final week of canal remediation.

Separate from the issue of the amount of recoverable damages is the issue of which contractors are liable to the City for those damages. We have developed sufficient information pre-suit that should establish Arc Electric's liability for the force main breach. If the City elects to litigate the matter, we will seek evidence of Prince Contracting and SICE's direct negligence through discovery. And although the general rule in Florida is that a general contractor is not liable for its independent subcontractor's negligence, we also will argue that Prince Contracting and SICE are vicariously liable for Arc Electric's actions.

The risk of an unrecoverable award arises if we cannot establish that Prince Contracting or SICE should be held vicariously liable for Arc Electric's negligence. The contractors suggested during negotiations that Arc Electric as a corporate entity cannot on its own satisfy a multi-million-dollar judgment. Because of the issue regarding Arc Electric's insurance coverage for damages related to pollution, which the insurers will argue leaves less than \$1,000,000 covered under general liability, a judgment solely against Arc Electric could be largely unrecoverable.

Conclusion

The attached offer constitutes the contractors' best and final offer to settle the City's claims without litigation. As you directed, we explored every reasonable opportunity to maximize a pre-suit settlement offer. We recommend the City settle the matter on the attached terms because litigation costs likely will significantly, if not completely, offset any increased award the City could obtain as a successful litigation judgment.

Thank you for the opportunity to assist the City in this important matter. We are available to provide the City further information or counsel regarding this settlement offer as needed. We are prepared to litigate the matter if the City desires.

**MEDIATED SETTLEMENT AGREEMENT AND MUTUAL RELEASES BY,
BETWEEN, AND AMONG THE CITY OF POMPANO BEACH, PRINCE
CONTRACTING, LLC, SICE, INC., AND ARC ELECTRIC, INC.
REGARDING THAT CERTAIN SEWER BREACH WHICH OCCURRED
ON JANUARY 4, 2019**

This “Mediated Settlement Agreement and Mutual Releases By, Between, and Among the City of Pompano Beach, Prince Contracting, LLC, SICE, Inc., and ARC Electric, Inc. Regarding That Certain Sewer Breach Which Occurred on January 4, 2019” (the “Agreement”), which becomes effective only on the day the City of Pompano Beach City Commission issues a resolution approving this Agreement and the City Manager or other authorized signatory of the City executes this Agreement, whichever last occurs (the “Effective Date”), is entered into by, between, and among the following parties: The City of Pompano Beach, Florida (the “City”); Prince Contracting, LLC (“Prince”); SICE, Inc. (“SICE”); and ARC Electric, Inc. (“ARC”). In this Agreement, Prince, SICE, and ARC may be referred to collectively as the “Contractors,” the Contractors and the City may be referred to collectively as the “Parties,” and the Parties may be referred to individually as a “Party.” The Parties enter into this Agreement following a full-day mediation with Mediator James L. Nulman on October 16, 2020, regarding the following matters:

Recitals

- A. **WHEREAS**, the Parties are involved in a dispute arising from a Florida Department of Transportation project known as the “I-95 Express Lanes Phase 3A-2, Financial Project No: 433108-5, 52-01, Contract No. E4Q64, Broward County, FL” (the “Project”), administered by the Florida Department of Transportation, District 4 as Owner/Operator (“FDOT”);
- B. **WHEREAS**, FDOT entered into a design/build prime contract with Prince, which served as the design/build prime contractor for the Project, and Prince subcontracted certain work for the Project to SICE pursuant to a “Subcontract Number: 7-005-S” dated as of May 26, 2016 (collectively, with all amendments, change orders, and modifications thereto, the “Prince-SICE Subcontract”);
- C. **WHEREAS**, SICE sub-subcontracted certain work for the Project to ARC pursuant to a “Subcontract” dated as of February 7, 2017 (collectively, with all amendments, change orders, and modifications thereto, the “SICE-ARC Subcontract”);
- D. **WHEREAS**, during the course of performing its work for the Project, ARC struck a 42” pressurized sewer pipe owned and operated by the City (the “Sewer Breach”);
- E. **WHEREAS**, the City has threatened to file a lawsuit for damages against ARC, SICE, and Prince regarding the Sewer Breach, has alleged Prince’s failure to comply with its contract with FDOT, and has alleged FDOT’s failure to enforce

and properly administer its contract with Prince (collectively, the “City Claims”); and

- F. **WHEREAS**, notwithstanding the foregoing Recitals, the Parties understand and recognize the uncertainty of litigation and the significant expense associated therewith, and, thus, have agreed to settle and compromise certain matters in controversy among them as set forth herein. The Parties agree that this settlement represents a compromise of disputed claims and that this Agreement is not to be considered as an admission of liability on the part of any Party, by whom liability is expressly denied.

Operative Provisions

NOW, THEREFORE, in consideration of the Recitals, above, and the mutual promises, conditions, covenants, and agreements, below, and other good and valuable consideration, the adequacy and sufficiency of which is acknowledged and confessed, the Parties agree as follows:

1. Mutual Releases.

- a. **City’s Release of FDOT and Contractors.** The City and its agents, assigns, attorneys, officers, employees, insurers, and representatives completely release and forever discharge FDOT, ARC, SICE, and Prince and each of FDOT’s, ARC’s, SICE’s, and Prince’s past, present, and future affiliates, parents, predecessors, subsidiaries, successors, agents, assigns, attorneys, directors, employees, heirs, insurers (including, without limitation, Old Republic General Insurance Corporation, The North River Insurance Company, and Zurich American Insurance Company), Philadelphia Indemnity Insurance Company (“PHLY”), as Surety of ARC, members, officers, partners, representatives, and shareholders, of and from any and all past, present, or future attorney fees, bills, causes of action, charges, claims (including the City Claims), costs, damages, debts, demands, expenses, liabilities, losses, remedies, rights, suits, and sums of money, of whatever nature or kind, whether known or unknown, whether in contract or in tort, at law or in equity, or arising under or by virtue of any statute or regulation, that relate to or arise from the Project, Sewer Breach, and City Claims. **EXCEPTION: Non-Party Claims.** In the event that the City and Contractors are sued by any Non-Party relating to the Sewer Breach, this Agreement shall not prevent any Party from asserting and proving a right to contribution from another Party or from asserting and proving another Party’s negligence or violation of law as an Affirmative Defense to a non-party claim that relates to or arises from the Sewer Breach. **However**, this exception does not apply to Old Republic General Insurance Corporation and The North River Insurance Company, each of whom the City releases from any obligations under policies issued to ARC for all past, present, or future attorney fees, bills, causes of

action, charges, claims (including the City Claims), costs, damages, debts, demands, expenses, liabilities, losses, remedies, rights, suits, and sums of money, of whatever nature or kind, whether known or unknown, whether in contract or in tort, at law or in equity, or arising under or by virtue of any statute or regulation, that relate to or arise from the Project, Sewer Breach, and City Claims.

- b. **Contractors' Release of the City.** ARC, SICE, and Prince, and each of ARC's, SICE's, and Prince's past, present, and future affiliates, parents, predecessors, subsidiaries, successors, agents, assigns, attorneys, directors, employees, heirs, insurers (including, without limitation, Old Republic General Insurance Corporation, The North River Insurance Company, and Zurich American Insurance Company), members, officers, partners, representatives, and shareholders, completely release and forever discharge the City and each of the City's past, present, and future agents, assigns, attorneys, employees, insurers, and representatives, of and from any and all past, present, or future attorney fees, bills, causes of action, charges, claims, costs, damages, debts, demands, expenses, liabilities, losses, remedies, rights, suits, and sums of money, of whatever nature or kind, whether known or unknown, whether in contract or in tort, at law or in equity, or arising under or by virtue of any statute or regulation, that relate to or arise from the Project, Sewer Breach, and City Claims.

2. **Settlement Payment.** In consideration of the mutual releases above and the other consideration described herein, the Contractors shall pay, or caused to be paid, to the City a single lump-sum settlement payment of **TWO MILLION FOUR HUNDRED THOUSAND DOLLARS (\$2,400,000.00)** (the "Settlement Payment") within forty-five (45) days after the Effective Date. The Contractors' respective obligations to contribute certain amounts towards the Settlement Payment shall be set forth in separate confidential settlement agreements solely between and among the Contractors.

3. **Several Payment Obligations.** The Parties agree that the payment obligations referenced in this Agreement are several and not joint and are the sole and separate obligation of that Party in amounts previously agreed by the Parties.

4. **Attorney Fees, Costs, and Expenses.** Each Party shall bear its own attorney fees, costs, and expenses arising from or related to the City Claims. Should any lawsuit be filed after the Effective Date regarding enforcement of this Agreement, the prevailing Party or Parties shall be entitled to recover from the non-prevailing Party or Parties all reasonable attorneys' fees, costs, and expenses incurred in such lawsuit.

5. **Warranties and Representations.**

- a. Each Party warrants and represents that it and/or its legal representative is legally competent and authorized to execute this Agreement, and that each individual

signing this Agreement is authorized to do so and bind the Party for whom he or she signs.

- b. Each Party warrants and represents that, before executing this Agreement, it has been informed of its terms, contents, conditions, and effect, and no promise or representation of any kind has been made to it by any other Party or anyone acting on such other Party's behalf, except as expressly stated herein. Each Party has relied solely upon its own judgment and advice of its respective legal counsel in making and entering this Agreement and each Party does so freely and voluntarily.
- c. Each Party warrants and represents that it has, through its respective legal counsel, participated in the preparation of this Agreement and it is agreed and understood that no provision hereof shall be construed against any Party by virtue of the activities of such Party or such Party's counsel in the preparation of this Agreement.
- d. Each Party, in executing and delivering this Agreement, relies wholly upon its own judgment, knowledge, and belief as to the nature, extent, and duration of the damage which the City may have suffered or sustained, or may sustain in the future, as a result of the Sewer Breach.
- e. Each Party further represents and warrants that it has not been influenced by any representations, statements, or warranties made by any person, firm, association, partnership, or corporation hereby released, or by any agent or other person representing it concerning the nature, extent, or duration of the damages or losses, or the legal liability therefore.
- f. Each Party further certifies that it is completely competent or authorized to execute this Agreement, and that it has fully read and completely understands the same or has had it explained to it.
- g. Each Party also represents and warrants that it is the sole and lawful owner of all claims that it is releasing herein, that it has the power and authority to execute a release of all such claims and that it has not sold, assigned, transferred, conveyed, hypothecated, or otherwise disposed of any claim or demand relating to any matter covered by this Agreement.

6. **Validity of Agreement Contingent Upon Approval of Same by City.** The validity of this Agreement is contingent upon approval of same by the City. The Agreement shall become effective the day the City of Pompano Beach City Commission issues a resolution approving this Agreement and the City Manager or other authorized signatory of the City executes this Agreement, whichever last occurs. The City shall immediately inform the

Contractors when this Agreement becomes effective, as stated herein, in order to provide the Contractors sufficient time to transmit the Settlement Payment to the City. In the event this Agreement does not become effective by March 31, 2021, then this Agreement and all of the provisions herein shall be null and void *ab initio*.

7. **Entire Agreement; Amendments in Writing.** Except for the Prince-SICE Subcontract, SICE-ARC Subcontract, and certain separate and confidential settlement agreements among the Contractors regarding the Sewer Breach (all of which remain in full force and effect as between and among the respective Parties thereto subject to their terms), this Agreement embodies the entire agreement between the City, on the one hand, and the Contractors, on the other hand, related to the subject matter hereof and supersedes, upon the Effective Date, all prior agreements and understandings, if any, whether oral or written, express or implied, relating to the subject matter hereof. Further, this Agreement may be amended only by an instrument in writing executed jointly by all Parties hereto.

8. **Governing Law; Provisions Severable.** This Agreement is intended to be performed in the State of Florida and the substantive law of the State of Florida shall govern the validity, construction, enforcement, and interpretation of this Agreement. If any provision is deemed void by applicable law, such void provision shall be deemed severed from the Agreement and the remaining provisions shall remain in full force and effect.

9. **Execution in Counterparts.** This Agreement may be executed in counterparts, and scanned and e-mailed signatures will constitute a fully enforceable Agreement that requires no further documentation.

10. **Mistakes.** Should it develop that there are any mistakes in this instrument which cause the release of the Contractors to be defective or less than complete, the City will execute any and all instruments and do any and all things necessary to effectuate a full, final, and complete release.

11. **Incorporation of Recitals.** The Parties specifically declare and represent that the Recitals at the beginning of this Agreement are true and correct, and are incorporated herein as contractual terms, not mere recitals.

The City of Pompano Beach, Florida

Prince Contracting, LLC

By: _____

By: _____

Title: _____

Title: _____

Date: _____

Date: _____

SICE, Inc.

ARC Electric, Inc.

By:  _____

By:  _____

Title: CHIEF FINANCIAL OFFICER

Title: President

Date: 03-05-2021

Date: 3-3-2021