

## SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS

This Settlement Agreement and Release of Claims ("this Agreement") is entered into by and between the City of Sioux Falls ("the City"), Koch Hazard Architects, Inc. ("KHA") and Associated Consulting Engineering, Inc., ("ACEI"). All parties shall be collectively referred to as "the Parties."

### PARTIES AND FACTS

1. On or about November 13, 2015, the City entered into a contract with KHA for the performance of certain design and other architectural and engineering services in relation to the construction of the City Center Building ("City Center Building") to be located at 231 N. Dakota Avenue in Sioux Falls, Minnehaha County, South Dakota ("Project").
2. KHA retained ACEI as its engineering subconsultant to perform the mechanical engineering services in relation to the Project.
3. The Parties decided that an open loop geothermal system was to be used for heating and cooling system for the City Center Building.
4. The construction of the City Center Building was completed in the spring of 2018 and the start-up of the open loop geothermal system was initiated. While the City was taking occupancy of the City Center Building, the open loop geothermal system started to fail.
5. The parties attempted several times to get the open loop geothermal cooling system operational, however the attempts were unsuccessful and the open loop geothermal system was abandoned.
6. The Parties decided to switch to an air-cooled chiller system, which was accomplished in the spring of 2019.
7. In an attempt to resolve the disputes between the Parties related to the City Center Building and the failed open loop geothermal system, the Parties agreed to engage in mediation before pursuing active litigation. The progress of mediation was hampered, in part, by the global COVID-19 pandemic. However the Parties completed mediation in late fall of 2021, and reached successful settlement of all issues on April 12, 2022.
8. The Parties have now resolved all of the disputes and claims related to the City Center Building.
9. In consideration of the facts, acknowledgements, conditions, recitals, and payments described herein, the Parties agree to mutually release one another from any and all claims arising from the construction of the City Center Building.

## TERMS

10. Payment and Consideration. In consideration of the mutual covenants, terms and conditions contained herein, and the exchange of other good and valuable consideration as described below, the receipt and sufficiency of which shall be acknowledged upon remittance, the City shall receive a total sum of Three Hundred Twenty Thousand Dollars and No Cents (\$320,000.00) in full and final satisfaction of all claims against KHA and ACEI, to be paid as follows:
- A. KHA and ACEI shall pay the City a cash payment of Two Hundred Twenty Thousand Dollars and No Cents (\$ 220,000.00) in new monies with \$200,000 to be paid by, or on behalf of, ACEI and \$20,000 to be paid by, or on behalf of, KHA; and
  - B. the City shall retain as its sole property all remaining contract reserves and any interest due and owing to KHA, its subcontractors, or other parties, which accrued pursuant to the Second Amendment to AIA Document B101-2007 Standard Form of Agreement between Owner and Architect for the City Administration Building, calculated as One Hundred Thousand Dollars and No Cents (\$ 100,000.00).
11. Release of All Claims. In consideration of the payments and covenants described in Paragraph 10 above and terms and conditions contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties, on behalf of themselves and their heirs, executors, administrators, successors, assigns, parents, subsidiaries, former and current officers, directors, employees, agents, owners, shareholders, members, attorneys, officials, public officials, councilmembers, consultants, contractors, and insurers, release and forever discharge each other and their affiliates, heirs, executors, administrators, successors, assigns, parents, subsidiaries, former and current officers, directors, employees, agents, owners, shareholders, members, attorneys, officials, public officials, councilmembers, consultants, contractors, and insurers, both jointly and severally, from any and all rights, demands, claims, damages, losses, costs, expenses, actions, and claims or causes of action of any sort whatsoever, whether in tort or in contract, at law or in equity, contingent or fixed, asserted or not currently asserted, known or unknown, foreseen or unforeseen, arising or accruing from any acts or omissions that may have occurred from the beginning of time until the execution of this Agreement, in any way related to or resulting from the disputes arising from the Project, the termination of the agreements, and any allegations made or that could be made in litigation.
12. Attorneys' Fees. The Parties shall bear their own respective attorneys' fees, costs, and expenses of any kind and nature.
13. No Admission of Fault or Liability. The Parties understand and agree that this is a compromise settlement of disputed claims in order to avoid the significant costs and uncertainties of litigation, and that the promises made in consideration of this Agreement



shall not be construed to be an admission of any liability or facts by any party. By executing this Agreement, the Parties expressly deny any liability or fault.

14. Entire Agreement. The Parties expressly acknowledge and agree that:

A. This Agreement constitutes an integration of the entire understanding and agreement between the parties hereto with respect to the subject matter hereof and supersedes any prior or contemporaneous oral or written agreements, proposed agreements, negotiations and discussions with respect to the subject matter hereof.

B. There are no representations, warranties, understandings, or agreements between the Parties other than those set forth in this Agreement.

C. In entering into this Agreement, the Parties have not relied on any representations, warranties, understandings, agreements, promises, or conditions not specifically set out in writing in this Agreement.

15. General and Miscellaneous Terms and Provisions. The parties agree that the general and miscellaneous terms and provisions below apply to this Agreement:

A. The Parties acknowledge that before entering into this Agreement they have had the opportunity to consult with legal counsel or other advisors and have done so. The Parties acknowledge that they have entered into this Agreement of their own free will and no promises or representations have been made by any person to induce the parties to enter into this Agreement other than the express terms set forth herein.

B. The Parties agree that if any other provision of this Agreement or the application thereof to any part or circumstance shall to any extent be invalid or unenforceable, the remainder of this Agreement or the application of said provision to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby and each provision of this Agreement, other than such invalid or unenforceable provision, shall be valid and enforceable.

C. Each party represents and warrants that as of the date of this Agreement, it has not assigned any other existing or possible claims against the other party to any other person or entity that is not a signatory to this Agreement.

D. Each Party agrees to execute and deliver any and all such other and additional instruments or documents and do any and all such other acts and things as may be necessary to fully effectuate this Agreement and carry out the terms and conditions set forth herein.

E. Preparation of this Agreement has been a joint effort of the signatories and neither this Agreement, nor any document delivered by the signatories pursuant hereto, nor shall any term nor provision thereof be construed more severely against any party as the drafter of any document notwithstanding any presumption of law to the contrary.

- F. Pursuant to SDCL 1-27-1.23, this Settlement Agreement is deemed a public record.
- G. Each term of this Settlement Agreement is contractual and not merely recital.
- H. Each Party signing this Settlement Agreement acknowledges and declares that he or she is authorized to sign this Settlement Agreement in his or her stated capacity and that he or she is authorized to bind the Party which he or she represents.
- I. For the convenience of the Parties hereto, this Settlement Agreement may be executed in counterparts; each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.
- J. For the convenience of the Parties hereto, this Settlement Agreement may be executed in counterparts; each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.
16. Execution. The Parties have caused this Agreement to be signed by their duly authorized officers or representatives. By signing this Agreement, the parties warrant that they have read and understand each and every provision of this Agreement, that they voluntarily agree to and signed this Agreement, that in so doing they are not relying upon any inducements, representations, agreement or understanding other than as set forth herein, and they are acting with the full advice of an explanation by their respective attorneys.
17. COUNTERPARTS; ESIGN; ELECTRONIC DELIVERY. This Agreement may be executed in counterparts, each of which will be deemed an original, and all of which together will constitute one and the same instrument, Electronic signature pursuant to the Electronic Signature in Global and National Commerce Act (ESIGN Act) shall not be denied legal effect, validity or enforceability solely because it is in electronic form. This Agreement, to the extent signed and delivered by means of a facsimile transmission or as an attachment to an electronic mail message in "pdf" or similar format, will be treated in all manner and respects as an original agreement or instrument, regardless of any variation in pagination or appearance, and will have the same binding legal effect as if it were the original or electronically signed version thereof delivered in person.

Dated this \_\_\_\_\_ day of June, 2022.

(Remainder of this page intentionally left blank.)

CITY OF SIOUX FALLS:

Eric L. Beck

Paul TenHaken, Mayor

ATTEST:

Tamara Jorgensen  
Tom Greco, City Clerk, ~~asst.~~  
Tamara Jorgensen



STATE OF SOUTH DAKOTA     )  
  : SS  
COUNTY OF MINNEHAHA     )

On this the 25 day of July, 2022, before me, the undersigned officer, personally appeared Paul TenHaken, Mayor of the City of Sioux Falls, South Dakota, being the Mayor of the City of Sioux Falls, and having acknowledged he has read the foregoing document and knows the contents thereof, and is authorized to sign the document for the purposes stated therein.

IN WITNESS WHEREOF I hereunto set my hand and official seal.

Angela Ricketts  
Notary Public, State of South Dakota

My Commission Expires: 08/17/2022





KOCH HAZARD ARCHITECTS, INC.

BY: [Signature]

Printed Name: Stacey McMahon

Its: President

STATE OF SOUTH DAKOTA )  
COUNTY OF MINNEBAKA ) : SS

On this the 6 day of JULY, 2022, the undersigned officer, personally appeared STACEY L. MCMAHAN, known to me or satisfactorily proven to be the PRESIDENT of Koch Hazard Architects, Inc., the corporation that is described in and that executed the within instrument and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF I hereunto set my hand and official seal.

[Signature]  
Notary Public, State of South Dakota

My Commission Expires: \_\_\_\_\_

MY COMMISSION EXPIRES  
9/18/2022

(SEAL)



ASSOCIATED CONSULTING  
ENGINEERING, INC.

BY: Damon de Wit

Printed Name: Damon de Wit

Its: Vice - President

STATE OF South Dakota )  
 ) : SS  
COUNTY OF Minnehaha )

On this the 13<sup>th</sup> day of July, 2022, the undersigned officer, personally appeared Damon de Wit, known to me or satisfactorily proven to be the Vice President of Associated Consulting Engineering, Inc., the corporation that is described in and that executed the within instrument and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF I hereunto set my hand and official seal.

Leslie A Campbell  
Notary Public, State of South Dakota

My Commission Expires: 4.4.24

(SEAL)

