

COPY



**RESOLUTION 2001-940**

**A RESOLUTION APPROVING A SETTLEMENT AGREEMENT REGARDING THE  
BULL RUN WATER CONNECTION PROJECT**

WHEREAS, the City of Sherwood, Star Insurance Company, David Evans & Associates and Aurora Engineering (including its insurer North Pacific) have reached an agreement to settle all claims between them related to the Bull Run Water Connection Project; and

WHEREAS, the City Council has determined that the settlement is in the best interests of the citizens of the City of Sherwood; and

WHEREAS, a signed copy of the Settlement Agreement is attached hereto and incorporated herein by reference;

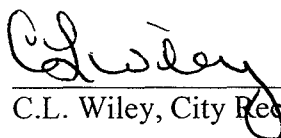
NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF SHERWOOD HEREBY RESOLVES:

- (1) That it approves and accepts the Settlement Agreement for the Bull Run Water Connection Project herein referenced; and
- (2) That upon authorizing the settlement, the City will proceed with prosecuting outstanding claims against Gonzales Boring & Tunneling.

ADOPTED this 3rd day of April, 2001.

  
\_\_\_\_\_  
Mark O. Cottle, Mayor

ATTEST:

  
\_\_\_\_\_  
C.L. Wiley, City Recorder

## SETTLEMENT AGREEMENT

**BETWEEN:** City of Sherwood (“City”)  
**AND:** Aurora Engineering, Inc. (“Aurora”)  
**AND:** David Evans & Associates, Inc. (“DEA”)  
**AND:** Star Insurance Company (“Star”)  
**DATED EFFECTIVE:** March 20, 2001

### RECITALS

A. Beginning in 1993, the City of Sherwood (“City”) embarked on the so-called Bull Run Water Supply System Connection Project (the “Project”). The Project was intended to connect the City’s water supply system to the Bull Run water supply system via 22,000 lf of 24” pipe by connecting to the City of Tualatin’s water line.

B. The City’s design professional was David Evans & Associates (“DEA”). The Project was put out to bid in 1996. Aurora Engineering, Inc. (“Aurora”) was the low bidder and was awarded the construction contract. Star Insurance Company (“Star”) provided the statutorily required payment and performance bond. On September 1, 1994, which was prior to issuing the payment and performance bond, Aurora, William M. Binckley, and Teresa M. Binckley executed a General Agreement of Indemnity (“GAI”) in favor of Star.

C. North Pacific Insurance Co. (“North Pacific”) was one of Aurora’s general liability insurance carriers at the time of the Project.

D. Aurora experienced difficulties on the Project. Star and Aurora executed a Financing Agreement (“the Financing Agreement”) on April 30, 1997, and thereafter began to finance Aurora’s work on the Project due to Aurora’s lack of funds.

E. The City terminated Aurora’s contract in January 1999 and made demand upon Star to complete the Project. Star refused to do so, and the City engaged other contractors to perform work on the Project, which work the City has alleged is completion work, and Star and Aurora have claimed is work performed to correct design deficiencies. Star and Aurora have also claimed that the work by other contractors includes betterment to the Project.

F. Shortly after the termination, two lawsuits were filed in connection with the Project – *Aurora Engineering, Inc. v. City of Sherwood* and *Star Insurance Company v. City of Sherwood*, United States District Court (OR) Case Nos. CV 99-1236 KI and 1237 KI (“the Lawsuits”).

G. By its terms, effective November 1, 1998, the City and DEA entered into a Joint Defense and Tolling Agreement regarding the Lawsuits and certain associated matters.

H. On or about April 28, 2000, Star filed a UCC-1 Financing Statement with the Uniform Commercial Code Department of Licensing of the State of Washington to secure “Any and all proceeds obtained in the resolution of the claim and/or claims against the City of

Sherwood in U.S. District court District of Oregon Lead Case Number CV99-1236KI (and case number CV99-1237KI), including proceeds representing the contract balance under the prime construction contract for the Sherwood-Bull Run Connection Project, Project No. SXWX0048, up to the total amount advanced by Star Insurance Company and/or any payments made by Star Insurance Company under its bond plus 8 percent interest and in accordance with the Financing Agreement dated April 30, 1997 . . .”

I. All parties to the disputes arising out of the Project agreed to mediate the disputes associated with the Lawsuits on January 5, 2001, utilizing the services of John Bakkensen. That mediation was adjourned without a settlement being reached, and a follow-up mediation session was held on February 5, 2001. At the conclusion of the second mediation session the parties to this Agreement except Aurora agreed to settle the Lawsuits as between themselves subject to certain conditions precedent. Prior to those conditions precedent being accomplished another mediation session was convened on March 20, 2001 at which time the settlement memorialized by this Agreement was reached.

NOW THEREFORE, in consideration of the terms, covenants, and conditions expressed in this Settlement Agreement to be kept and performed by the parties to this Settlement Agreement, and for other good and valuable consideration, the receipt, adequacy, and sufficiency of which is hereby acknowledged, and based on the foregoing recitals, the parties mutually agree as follows:

## **AGREEMENT**

**1. Condition Precedent.** The parties agree that approval by the City Council of the City of Sherwood of this Agreement by resolution is a condition precedent to the settlement outlined in this Agreement. The City Council will meet to consider the settlement as soon as practicable after its execution and the City shall promptly notify each of the other parties to this Agreement of the City Council action.

### **2. Settlement**

**2.1.** Star shall pay Aurora the sum of \$100,000 on or before the earlier of five days after the satisfaction of the condition precedent or March 31, 2001.

**2.2.** DEA shall pay Aurora the sum of \$20,000 on or before the earlier of five days after the satisfaction of the condition precedent or March 31, 2001.

**2.3.** Star releases Aurora, William M. Binckley, and Teresa M. Binckley, and each of them, from any and all obligations they have to Star relating to the Project, the bond for the Project, the GAI, the Financing Agreement, the April 28, 2000 Financing Statement, the Lawsuits, or otherwise.

**2.4.** Star shall pay the City the sum of \$575,000 on or before the earlier of five days after the satisfaction of the condition precedent or March 31, 2001.

**2.5.** Star and Aurora shall each assign to the City all of the claims of Aurora and Star against Gonzales Boring and Tunneling, Inc. (“Gonzales”) arising out of the Project and the Lawsuits and each of them.

2.6. DEA shall pay the City the sum of \$100,000 on or before the earlier of five days after the satisfaction of the condition precedent or March 31, 2001.

2.7. DEA forgives all charges for fees and costs against the City that it has, or may have, arising out of the Project (including all oral and written agreements relating to the Project or the Lawsuits) or the Joint Defense and Tolling Agreement regarding the Lawsuits.

2.8. Aurora, through one of its insurers, CGU/North Pacific Insurance Company, shall pay the City the sum of \$150,000 on or before the earlier of five days after the satisfaction of the condition precedent or March 31, 2001.

2.9. Except as set forth in a letter agreement from Star's attorney, Roger Lenneberg, to Aurora and/or the Oles Morrison Law Firm dated March 21, 2001, which exception applies only as between Aurora and Star, the City, Star, Aurora, and DEA, and each of them, on behalf of themselves, their executors, successors, officers, assigns, shareholders, directors, agents, attorneys, sureties, and insurers (save and except Aurora's insurers, Certain Underwriters at Lloyds and CNA Reinsurance Company, Ltd.), mutually release, acquit, and forever discharge each other, and any parent or any other affiliated corporation or entity, their executors, administrators, personal representatives, heirs, successors, assigns, shareholders, officers, directors, agents, attorneys, sureties, and insurers (save and except Aurora's insurers, Certain Underwriters at Lloyds and CNA Reinsurance Company, Ltd.), from any and all claims, demands, costs, expenses, damages, judgments, or causes of action of whatsoever kind, nature, or description which they have, had, or could have had, and which could have been asserted between or among them arising out of the Project or the Lawsuits.

2.10. The City, Star, Aurora, and DEA shall each stipulate to dismissal of the *Aurora Engineering, Inc. v. City of Sherwood* lawsuit with prejudice and without costs or fees to any party.

2.11. The City, Star, Aurora, and DEA shall each stipulate to dismissal of the *Star Insurance Company v. City of Sherwood et al.* lawsuit with prejudice and without costs or fees to any party, but only (a) with respect to the claims of Star against the City and DEA and (b) with respect to the counterclaims of the City against Star and Aurora, but only to the extent that such counterclaims by the City are not inconsistent with the provisions of paragraph 3 of this Agreement, so that the City can pursue the claims against Gonzales.

2.12. Star, Aurora, and DEA agree to cooperate with the City in its prosecution of the claims against Gonzales as more fully set forth in paragraph 3 of this Agreement. Any recovery against Gonzales shall belong to the City.

2.13. Star and Aurora shall deliver, or cause to be delivered, all original copies of any as-built drawings in their possession, or in the possession of any of their experts, to the City on or before the earlier of five days after the satisfaction of the condition precedent or March 31, 2001.

### **3. Prosecution of Claims Against Gonzales.**

**3.1.** Notwithstanding any other provision of this Agreement, the parties expressly agree that all claims of Star or Aurora against Gonzales shall be preserved so that the City, for the benefit of the City, can pursue them. The City expressly agrees that neither Star nor Aurora have made representations or warranties with regard to the nature or the value of the claims of Star or Aurora against Gonzales upon which the City has relied in agreeing to the settlement memorialized by this Agreement.

**3.2.** Immediately upon approval of the settlement outlined in this Agreement by the City Council of the City of Sherwood, the City shall be substituted for Star in the *Star Insurance Company v. City of Sherwood et al.* in order to pursue the claims of Aurora and Star against Gonzales assigned under this Agreement. All parties agree to cooperate fully with the City in accomplishing such substitution of parties.

**3.3.** Star shall, without charge, provide to the City all of its information, analyses, expert reports, deposition transcripts, and any other data, documentation, or analyses relating to the prosecution and defense of the claims of Aurora or Star against Gonzales. Star agrees to allow the City to interview their attorneys and staff for up to six hours regarding the claims against Gonzales without charge.

**3.4.** Aurora agrees to cooperate with the City in its prosecution of the claims of Aurora or Star against Gonzales. Aurora agrees to allow the City to interview members of Aurora's staff for up to six hours regarding the claims against Gonzales without charge. Such interviews shall be by telephone or at Aurora's offices in the Seattle area.

**3.5.** Aurora shall allow the City to view, test, and analyze the portions of the materials from the Tualatin-Sherwood bore for evidence purposes that are currently in its possession. The City recognizes that such materials are in a location that does not belong to Aurora and that Aurora may be asked to remove the materials within a short time after execution of this Agreement. Aurora agrees to give the City two weeks notice if it is required to move such materials, and the City shall then have the right to take possession of and move any such materials it desires to retain. Any materials not so moved after the notice is given may be disposed of at Aurora's discretion.

**3.6.** DEA shall, without charge, provide to the City all of its information, analyses, expert reports, deposition transcripts, and any other data, documentation, or analyses relating to the prosecution and defense of the claims of Aurora or Star against Gonzales. DEA agrees to allow the City to interview its attorneys and staff for up to six hours regarding the claims against Gonzales without charge. DEA agrees to cooperate with the City in its prosecution of the claims against Gonzales.

### **4. Indemnity.**

**4.1.** The City agrees to defend, indemnify, and hold Aurora harmless from claims by anyone, including, but not limited to Gonzales, arising out of the Lawsuits, this Agreement, or the acts or omissions undertaken pursuant to this Agreement to the same extent and on the same basis as Aurora would be entitled to a defense and indemnity

under the CGU/North Pacific insurance policies issued to Aurora numbered CO7113675, CO80113675, ECL0931, and ECL11702.

**4.2.** If Aurora seeks protection as an indemnified party under this paragraph 4 it shall promptly notify the City in writing of such claims and shall tender the same to the City for defense. The City shall have no obligation for any costs incurred in providing such notice or any claims for which prompt written notice is not given. Claims shall be made by first class and certified mail to the City of Sherwood (Attn: City Manager) at Sherwood City Hall, 20 NW Washington Street, Sherwood OR 97140 with a copy to Charles R. Schrader, Tarlow Jordan & Schrader, PO Box 230669, Portland OR 97281.

**4.3.** A breach of any provision of this Paragraph 4 shall not affect the releases of this Agreement, but shall only give rise to an independent claim for breach of this Paragraph 4. In the event of a default under this Paragraph 4, the defaulting party shall reimburse the nondefaulting party for all costs and expenses reasonably incurred by the nondefaulting party in connection with the default, including without limitation attorney fees. Additionally, in the event a suit or action is filed or a proceeding undertaken to enforce Paragraph 4 of this Agreement, or with respect to Paragraph 4 of this Agreement, the prevailing party shall be reimbursed by the other party for all costs and expenses incurred in connection with the suit, action, or proceeding, including without limitation reasonable attorney fees at the trial level and on appeal. This clause applies, but is not limited, to proceedings in bankruptcy or otherwise.

**4.4.** It is expressly understood and agreed that the City has no indemnity or contribution obligation whatsoever toward Aurora with regard to claims by Aurora against Certain Underwriters at Lloyds, CNA Reinsurance Company, Ltd., or any other person or entity under any legal, equitable, or statutory theory.

## **5. Miscellaneous.**

**5.1. Entire Agreement.** Except for the letter agreement from Star's attorney Roger Lenneberg dated March 21, 2001 as described in subparagraph 2.9 of this Agreement, this Agreement is intended by the parties to be the final expression of their agreement and is the complete and exclusive statement of the terms thereof notwithstanding any representation, statements, or agreements to the contrary heretofore made. This Agreement supersedes and replaces any prior mediated settlement agreements between or among the parties.

**5.2. Modifications.** Any modification of this Agreement or additional obligation assumed by any party to this Agreement in connection with this Agreement shall be binding only if evidenced in a writing signed by the party or an authorized representative of the party against whom or which the modification is asserted.

**5.3. Severability.** If a term, condition, or provision of this Agreement or the application thereof to any circumstance is determined to be invalid or unenforceable to any extent, the remaining provisions of this Agreement shall be unaffected and shall remain valid and fully enforceable.

**5.4. Nonwaiver.** Any right, power, or remedy provided under this Agreement to any party hereto shall be cumulative and in addition to any other right, power, or remedy provided under this Agreement or now or hereafter existing at law or in equity. No course of dealing between or among the parties hereto or any delay or failure on the part of any party in exercising any rights hereunder or at law or in equity shall operate as a waiver of any rights of such party, except to the extent expressly waived in writing by such party.

**5.5. Future Assurances.** Each of the parties shall, upon request of any other party, execute and deliver such additional documents as may be necessary or convenient for the purpose of evidencing or perfecting any rights or interests arising under this Agreement. No such action or actions may be construed to create a partnership or joint venture with respect to any aspect of this Agreement, or otherwise.

**5.6. Third Parties.** Nothing in this Agreement, whether express or implied, is intended to offer or confer any rights or remedies under or by reason of this Agreement on any persons other than the parties to it and their respective agents, officers, sureties, etc., nor is anything in this Agreement intended to relieve or discharge the obligation or liability of any third persons to any party to this Agreement, nor shall any provision give any third persons any rights of subrogation or action over against any party to this Agreement.

**5.7. Successors and Assigns.** This Agreement shall inure to the benefit of and shall be binding upon each of the parties and their successors, assigns, personal representatives, heirs, and beneficiaries, as the case may be.

**5.8. Number, Headings, and Gender.** In this Agreement, the singular shall include the plural and the plural the singular. The masculine and neuter shall include the masculine, feminine, and neuter, as the context requires. The section and paragraph headings contained in this Agreement are intended solely for convenience of reference and shall in no way limit or expand the meaning or interpretation of this Agreement. In the interest of brevity, this Agreement may omit modifying terms such as “all” and “any” and articles such as “the” and “an”, but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

**5.9. Mutual Preparation.** Each party intends that this Agreement in all respects shall be deemed and construed to have been prepared mutually by all parties and it is hereby expressly agreed that any uncertainty or ambiguity existing herein shall not be construed against any party.

**5.10. Counsel.** The parties acknowledge that they have read this Agreement, that they have discussed it with their counsel, that they had an opportunity to offer modifications to the Agreement, and that they approve of the form of the Agreement.

**5.11. Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument.

**5.12. Choice of Law.** It is the intention of the parties to this Agreement that this Agreement and the performance under this Agreement, and all suits, actions, and proceedings under this Agreement, be construed in accordance with and under and pursuant to the laws of the State of Oregon (without regard to the law of conflict of laws), and that, in any suit, action, or proceeding that may be brought arising out of, in connection with, or by reason of this Agreement, the laws of the State of Oregon shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any suit, action, or proceeding may be instituted.

**5.13. Venue.** If any suit or action is filed by any party to enforce this Agreement or otherwise with respect to the subject matter of this Agreement, venue shall be in the state courts in Washington County, Oregon, or the U.S. District Court for the District of Oregon, in Portland.

**5.14. Mediation.** The parties mutually agree that any dispute that may arise under this Agreement will be submitted to John Bakkensen (or, if Mr. Bakkensen is unable to serve, another mediator agreed to by both parties) as soon as reasonable after such dispute arises, but in any event prior to the commencement of arbitration or litigation. Such mediation shall occur in the Portland, Oregon metropolitan area and the mediation fees and mediator's expenses shall be shared equally by the parties. The parties agree to exercise their best efforts in good faith to resolve all disputes in mediation.

**5.15. Warranty of Authority.** Each signator, by affixing his or her signature hereto, personally certifies that he or she is authorized to do so by the Charter, Articles of Incorporation, Bylaws, Operating Agreement, governing body, and/or Board of Directors of the entity for which he or she is executing this Agreement, and that his or her signature shall cause this Agreement to be binding upon such entity.

**The City**

**Star**

The City of Sherwood, Oregon

Star Insurance Company

By: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

Its: \_\_\_\_\_

**DEA**

**Aurora**

David Evans & Associates, Inc.

Aurora Engineering, Inc.

By: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

Its: \_\_\_\_\_