RESOLUTION R1011-34

A RESOLUTION AUTHORIZING THE CITY ADMINISTRATOR TO EXECUTE A SETTLEMENT AGREEMENT WITH WOODBURN CONSTRUCTION

WHEREAS: In 2009, the City of Gold Beach contracted with Woodburn Construction to for the construction of a Lab Building and Public Serve Building and associated site work that is included as part of a larger waste water treatment plant improvement project; and

WHEREAS: The project was not completed on schedule; and

WHEREAS: Woodburn Construction has made claims against the City for work completed not yet incorporated into the contract;

WHEREAS: Woodburn Construction also has made claims against the City for delay damages; and

WHEREAS: The Contract between Woodburn Construction and the City provides that the City is entitled to recovery of liquidated damages in the event construction is not completed on schedule; and

WHEREAS: Both parties wish to settle all claims arising out of contract and avoid arbitration.

NOW THEREFORE, BE IT RESOLVED the City Council of the City of Gold Beach authorizes the City Administrator to execute the settlement agreement with Woodburn Construction attached as Exhibit A to this resolution.

Passed by the City Council of the City of Gold Beach, County of Curry, State of Oregon, this 9th Day of May 2011.

James H. Wernicke, Mayor

ATTEST:

Jodi Fritts, City Recorder

EXHIBIT A

SETTLEMENT AGREEMENT
AND
MUTUAL RELEASE OF CLAIMS

This SETTLEMENT AGREEMENT AND MUTUAL RELEASE OF CLAIMS (this "Agreement") is made and binding between the City of Gold Beach, an Oregon municipal corporation (City), and Woodburn Construction Co. (Woodburn), an Oregon corporation.

RECITALS

A. In 2009, the City and Woodburn entered into an agreement for the construction of certain public facilities known as the City of Gold Beach Wastewater System Improvements Phase I (Contract), consisting of construction of a Lab Building and Public Service Building as well as associated site work (Project).

B. The Project was not completed within the time frame contemplated by the Contract.

C. The Contract provides that the City is entitled to liquidated damages in the event construction is not completed in the time contemplated by the Contract. Woodburn disputes that the City is entitled to liquidated damages.

D. Woodburn has made claims for work done on the Project that both parties agree are legitimate claims for work performed but have not yet been incorporated into the Contract price.

E. Woodburn has also made claims against the City for delay damages and other increases to the Contract price. The City disputes the legitimacy of some of Woodburn's claims.

F. Except as provided in paragraph 2.1.2 of this agreement, the parties wish to settle all claims arising out of the Contract and work performed on the Project.

AGREEMENT

1. CONSIDERATION

1.1. In consideration of the releases set forth below in paragraph 2 of this Agreement and of the other terms and conditions of this Agreement, the parties agree as follows:

1.1.1. Within 30 days after The City's ratification of this Agreement, The City will make a final payment to Woodburn of One Hundred Forty Seven Thousand Four Hundred Thirty-One and 27/100 Dollars ($147,431.27). Of this amount, Fifty-Eight Thousand Eight Hundred Thirty-Six and 46/100 Dollars ($58,836.46) is retention, which has previously been billed by Woodburn to The City, and Eighty Eight Thousand Five Hundred Ninety-Four and 81/100 Dollars ($88,594.81) is reflected in a Final Change Order and will be the Final Payment. This payment includes the contract retainage amount as well as a lump sum settlement of all Woodburn's outstanding claims related to the Contract and work performed on the Project.

1.2. As further consideration, except as provided in paragraph 2.1.2 of this agreement, each party agrees to release all claims that each may have against the other arising out of the Contract as set forth in paragraph 2 of this Agreement.

2. RELEASES

2.1. City

2.1.1. Except as provided in paragraph 2.1.2, the City releases and discharges Woodburn, its officers, employees, and agents from any and all past, present, and future claims, demands, obligations, causes of action, or damages of any kind, known or unknown, arising out of the Contract or work performed on the Project. In addition the City expressly waives and assumes the risk of any and all past, present, and future claims, demands, obligations, causes of action, or damages of any kind made by or through the City, whether known or unknown, arising out of the Contract or work on the Project.

2.1.2. The City reserves all rights to the claims described in General Condition 4.3.5 of the Contract, and to all claims regarding warranties for materials used or work performed on the Project, both express and implied.

2.2. Woodburn

2.3. Woodburn releases and discharges the City, its officers, employees, and agents from any and all past, present, and future claims, demands, obligations, causes of action, or damages of any kind, known or unknown, arising out of the Contract or work performed on the Project. In addition, Woodburn expressly waives and assumes the risk of any and all past, present, and future claims, demands, obligations, causes of action, or damages of any kind made by or through Woodburn, whether known or unknown, arising out of the Contract or work performed on the Project.

3. EXPRESS ACKNOWLEDGMENTS, REPRESENTATIONS, AND WARRANTIES

3.1. Woodburn agrees to accept payment of the amount specified in Paragraph 1 of this Agreement as a complete compromise of matters involving disputed issues of law and fact. Woodburn assumes the risk that the facts or law may be other than as Woodburn believes.

3.2. Each party expressly represents and warrants that it has relied on its own knowledge of the facts and the advice of its own counsel concerning the consequences of this agreement; and that the individuals signing this Agreement are legally competent to execute this Agreement and have full authority to sign this Agreement. The parties further warrant that no promise or inducement has been offered to enter into this Agreement, except as set forth in this Agreement, and that this Agreement is executed without reliance on any statement or representation by any other party concerning the nature and extent of damages or legal liability.

3.3. The parties represent and warrant that no other person or entity has any interest in the claims, demands, obligations, or causes of action referred to in this Agreement and that each party has the sole right and exclusive authority to execute this Agreement and to receive the sums specified in it and that no party has sold, assigned, transferred, conveyed, or otherwise disposed of any of the claims, demands, obligations, or causes of action referred to in this agreement.

3.4. Except as provided in paragraph 2.1.2, the parties expressly acknowledge and agree that the purpose and effect of this Agreement is to fully and forever resolve all issues and claims related to the Contract and the Project, and that neither party will pursue the other for anything relating in any way to the claims released through this agreement.

3.5. The parties expressly acknowledge and agree that the terms of this Agreement are contractual in nature and not merely a recital.

4. NO ADMISSION OF LIABILITY

City and Woodburn agree that entering into this Agreement and performance pursuant to this Agreement do not constitute an admission of liability and that such liability is expressly denied.

5. ATTORNEY FEES

Each party to this Agreement will bear all of that party's attorney fees and costs incurred to the date of this Agreement.

6. GOVERNING LAW

This Agreement shall be construed and interpreted in accordance with the laws of the state of Oregon. Because the parties and their respective lawyers have reviewed, revised, and negotiated, or had the opportunity to review, revise, or negotiate the terms, conditions, and language of this agreement, the rule of construction that ambiguities are to be resolved against the drafting party does not apply.

7. WAIVER

The waiver by either party of a breach of any provision of this Agreement will not operate or be construed as a waiver of any other provision of this Agreement or of any subsequent breach of the same provision of this Agreement.

8. MODIFICATION

No modification of this Agreement will be valid unless it is in writing and signed by both parties.

9. NO THIRD PARTY BENEFICIARIES

This Agreement is entered into for the sole benefit of the City and Woodburn, and nothing contained herein is intended for the benefit of any other person or entity.

10. ENTIRE AGREEMENT

This Agreement embodies the entire agreement of the parties regarding the settlement and release of claims related to the Contract and work performed on the Project. There are no promises, terms, conditions or obligations other than those contained herein. This Agreement supersedes all prior communications, representations or agreements, either oral or written, between the parties on the subject of this Agreement and is conclusive and binding on and inures to the benefit of the successors and assigns of the parties.

11. PARAGRAPH HEADINGS

Paragraph headings are used solely for convenience and are not to be used in construing or interpreting this Agreement.

12. SAVING CLAUSE

If any provision of this Agreement, or the application of a provision to any person or circumstance, is held invalid, the remainder of this agreement, or the application of that provision to other persons or circumstances, will not be affected thereby.

13. FURTHER ASSURANCES

The parties agree to execute and deliver any further documents, instruments, and other agreements as are necessary or convenient to carry out the terms and purposes of this Agreement.

14. COUNTERPARTS

This Agreement may be executed in one or more counterparts, including facsimile counterparts, and all so executed shall constitute one agreement, binding on all the parties to this agreement, even though all parties are not signatories to the original or the same counterpart. Any counterpart of this agreement, which has attached to it separate signature pages, which altogether contain the signatures of all parties, is for all purposes deemed a fully executed original instrument.

15. VOLUNTARY AGREEMENT

The parties acknowledge and agree that they have carefully read and fully understand the provisions of this Agreement, and that they voluntarily enter into this Agreement by signing below. The individuals signing below are authorized to, and by signing do, bind the parties to the terms of this agreement.

CITY:	WOODBURN:
CITY OF GOLD BEACH	WOODBURN CONSTRUCTION CO.
By: _____	By: _____
Ellen Barnes, City Administrator	Terence C. Withers, President
Date: 5/17/11	Date: 5/6/11

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