

RESOLUTION NO. R-174-23

**RESOLUTION APPROVING AND AUTHORIZING THE MAYOR
TO EXECUTE A SETTLEMENT AGREEMENT AND MUTUAL RELEASE
IN LITIGATION INVOLVING THE MAY BRANCH
OUTFALL CULVERT REPLACEMENT, PROJECT NO. 12-06-E**

WHEREAS, the City of Fort Smith engaged Mickle Wagner Coleman, Inc., its subcontractor Data Testing, Inc., and Mobley Contractors, Inc. for design and construction of the May Branch Outfall Culvert Replacement, Project No. 12-06-E, along the North "P" Street right-of-way from the North "P" Street bridge to and beyond the North "P" Street pump station; and

WHEREAS, problems with the resulting constructed project resulted in the City initiating litigation by way of Complaint filed April 28, 2023 in the Circuit Court of Sebastian County, Arkansas styled as *City of Fort Smith v. Mickle Wagner Coleman, Inc., and Mobley Contractors, Inc.* seeking damages for alleged damages and defects resulting from alleged improper design, construction and repair of the project; and

WHEREAS, the parties desire to settle and to compromise the claims and disputes and have agreed to the Settlement Agreement and Mutual Release to resolve the matter.

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the City of Fort Smith, Arkansas that:

Section 1. The Settlement Agreement and Mutual Release in the matter regarding Mickle Wagner Coleman, Inc., Data Testing, Inc., and Mobley Contractors, Inc., attached hereto and incorporated herein, is approved.

Section 2. The Mayor is hereby authorized to execute such agreement.

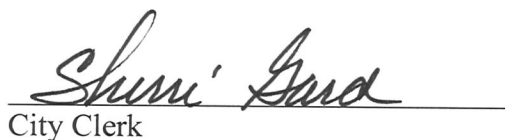
This Resolution adopted this 19th day of September, 2023.

APPROVED:



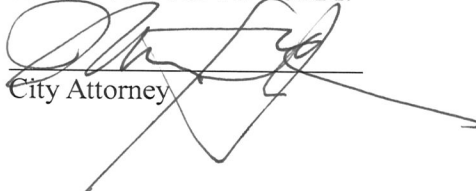
Mayor

ATTEST:



City Clerk

APPROVED AS TO FORM:



City Attorney

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release (“Agreement”) is agreed to by and on behalf of the City of Fort Smith, Arkansas (“the City”), Mickle Wagner Coleman, Inc. and Data Testing, Inc., (hereinafter jointly referred to as "MWC") and Mobley Contractors, Inc. (“Mobley”).

RECITALS

A. The City caused to be constructed drainage improvements in the City of Fort Smith identified as the May Branch Outfall Culvert Replacement, Project No. 12-06-E, along the North "P" Street right of way from the North "P" Street bridge to and beyond the North "P" Street pump station, (hereinafter referred to as “the Project.”

B. On November 2, 2011, the City and MWC entered into an agreement for MWC to provide engineering services and testing services (the "engineering contract") with reference to the Project.

C. Based on plans prepared by MWC, the Project was submitted for public bidding. Mobley submitted the successful bid and, on October 2, 2012, Mobley and the City entered into a contract (the "construction contract") for the construction of the Project.

D. Final completion and payment under the contract for the construction of the Project occurred on December 16, 2014.

E. By early May, 2015, within the warranty period provided in the construction contract, surface sink holes along and in the vicinity of the Outfall Culvert Replacement developed and were identified. The term "sink hole situation" is used herein to refer to the alleged defects in the Outfall Culvert Replacement.

F. In April of 2017, The City, MWC and Mobley (each individually a “Party” and all of them collectively “the Parties”) entered into an Agreement Regarding May Branch Outfall Culvert Replacement Project Warranty and Remediation Work and Tolling Agreement (Agreement I).

G. During the performing of the initial remediation work and in a subsequent inspection, damage to several box culvert joints was observed where settlement/movement in the joints had caused spalling or flaking of concrete which, at some locations, exposed the structural steel of the concrete culverts. Additional defects and failure of initial repair were noted.

H. The Agreement I remediation work was accomplished by the retained contractors and the costs were shared by the Parties.

I. The Parties executed additional extensions to the Tolling Agreement to provide additional time to evaluate effects of flooding on Project facilities.

J. Thereafter, the Parties declined to extend the Tolling Agreement further, and the City initiated litigation by way of Complaint filed April 28, 2023, in the Circuit Court of Sebastian County, Arkansas, styled as *City of Fort Smith, Arkansas v. Mickle Wagner Coleman, Inc. and*

Mobley Contractors, Inc., Sebastian County Circuit Court No. 66FCV-23-380 (hereinafter referred to as “the Lawsuit” or “the Dispute”). The Lawsuit was not served on either MWC or Mobley.

K. In the Lawsuit, the City sought damages from MWC and Mobley for alleged damages and defects resulting from alleged improper design and construction and repair of the Project.

L. The Parties desire to settle and to compromise the claims and disputes set forth in the Lawsuit which are discussed herein, and which desire to settle and compromise is set forth in the terms and conditions set forth hereafter.

In consideration of the above recitals, which are incorporated herein as essential terms of this Agreement, and the covenants herein contained, the Parties agree as follows:

AGREEMENT

1. Dismissal of Lawsuit. Within 15 business days following the payment as set forth in the paragraph herein entitled “**2. Payment Terms and Conditions**” (the “Payment Terms”), the City agrees that it will dismiss any lawsuit, administrative complaint or any other claim alleging fault by MWC, Mobley, or their agents or employees, representatives, officers, shareholders, legal counsel, and respective insurance carriers, with prejudice.

2. Payment Terms and Conditions. MWC and Mobley, through their respective insurance carriers, shall collectively pay (split equally between them) to the City the sum of One Hundred Thousand Dollars and No Cents (\$100,00.00), in full settlement of the Dispute and Lawsuit arising from the design and construction and repair of the Project, subject to the terms and conditions in this Agreement. Payment shall be made via wire transfer or check within 30 days of the last date on which the last Party signs this Agreement.

3. Other Fees and Expenses. The Parties shall bear their own fees, costs, and expenses incurred in connection with the Dispute and Lawsuit.

4. Mutual Release. The Parties do hereby RELEASE, ACQUIT, AND FOREVER DISCHARGE each other, as well as any and all of their current and former representatives, agents, employees, servants, officers, directors, members, insureds, insurers, reinsurers, successors, assigns, parents, subsidiaries, affiliates, divisions, alter egos, shareholders, joint ventures, subcontractors, fiduciaries, political subdivisions, public officials, attorneys, clients, and all other persons acting on their respective behalves (collectively “Released Persons”), from any and all actions and causes of action in law or in equity, whether arising in contract, quasi-contract, tort, fraud, statute, or any other basis in law or in equity, claims, demands, compensation, and liability of whatsoever kind or nature, known as well as unknown and unanticipated, arising out of or related to the design and construction and repair of the Project. (“Released Claims”).

5. Covenant Not to Sue. The Parties agree that they will not commence, prosecute, or permit anyone within their control to commence or prosecute any action or other proceeding against any Released Person with respect to the claims released herein, except to enforce this

Agreement. This covenant is enforceable as contract, separate and apart from the releases granted elsewhere in this Agreement.

6. No Admission of Fault. The Parties acknowledge that this Agreement is a settlement of disputed claims and that the Parties deny all fault, wrongdoing, violation of any federal or state law, or liability arising from the Dispute and Lawsuit and that the Parties agree that this Agreement may not be construed or deemed to be evidence of an admission or concession on the part of any Party with respect to any claim of any fault or liability or wrongdoing or damage whatsoever, or any infirmity in the claims or defenses asserted by the Parties.

7. Beneficiaries. Except as expressly provided herein, this Agreement is intended to confer rights and benefits only on the Parties and Released Persons, and their respective successors and permitted assigns, and, it is not intended to confer any right, benefit upon any other third parties or other persons. No person or entity other than the Parties and Released Persons, and their respective successors and permitted assigns, shall have any enforceable right under this Agreement. All rights of action for any breach of this Agreement are hereby reserved to the Parties and Released Persons, and their respective successors and permitted assigns.

8. Governing Law. This Settlement Agreement shall be governed by and construed in accordance with laws of the State of Arkansas.

9. Forum Selection. The Parties to this Agreement submit to the jurisdiction of the Sebastian County Circuit Court or as allowed by law, the United States District Court for the Western District of Arkansas for any action involving any dispute regarding this Agreement or under any statute or common law relating in any way, directly or indirectly, to the subject matter of this Agreement or to the dealings between the Parties during the term of this Agreement. All such actions and disputes shall be heard exclusively in one of these two courts.

10. Ambiguity. This Agreement has been prepared by the combined efforts of the Parties and their respective attorneys. No party may claim ambiguity of any term, word, phrase or provision of this Agreement is to be construed against another party on the grounds that the other party is drafter of the term, word, phrase or provision in question. Accordingly, the Parties expressly waive any rule of law or any legal decision that would require interpretation of any ambiguities in this Agreement against the party that has drafted it.

11. Mistake of Fact and Waiver. It is understood by the Parties that the facts in respect of which the Agreement is made may subsequently prove to be other than or different from the facts now known by any of them or believed by any of them to be true, as set out in the Agreement. Each of the Parties accepts and assumes the risk of the facts proving to be so different, and each of the Parties agrees that all the terms of the Agreement shall be in all respects effective and not subject to termination or rescission by any such difference in facts. The Parties also agree, represent, and warrant that they realize and acknowledge that actual matters now unknown to them may hereafter give rise to causes of action, claims, demands, debts, controversies, damages, costs, losses and expenses which are presently unknown or unanticipated or unsuspected, that they are not relying on any other party to disclose any such unknown claims, and they further agree,

represent and warrant that this document has been negotiated and agreed upon in light of that realization. The Parties hereby waive any claim for fraud in the inducement of this Agreement.

12. Counterparts. This Agreement may be executed in counterparts, each of which will be as effective as an original.

13. Severability. If any provision or provisions of this Agreement fail or are declared by a court to be invalid, illegal, unenforceable or in conflict with the law of any jurisdiction, then the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby, and the Parties shall make whatever adjustments are necessary to make sure that the Parties receive the equitable benefit of this Agreement.

14. Authority. Each of the signatories below represents and warrants that the Party on whose behalf they have signed has fulfilled all requirements to convey authority to them to sign this Agreement, has authorized them to sign this Agreement, and the signature binds the person or entity for whom or for which they are signing. The Parties also represent and agree that they have not transferred or assigned any of the Released Claims to any other person or entity.

15. Merger. The Parties acknowledge and warrant that they have read and understood this Agreement; that they have been represented by counsel in connection with the negotiation of this Agreement; and that this Agreement contains the entire agreement and understanding of the Parties relating to this settlement of the Lawsuit and the claims that were raised or could have been asserted therein, and this Agreement supersedes any previous understandings, representations, commitments, or agreements, oral or written. There are no conditions precedent to its effectiveness other than as are set forth in this Agreement. The Parties further acknowledge that this Agreement cannot be waived, modified or altered except by written agreement signed by both of the parties.

16. Acknowledgement.

THE PARTIES AGREE AND ACKNOWLEDGE THAT EACH HAS READ THE FOREGOING AGREEMENT CAREFULLY, FULLY UNDERSTANDS ITS TERMS, AND ARE EXECUTING THIS AGREEMENT VOLUNTARILY, OF THEIR OWN FREE WILL, AND WITHOUT ANY COERCION, UNDUE INFLUENCE, THREAT OR INTIMIDATION OF ANY KIND OR TYPE WHATSOEVER.

AUTHORIZED REPRESENTATIVE OF
CITY OF FORT SMITH

By: _____
(printed name)

Title: _____

Date: _____

AUTHORIZED REPRESENTATIVE OF
MICKLE WAGNER COLEMAN, INC.

By: _____
(printed name)

Title: _____

Date: _____

AUTHORIZED REPRESENTATIVE OF
MOBLEY CONTRACTOR, INC.

By: _____
(printed name)

Title: _____

Date: _____