

City of Piedmont
COUNCIL AGENDA REPORT

DATE: July 6, 2015

TO: Mayor and Council

FROM: Michelle Marchetta Kenyon, City Attorney

SUBJECT: Authorize the City Administrator to Enter into Settlement Agreement and Release of All Claims Between Robert Gray & Associates (“RGA”) and the City of Piedmont

RECOMMENDATION

By motion, authorize the City Administrator to execute Settlement Agreement and Release of All Claims Between Robert Gray & Associates (“RGA”) and the City of Piedmont which resolves all claims against RGA in the litigation of *City of Piedmont v. Robert Gray & Associates, et.al*

DISCUSSION

In 2011, the City filed a complaint against RGA and Harris & Associates (“Harris”) related to the creation and construction of the Piedmont Hills Underground Assessment District with the City of Piedmont (“Project”). In the complaint, City alleged causes of action for breach of contract and negligence against both defendants. Following protracted litigation and several mediation sessions, both the City and RGA have reached a full and final settlement of all claims and demands associated with the complaint and all claims asserted against RGA for actions it took pursuant to the Project. In exchange, RGA has agreed to pay the City the amount of \$500,000 for a full release of all claims.

If this Settlement Agreement is approved by the Council, this settlement will be subject to the approval of the Superior Court of Contra Costa County as a good faith settlement. Payment of the \$500,000 will be submitted by RGA to the City within 15 days of the final approval by the Court. Although this settlement will resolve all claims against RGA, litigation against Harris will proceed as no settlement has been reached with Harris.

ATTACHMENTS:

- A. Settlement Agreement and Release of All Claims Between Robert Gray & Associates (“RGA”) and the City of Piedmont

SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS

1.0 PARTIES

THIS SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS (“Agreement”) is made by and entered between the following parties (“Parties”): The CITY OF PIEDMONT (“Plaintiff/Claimant”) and ROBERT GRAY & ASSOCIATES (“Defendant”) hereafter RGA.

2.0 RECITALS

2.1 The Parties named in Section 1.0 have been involved in civil litigation entitled *CITY OF PIEDMONT v. ROBERT GRAY & ASSOCIATES; HARRIS & ASSOCIATES, INC.*, in the Superior Court of California, County of Contra Costa, action number MSC11-00762 (hereinafter “the Litigation” or “the Dispute”). Plaintiff filed its complaint arising out of certain alleged acts or omissions by defendants relating to the creation and construction of the Piedmont Hills Underground Assessment District within the City of Piedmont (the “Project”). In the Complaint, Plaintiff sets forth causes of action for breach of contract and negligence against the professional consulting firms it retained on the Project: RGA and Harris & Associates, Inc. (“Harris”) - - alleging, among other claims, that RGA and Harris negligently created plans, specifications and bid documents for the Project, causing the Plaintiff to experience and incur unanticipated cost overruns.

2.2 The Parties each recognize that further continuation, prosecution and defense of the litigation among themselves will require substantial time, effort, and expense unless such Dispute is settled and terminated among them at this time.

2.3 To avoid the uncertainties and expense of further prosecution and defense of the Dispute, the Parties have reached a full and final settlement of all claims, demands, and/or causes of action which the Parties have had, have or may have, relating to or arising out of the Dispute. The Parties have memorialized that settlement in writing in this Agreement.

2.4 All parties to this agreement have been fully advised of their rights under applicable law and of the facts regarding pre-trial preparation and probable outcome at trial.

2.5 Plaintiff agrees this Settlement Agreement shall serve as a waiver of all claims against Defendant RGA, including, but not limited to, any cause of action against RGA included in the Complaint accruing before the date of this agreement as a result of the events described in or related to those set forth in the Complaint.

AGREEMENT

NOW THEREFORE, in consideration of the facts recited above and the covenants and conditions hereinafter set forth, the Parties hereby agree as follows:

3.0 AMOUNT OF SETTLEMENT AND NEED FOR COURT APPROVAL

This Agreement is subject to approval by the Court as a good faith settlement via motion to be filed by defendant. Within fifteen (15) days following such approval by the Court, defendant RGA, through its insurer HCC, shall tender to counsel for Plaintiff the agreed settlement contribution totaling the sum of \$500,000.00 (Five Hundred Thousand Dollars), payable as instructed to the CITY OF PIEDMONT.

4.0 RELEASE AND DISCHARGE

4.1 For the consideration set forth in Section 3.0, Plaintiff hereby releases and forever discharges Defendant RGA as well as RGA's principals, owners, administrators, heirs, employees, agents, assigns, insurance carriers and attorneys, and all persons acting by and through, under or in concert with them, or any of them, from any and all past, present or future claims, demands, obligations, actions, causes of action, rights, damages, costs, losses of services, expenses and compensation of any nature whatsoever, whether based on a contract, tort, or other theory of recovery, and/or liabilities of any nature, whether anticipated or unanticipated, known or unknown, fixed or contingent, past or present, which Plaintiff now has, or which may hereafter accrue or otherwise be acquired, on account of, or may in any way grow out of the events described in the Complaint, from the beginning of time to and through the date of this Agreement, including but not limited to all claims asserted in the Lawsuit.

4.1 This Release shall apply to Defendant's present and future officers, directors, stockholders, employees, board members, independent contractors, attorneys, owners, agents, servants, representatives, employers, subsidiaries, affiliates, partners, agents, representatives, successors in interest, assigns and all other persons, firms, corporations or entities with whom any of the former have been, are now, or may hereafter be affiliated.

4.2 This Release on the part of the Plaintiff shall be a fully binding and complete settlement by the Plaintiff, its assigns and successors as to defendant RGA.

4.3 Plaintiff acknowledges and agrees that the Release and discharge set forth above is a general release. Plaintiff expressly waives and assumes the risk of any and all claims for damages which exist as of this date, but of which the Plaintiff does not know or suspect to exist, whether through ignorance, oversight, error, negligence or otherwise, and which, if known, would materially affect the Plaintiff's decision to enter into this Settlement Agreement. Plaintiff further agrees that Plaintiff has accepted the waiver specified herein as a complete compromise of matters involving disputed issues of law

and fact. Plaintiff assumes the risk that the facts or law may be other than Plaintiff believes.

4.4 Plaintiff expressly waives all rights it has, or may have, under Section 1542 of the Civil Code of California and similar laws of any state or territory of the United States or other jurisdictions. Section 1542 of the Civil Code of California provides as follows:

Section 1542. General Release - Claims Extinguished. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

5.0 CONSIDERATION FOR SETTLEMENT

5.1 In consideration for this Release and dismissal with prejudice of Contra Costa County Superior Court Case No. MSC11-00762 - - the parties agree and recognize that Defendant RGA will remit the total sum of \$500,00.00 (Five Hundred Thousand dollars) payable to "Plaintiff CITY OF PIEDMONT and its attorneys of record."

5.2 Plaintiff will dismiss RGA from the Complaint, with prejudice, in the civil court with each side to bear their own attorney's fees and costs. Said dismissal to be filed within one week of receiving the payment set forth in Section 5.1.

6.0 REPRESENTATION OF COMPREHENSION OF DOCUMENT

6.1 In entering into this Settlement Agreement, Plaintiff represents that it has either relied upon the advice of his attorney, who is an attorney of its own choosing, or waived its right to so seek such advice, concerning the legal and income tax consequences of the Settlement Agreement and that the terms of this Settlement Agreement are fully understood and voluntarily accepted by Plaintiff.

7.0 WARRANTY OF CAPACITY TO EXECUTE AGREEMENT

7.1 Plaintiff represents and warrants that no person or entity has, or has had, any interest in the claims, demands, obligations, or causes of action referred to in this Settlement Agreement, except as otherwise set forth herein; Plaintiff has the sole right and exclusive authority to execute the Settlement Agreement on behalf of all plaintiff-related parties and that the Plaintiff has not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action referred to in this Settlement Agreement.

7.2 Plaintiff is unaware of any liens upon the claims in this action or the proceeds of this settlement. However, Plaintiff acknowledges that it is solely responsible to pay any liens, if legally enforceable.

8.0 GOVERNING LAW

8.1 This Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of California. For Plaintiff's protection, California law requires the following to appear on this form:

ANY PERSON WHO KNOWINGLY PRESENTS A FALSE OR FRAUDULENT CLAIM FOR THE PAYMENT OF A LOSS IS GUILTY OF A CRIME AND MAY BE SUBJECT TO FINES AND CONFINEMENT IN STATE PRISON. INSURANCE CODE §1871.2.

9.0 NO ADMISSIONS

9.1 The execution of this Agreement shall not constitute or be construed as an admission of liability by Defendant RGA or by Plaintiff, or the admission of the validity of any claim made by Plaintiff against Defendant RGA . The purpose of this Agreement is to settle disputed claims and not to admit liability. Each party expressly denies any liability to the other.

10.0 ADDITIONAL DOCUMENTS

10.1 The parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to give full force and effect to the basic terms and intent of this Settlement Agreement.

10.2 This Agreement may be executed simultaneously in one or more counterparts, which counterparts may be on facsimile paper, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

11.0 SUCCESSORS IN INTEREST

11.1 This Settlement Agreement shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns of each party hereto.

12.0 ATTORNEYS' FEES

12.1 The Parties hereto acknowledge and agree that they each are to bear their own costs, expenses and attorneys' fees arising out of or connected with the Litigation and with drafting and execution of this Agreement. The Parties agree that in the event that there is any litigation in which a claim is made of a breach of this Agreement or a

defense is asserted based on this Agreement, the prevailing parties in that litigation shall recover their reasonable attorneys' fees and costs.

13.0 ENFORCEMENT

13.1 This Agreement may be enforced by the Parties hereto by a motion under Code of Civil Procedure § 664.6, or by any other procedure permitted by law in the State of California. This Agreement shall be admissible for purposes of enforcing it. If any action, whether by arbitration, at law or in equity, is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and expenses, costs, collection costs and fees in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire Agreement. The provisions of the confidentiality agreement relating to mediation are waived with respect to enforcement thereof. This Agreement is entered into in Contra Costa County, California. Any action to enforce this Agreement is properly venued within Contra Costa County.

14.0 OTHER PROVISIONS

14.1 The Parties expressly recognize that this is a compromise settlement of a disputed claim and that payment in consideration of this Release shall not be construed to be an admission of liability by any other party, or any other person, entity, association, or corporation.

14.2 The Parties acknowledge that this Release is executed without reliance on any representation made by any other party, or anyone acting on their behalf.

14.3 This Agreement contains the entire agreement between the Parties and shall be construed and enforced in accordance with the laws of the State of California.

14.4 The undersigned acknowledge that, in entering into this Agreement, they have sought or obtained, or otherwise waived, the advice of legal counsel and, in executing this Agreement, do so with full knowledge of its significance and with the express intention of effecting its legal consequences.

14.5 The text of the Agreement is the product of negotiation by the Parties and their counsel and is not to be construed as being prepared by one party or the other.

14.6 The Parties agree that this Agreement shall be governed by the laws of the State of California.

14.7 This Settlement Agreement may be executed in counterparts, each of which shall be an original, but all of which shall constitute one and the same instrument.

14.8 The Parties agree that this Agreement may be deemed executed by the delivery of signatures of the Parties by facsimile or electronic transmission.

14.9 This Agreement shall be effective on the date that the Court approves this settlement agreement as a good faith settlement within the meaning of Code of Civil Procedure § 877.6.

14.10 In the event any portion of this Agreement is found void or voidable by a court of competent jurisdiction, or arbitrator(s), such portion shall be stricken, and the Agreement reformed to as closely approximate, as the law permits, the intent of the stricken portion or portions. The remainder of said stricken provision and of the entire Agreement will remain in effect.

14.11 The Agreement is binding upon and shall inure to the benefit of each of the parties hereto and their respective parents, subsidiaries, affiliates, predecessors, successors, divisions, shareholders, directors, officers, employees, attorneys, agents, representatives, heirs and assigns.

14.12 The Parties have made such investigation of the facts pertaining to this settlement and the Agreement and of all of the matters pertaining thereto as they deem necessary.

14.13 If one or more of the provisions contained in this Agreement shall for any reason be held invalid, illegal or unenforceable in any respect, the invalidity, illegality or unenforceability of that provision shall not affect any other provision of the Agreement and this Agreement shall be construed as if the invalid, illegal or unenforceable provision were never contained in it.

DATED: _____

CITY OF PIEDMONT, Plaintiff

BY: _____
Title

APPROVED AS TO FORM:

LOMBARDI, LOPER & CONANT, LLP

DATED: _____

Matthew S. Conant, Esq./Attorney for
Plaintiff CITY OF PIEDMONT

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DATED: _____

ROBERT GRAY & ASSOCIATES,
Defendant

BY: _____
Title

APPROVED AS TO FORM:

TYSON & MENDES

DATED: _____

Patrick J. Mendes, Esq./Attorney for
Defendant ROBERT GRAY &
ASSOCIATES