

RESOLUTION NO. 3574

A RESOLUTION APPROVING A SETTLEMENT AGREEMENT WITH AHANU CONSTRUCTION, INC., CMG CONSTRUCTION, INC., AND NORTH AMERICAN SPECIALTIES INSURANCE REGARDING DISPUTES AND CLAIMS ON THE CONTRACT FOR WATER SYSTEM IMPROVEMENTS FOR PHASE 3 WATER MAIN REPLACEMENT 20” TRANSMISSION MAIN DATED APRIL 12, 2011 AND THE CLAIM UPON THE BOND SECURING PERFORMANCE OF SUCH CONTRACT.

WHEREAS, on April 12, 2011, the City of Miles City and Ahanu Construction, Inc. (“*Ahanu*”) entered into a contract for the construction of certain improvements for the City of Miles City municipal water system commonly referred to as “System Improvements for Phase 3 Water Main Replacement 20” Transmission Main” hereinafter “*the Contract*”;

AND WHEREAS, by letter dated October 25, 2011, and signed on October 26, 2011 and delivered to the City of Miles City on October 26, 2011, Ahanu Construction, Inc. informed the City of Miles City, that it was irrevocably and voluntarily abandoning the Contract effective upon the City's receipt of such letter;

AND WHEREAS, North American Specialties Insurance (“*NAS*”) is the surety on the performance bond for Ahanu Construction, Inc. under the Contract;

AND WHEREAS, due to Ahanu Construction, Inc.’s. default in the performance of the Contract and its voluntary and irrevocable abandonment of the Contract, *NAS* undertook the performance and completion of the Contract and designated *CMG Construction, Inc* (“*CMG*”). of Billings, Montana as the independent contractor to perform and complete the Contract on behalf of *NAS*;

AND WHEREAS, Ahanu subsequently requested mediation of its disputes and claims with the City under the Contract, pursuant to the terms of the Contract;

AND WHEREAS, *CMG* has asserted certain claims with the City’s project engineer for extra compensation and extra time upon the Contract;

AND WHEREAS, the City has asserted certain claims and penalties against Ahanu, *CMG*, and *NAS* under the terms of the Contract;

AND WHEREAS, Ahanu, *CMG*, *NAS*, the City, and the City’s project engineer, have engaged in settlement discussions to resolve their mutual claims;

AND WHEREAS, Ahanu, *CMG*, and *NAS* are agreeable to the resolution of these claims pursuant to the terms of the General Waiver of Claims and Release attached hereto as Exhibit “*A*”, and made a part hereof;

AND WHEREAS, the City’s project engineer has recommended the City’s acceptance of the terms and conditions of the General Waiver of Claims and Release attached hereto as Exhibit

GENERAL WAIVER OF CLAIMS AND RELEASE

PARTIES: Ahanu Construction, Inc. (**Ahanu**); North American Specialty Insurance Company (**NAS**); CMG Construction, Inc. (**CMG**); City of Miles City, Montana (**Miles City**) and I.E. Holding Company, Inc. & Subsidiaries (including Interstate Engineering Inc.) (**Interstate**); collectively "the **Parties**" or "the parties".

DATE OF INCIDENT: April 2011 to present.

DESCRIPTION OF INCIDENT: Phase 3 Water System Improvements 20" Transmission Main, I.E. #S10-069, Miles City, Montana (the **Project**) awarded to **Ahanu** by Notice of Award dated April 12, 2011.

SUM OF SETTLEMENT: **Miles City** hereby waives claims for penalties and costs as described below against **Ahanu**, **NAS**, and **CMG**; **Miles City** further agrees to pay the total sum of \$173,714.31, to **Ahanu**, **NAS**, and **CMG**, which the parties agree is the remaining amount **Miles City** owes under the contract between **Miles City** and **Ahanu**, including Change Orders 1 through 6. Proceeds will be disbursed as follows: **Miles City** will issue a check to **Ahanu**, **NAS**, and **CMG**, as joint payees, in the amount of \$161,214.31, and will hold back \$12,500.00 for completion of corrective actions necessary to finalize the **Project**, including, but not limited to, chip sealing along the entire length of the project.

Ahanu, **NAS**, and **CMG** hereby waive and release claims against **Miles City** and **Interstate** as described below.

Interstate hereby waives and releases claims against **Ahanu**, **NAS** and **CMG** as described below. **Interstate** will pay **Ahanu**, **NAS**, and **CMG** \$10 each, the adequacy of which is hereby acknowledged as consideration for **Ahanu**, **NAS**, and **CMG**'s release of **Interstate** as described herein.

1. Waiver and Release – **Ahanu**, **NAS**, and **CMG**

Ahanu, **NAS**, and **CMG** acknowledge receipt of the above sum of money and in consideration for payment of such sum, and in consideration of **Miles City**'s and **Interstate**'s waiver and release set forth below, for themselves, and their heirs, personal representatives, successors, assigns, agents, partners, officers, directors, parent corporations, subsidiaries, affiliates, and employees fully and forever release and discharge **Miles City** and **Interstate**, their respective heirs, personal representatives, successors, assigns, agents, partners, officers, directors, subsidiaries, affiliates, employees and attorneys from any and all actions, claims, causes of action, demands, or expenses for damages or injuries, whether asserted or unasserted, known or unknown, foreseen or unforeseen, of whatever kind, nature and/or

description, whether legal or equitable, and the consequences thereof, including any claims, losses, costs or damages, whether known or unknown, liquidated or unliquidated, fixed or contingent, direct or indirect arising out of the described incident/**Project**, including all claims which could have been asserted by **Ahanu, NAS, and CMG** against **Miles City and Interstate**.

2. Waiver and Release - Miles City and Interstate

Miles City and Interstate in consideration of the mutual covenants contained herein, for themselves, and their heirs, personal representatives, successors, assigns, agents, partners, officers, directors, parent corporations, subsidiaries, affiliates, and employees fully and forever release and discharge **Ahanu, NAS, and CMG**, their respective heirs, personal representatives, successors, assigns, agents, partners, officers, directors, subsidiaries, affiliates, employees and attorneys from any and all actions, claims, causes of action, demands, or expenses for damages or injuries including penalty damages and Miles City's out of pocket costs, including engineering and attorneys fees, and direct expenses of Miles City's work crews, whether asserted or unasserted, known or unknown, foreseen or unforeseen of whatever kind, nature and/or description, whether legal or equitable, and the consequences thereof, including any claims, losses, costs or damages, whether known or unknown, liquidated or unliquidated, fixed or contingent, direct or indirect arising out of the described incident/**Project**, including all claims which could have been asserted by **Miles City and Interstate** against **Ahanu, NAS and CMG**. **Miles City and Interstate** agree that the release language of this paragraph specifically includes any and all claims arising out of the investigation, handling, adjusting, defense or settlement of the claims including, without limitation, any claims for breach of contract, in tort, violation of the covenant of good faith and fair dealing, violation of Montana Code Annotated §§ 33-18-201 et seq., and in common-law bad faith which could otherwise be made against **NAS's** bonds on the **Project**, including any claims which could otherwise be asserted against **Ahanu and CMG**, either individually or in their capacity as Indemnitors, except as provided in paragraph 4.

3. Future Damages

Inasmuch as the injuries, damages, and losses resulting from the events described herein may not be fully known and may be more numerous or more serious than it is now understood or expected, **Ahanu, NAS, CMG, Miles City and Interstate** agree, as a further consideration of this agreement, that their Release applies to any and all injuries, damages and losses resulting from the incident described herein/**Project**, even though now unanticipated, unexpected and unknown, as well as any and all injuries, damages and losses which have already developed and which are now known or anticipated.

4. Project Warranty

Notwithstanding any other provision of this Agreement, **Ahanu, NAS and CMG** shall remain responsible to **Miles City** for all actual expenses and costs incurred to perform any additional work under the **Project** warranty which arises from **Ahanu's** and **CMG's** work. The **Project** warranty expires on May 31, 2013, at which time the obligations outlined in this paragraph shall also expire.

5. **Release of Insurers**

Ahanu, NAS, and CMG further release 1) the Montana Municipal Interlocal Authority (MMIA), a risk retention pool, its members, and all of its excess coverage insurers and reinsurers; and 2) Evanston Insurance Company, insurer for **Interstate**, including any and all of its associated or affiliated companies, and all employees and agents of any of them, from all obligations under any part of the insurance policies applicable to **Ahanu, NAS, and CMG's** claims and from any and all claims arising out of the investigation, handling, adjusting, defense or settlement of the claims including, without limitation, any claims for breach of contract, in tort, violation of the covenant of good faith and fair dealing, violation of Montana Code Annotated §§ 33-18-201 et seq., and in common-law bad faith.

6. **No Admission of Liability**

It is understood that the above-mentioned consideration and waiver of claims are accepted as the sole consideration for full satisfaction and accord to compromise a disputed claim, and that neither the payment of sums or other provisions, nor the negotiations for settlement shall be considered as an admission of liability.

7. **No Additional Claims**

Ahanu, NAS, CMG, Miles City and Interstate represent that no additional claims are contemplated against any other party potentially liable for the losses, damages, and injuries for which this Release is given. In the event any additional claim is made which directly or indirectly results in additional liability exposure to any other party for the losses, injuries, and damages for which this Release is given; **Ahanu, NAS, CMG, Miles City and Interstate** covenant and agree to indemnify and save the other releasees harmless from all such claims and demands, including reasonable attorneys' fees and all other expenses necessarily incurred.

8. **Disclaimer**

The parties have carefully read the foregoing, discussed its legal effect with their attorneys, understand the contents thereof, and signs the same of their own free will and accord. To the extent any documents are required to be executed by any of the parties to effectuate this Agreement, each party agrees to execute and deliver such documents as may be required to carry out the terms of this Agreement.

9. **Severability**

Should any provision of this Agreement be determined to be unenforceable, all remaining terms and clauses shall remain in force and shall be fully severable.

10. **Choice of Law**

The laws of the State of Montana shall apply to the interpretation of this Agreement.

11. Final Agreement; Contingent Upon City Council Approval

This written Agreement constitutes the final and entire agreement between the parties and shall fully extinguish and supersede any and all prior oral agreements, understandings, or contracts, implied and expressed, to the contrary. This agreement is contingent upon its approval by the City Council of the City of Miles City by appropriate resolution.

12. Complete Defense

This Agreement may be plead by the parties as a full and complete defense to any action, suit or other proceeding which may be instituted, prosecuted or attempted by any other party pertaining to the Project.

13. Fees and Costs

Each party agrees to bear their own costs and attorneys' fees.

14. Warranty of Capacity to Execute Agreement

By their signatures below, each respective signatory represents that he or she has the express authority of the party for which he or she executes this Agreement and further has the express authority to bind his or her principal to the terms hereof. The parties represent and warrant that no other person or entity has or has had any interest in the claims, demands, obligations or causes of action referred to in this Agreement and that he, she or it has the sole right and exclusive authority to execute this document and receive the sum specified in it.

15. No Inducement

Each party declares and represents that no promise, inducement, or other agreement not expressly contained herein has been made and that this Agreement contains the entire agreement of the parties. The terms of this Agreement are contractual and not recitals only.

16. Amendment

This Agreement shall not be altered, amended, or modified in any respect except by a writing duly executed by all parties hereto.

17. Numbers and Headings

Paragraph numbers and headings are used herein for convenience only and shall have no force and effect in the interpretation or construction of this Agreement. As used in this Agreement, the singular shall include the plural; and the masculine, the feminine and neuter genders.

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18. No Waiver

No waiver of any breach of any one or more of the conditions or covenants of this Agreement by any party shall be deemed to imply or constitute a waiver of a breach of any other condition or covenant in this Agreement or of a breach of the same condition or covenant in the future.

19. Joint Authorship

This Agreement is the product of the negotiations of the parties. By virtue of the signature of all parties hereinbelow, this Agreement shall be deemed to have been drafted by all parties jointly, and any ambiguity herein shall not be construed for or against any party.

20. Counterpart Signatures

This Agreement may be executed in counterparts and shall be effective immediately upon exchange of counterpart signatures by facsimile or otherwise.

21. No Third-Party Beneficiary

Each of the provisions of this Agreement is for the sole and exclusive benefit of the parties and none of the provisions is intended to benefit any third party; provided however, that the release provisions of paragraph 5, above, shall extend to the persons and entities described therein.

22. Assignment

This Agreement and the rights and obligations hereunder shall not be assigned without the prior written consent of all the parties and such consent may be withheld at the sole discretion of each party. Except as so restricted, this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

23. General Indemnity Agreement

Notwithstanding any other provision of this Agreement, **Ahanu**, **CMG**, and **NAS** all agree that the release provisions of this Agreement do not include or in any way modify or limit the General Indemnity Agreement ("GIA"), attached hereto as Exhibit "A". It is agreed by **Ahanu**, **CMG** and **NAS** that, to the extent legally enforceable, the GIA shall remain in full force and effect after the complete execution of this Agreement and shall not merge into or otherwise become included within or limited by this Agreement. **Ahanu** and **CMG** acknowledge and agree that **NAS** has reserved all rights, remedies and defenses available to it pursuant to the GIA and applicable law governing the same. Likewise, **NAS** acknowledges and agrees that **Ahanu** has reserved all rights, remedies and defenses available to it pursuant to the GIA and applicable law governing the same.

CAUTION: READ BEFORE SIGNING!

DATED this 7th day of December, 2012.

Ahanu Construction, Inc.

By: [Signature]
Its PRESIDENT
RELEASOR

DATED this 7th day of December, 2012.

North American Specialty Insurance Company

By: [Signature] DAVID LEWIS
Its Vice President
RELEASOR

DATED this 7th day of December, 2012.

CMG Construction, Inc.

By: [Signature]
Its Sec. Texas
RELEASOR

DATED this 7th day of December, 2012.

City of Miles City, Montana

By: C.A. Gentry
Its MAYOR (office)
RELEASOR

DATED this 7th day of December, 2012.

I.E. Holding Company, Inc.

By: [Signature]
Its Treasurer (office)
RELEASOR

STATE OF MONTANA)

: SS
County of Yellowstone

This instrument was acknowledged before me on the 21 day of December, 2012, by Releasor (Ahanu):



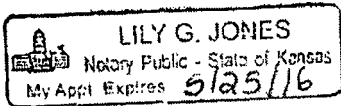
[Signature]
SUSAN McALLISTER-EMTER
NOTARY PUBLIC for the State of Montana
Residing at Billings, Montana
My Commission Expires
January 16, 2013

[Signature]
SUSAN McALLISTER-EMTER (printed name)
Notary Public, State of Montana
Residing at: Billings MT
My commission expires: January 16 2013

STATE OF KANSAS)

: SS
County of Johnson

This instrument was acknowledged before me on the 7th day of December, 2012, by Releasor (NAS).



[Signature]
David Lewis (printed name)
Notary Public, State of Kansas
Residing at: Overland Park, Kansas
My commission expires: 5/25/16

STATE OF MONTANA)

: SS
County of Yellowstone

This instrument was acknowledged before me on the 21 day of December, 2012, by Releasor (CMG)



[Signature]
SUSAN McALLISTER-EMTER
NOTARY PUBLIC for the State of Montana
Residing at Billings, Montana
My Commission Expires
January 16, 2013

[Signature]
SUSAN McALLISTER-EMTER (printed name)
Notary Public, State of Montana
Residing at: Billings MT
My commission expires: January 16 2013