

SETTLEMENT AGREEMENT AND MUTUAL RELEASE OF CLAIMS
(D.A. McCosker Construction Co., dba Independent Construction Company, and Fidelity & Deposit Co. of Maryland v. State of California Department of Water Resources, Office of Administrative Hearings Case No. A-0021-2013; D.A. McCosker Construction Co., dba Independent Construction Company, and Fidelity & Deposit Co. of Maryland v. State of California Department of Water Resources, Sacramento County Superior Court Case No. 34-2017-00209945-CU-PT-GDS; State of California Department of Water Resources v. D.A. McCosker Construction Co., dba Independent Construction Company, and Fidelity & Deposit Co. of Maryland, Alameda County Superior Court Case No. RG19040731)

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE OF CLAIMS (“**Agreement**”) is entered into by and between the State of California Department of Water Resources (“**DWR**”), on the one hand, and D.A. McCosker Construction Co., dba Independent Construction Company (“**ICC**”), and Fidelity & Deposit Co. of Maryland (“**Fidelity**”), on the other hand. The Agreement refers to ICC and Fidelity collectively as the “**ICC Parties**.” The Agreement refers to DWR, ICC and Fidelity collectively as the “**Parties**, and to each individually as a “**Party**.” The Agreement shall be effective as of the Effective Date specified in Section 1.1, below.

RECITALS

A. ICC was the prime contractor for DWR on a construction project for the construction of the Dyer Reservoir, DWR Spec. No. 09-01 (“**Project**”), which completed construction in 2012. Fidelity issued payment and performance bonds on behalf of ICC for that Project. DWR was the public agency with authority over and for the Project.

B. On September 9, 2013, the ICC Parties filed a Complaint in Arbitration against DWR in the Office of Administrative Hearings, Case No. A-0021-2013, JAMS Reference No. 1110016426 (“**Arbitration**”). On July 15, 2015, DWR filed a Cross-Complaint in the Arbitration against the ICC Parties.

C. On March 15, 2017, the arbitrator in the Arbitration issued a Ruling on Interest, Costs and Final Award, awarding \$5,147,147.74 to the ICC Parties. After cross-petitions filed by the Parties in the Sacramento Superior Court resulted in a remand of the action back to the arbitrator, the arbitrator issued an Amended Decision on Remand on January 4, 2018, awarding \$5,271,683.97 to the ICC Parties. For the avoidance of doubt, the term “**Arbitration**” defined above encompasses the arbitration proceedings on remand and the January 4, 2018, Amended Decision on Remand.

D. On January 17, 2018, the ICC Parties filed a Petition to Confirm the Amended Arbitration Award Following Remand in Sacramento County Superior Court, Case No. 34-2017-00209945-CU-PT-GDS (“**Petition Proceedings**”). On February 9, 2018, DWR filed in the Petition Proceedings a Petition to Vacate Arbitration Award Following Remand.

E. Following an order of the Sacramento Superior Court Vacating the Award, the parties filed cross-appeals before the California Court of Appeals, Third Appellate District, Case No. C089969 (“**Appellate Proceedings**”). On March 6, 2023, the Third District Court issued a Decision reversing the Sacramento Superior Court’s order of vacatur and remanding the action to

the Sacramento Superior Court, which thereafter remanded the matter back to the Arbitrator. The Remanded issues are currently pending before the arbitrator.

F. On October 25, 2019, DWR filed a Complaint for Breach of Contract and Disgorgement against the ICC Parties in Alameda County Superior Court, Case No. RG19040731 (“**Alameda Action**”). The Alameda Action is currently pending.

G. The Parties desire by this Agreement to settle and resolve all pending claims and disputes between them arising out of or related to the Arbitration, the Petition Proceedings, the Appellate Proceedings, the Alameda Action, and the Project (collectively, the “**Actions**”), as further described and defined in Article II, below.

NOW THEREFORE, in consideration of the mutual covenants and promises contained herein and other good and valuable consideration described herein, the Parties agree as follows:

ARTICLE I

EFFECTIVE DATE

1.1 Effective Date. The effective date of the Agreement (“**Effective Date**”) shall be the latest date on which all Parties receive fully executed signature pages from the other Parties. An executed signature page transmitted by email to counsel approving this agreement as to form shall be deemed received on the date of the email transmission.

ARTICLE II

TERMS OF SETTLEMENT

2.1 Settlement Payment. DWR shall make one single and collective payment in the amount of \$7,750,000.00 (seven million seven hundred and fifty thousand dollars) to the ICC Parties (“**Settlement Payment**”). DWR will make its best effort to make the Settlement Payment within 60 (sixty) days of the Effective Date, but will in any event make the Settlement Payment no later than 75 (seventy-five) days after the Effective Date. DWR shall have no role or responsibility regarding the allocation of the single and collective Settlement Payment as between the ICC Parties. DWR shall remit, or cause to be remitted, the Settlement Payment by check made out solely to “Independent Construction Company” and sent to 3911 Laura Alice Way, Concord, CA 94520. The Settlement Payment is in full satisfaction of any and all claims and demands by any Party arising out of or related to the Actions, and is inclusive of all costs and attorney’s fees that any Party has been or could be awarded in relation to the Actions.

2.2 Dismissals of the Actions. The ICC Parties and DWR shall dismiss the Arbitration with prejudice within five (5) days of the receipt of the Settlement Payment enumerated in Section 2.1, above. The ICC Parties and DWR shall dismiss the Petition Proceedings with prejudice within five (5) days of the receipt of the Settlement Payment enumerated in Section 2.1, above. DWR shall dismiss the Alameda Action with prejudice withing 5 days of the Effective Date.

2.3 No Further Actions. The Parties agree that none of them will commence, continue, or otherwise pursue any further claims, demands, suits, litigation, petitions or

arbitration arising out of or related to the Actions or the Project.

MUTUAL RELEASE OF CLAIMS

2.4 DWR Release of Claims. Notwithstanding the provisions of Section 1542 of the California Civil Code, DWR hereby releases and forever discharges the ICC Parties and their principals, members, partners, shareholders, officers, directors, affiliates, employees, agents, successors, assigns, attorneys and insurers from and against any and all claims, demands, actions, avoidance actions, causes of action, rights, obligations, debts, liens, costs, liabilities, accounts, damages, attorneys' fees, losses and expenses of every kind and nature whatsoever, whether known or unknown, foreseen or unforeseen, patent or latent, suspected or unsuspected, which DWR had, currently has or may have related to the Actions ("**DWR Released Claims**"); provided, however, that nothing in this Section shall waive or release any rights DWR might have to seek enforcement of, or make a claim for breach of, the covenants, representations, warranties, promises and provisions of this Agreement.

2.5 ICC Parties Release of Claims. Notwithstanding the provisions of Section 1542 of the California Civil Code, the ICC Parties hereby release and forever discharge DWR and the State of California, and their principals, members, partners, officers, directors, affiliates employees, agents, successors, assigns, attorneys, consultants, and insurers from and against any and all claims, demands, actions, avoidance actions, causes of action, rights, obligations, debts, liens, costs, liabilities, accounts, damages, attorneys' fees, losses and expenses of every kind and nature whatsoever, whether known or unknown, foreseen or unforeseen, patent or latent, suspected or unsuspected, which the ICC Parties had, currently have or may have related to the Actions ("**ICC Parties Released Claims**"); provided, however, that nothing in this Section shall waive or release any rights the ICC Parties might have to seek enforcement of, or make a claim for breach of, the covenants, representations, warranties, promises and provisions of this Agreement.

2.6 Notwithstanding any provision to the contrary in this Settlement Agreement, all Parties agree and understand that: Fidelity enters into this Settlement Agreement solely in its capacity as Surety on the bonds issued on behalf of ICC ("Surety and Bonds") (ii) this Settlement Agreement does not apply to any other claims unrelated to the claims asserted in the Subject Actions and/or that Surety may possess or defend on any other bonds or policies of insurance; (iii) this Settlement Agreement does not modify or expand Surety's obligations under the Bonds; (iv) as between the bond principal and Surety, various other written agreements exist, including but not limited to general agreements of indemnity, which govern and control their relationships, and this Settlement Agreement does not abridge, modify or otherwise amend the obligations and responsibilities set out in these other written agreements, and (v) any confidentiality provision that may be contained in this Settlement Agreement shall not apply to Surety with regard to inter/intra-company communications or reporting requirements between Surety and its parent companies, affiliates, subsidiaries, reinsurers, accountants, auditors, or any other business or organization under Surety, including but not limited to its normal business practices or functions and/or the requirements of any state or federal regulatory entity with control or regulatory authority over Surety.

2.7 Waiver of Section 1542. Each of the Parties acknowledges that it has been informed of the provisions of Section 1542 of the California Civil Code and does hereby expressly waive and relinquish all rights and benefits it has or may have had under that statute, which reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Each of the Parties understands and acknowledges the significance and the consequence of such specific waiver of Section 1542, and hereby assumes full responsibility for any injuries, damages or losses that it may incur as a result of the execution of this Agreement.

2.8 Subsequent Discovery of Different or Additional Facts. Each of the Parties acknowledges that it may hereafter discover facts different from or in addition to those it now knows or believes to be true with respect to the claims herein released, and agrees that this Agreement shall be and remain in effect in all respects as a complete and general release as to all such released matters and that such matters are expressly released notwithstanding discovery of any such different or additional facts.

2.9 No Assignment of Released Claims. Each of the Parties represents to the other Parties that neither it nor any other person or entity has encumbered, assigned, or transferred or purported to assign or transfer to any person or entity any claims released by this Agreement (“**Released Claims**”), nor have any such Released Claims been subrogated. In the event any Party breaches the representations and warranties described above, such Party agrees to indemnify and hold the other Parties harmless against and from any such transfer or assignment of Released Claims, and against and from any Released Claim, including attorneys’ fees actually paid or incurred, arising out of any such transfer or assignment of Released Claims.

2.10 Enforcement of Agreement Pursuant to CCP Section 664.6. The Parties agree that the Sacramento Superior Court, in the Petition Proceedings, shall retain jurisdiction pursuant to Code of Civil Procedure section 664.6 to enforce the terms of this Agreement even after the dismissal of the Petition Proceedings pursuant to Section 2.2, above. This Agreement shall be admissible and enforceable pursuant to California Evidence Code section 1123.

ARTICLE III

REPRESENTATIONS AND WARRANTIES OF THE PARTIES

3.1 Representations and Warranties of the Defendants. Each Party represents and warrants that it has the full capacity, right, power and authority to enter into, deliver and perform this Agreement.

3.2 Survival of Representations and Warranties. The representations and warranties set forth in this Agreement shall survive the execution and delivery of this Agreement indefinitely.in

ARTICLE IV

MISCELLANEOUS

4.1 Binding Effect. This Agreement, and all covenants and releases set forth herein, shall be binding upon and shall inure to the benefit of the respective Parties hereto, their respective past or present representatives, legal successors, assigns, partners, members, owners, managers, agents, attorneys, officers, directors, employees and shareholders and any trustee in bankruptcy.

4.2 Governing Law. This Agreement shall be construed in accordance with, and be deemed governed by, the laws of the State of California, without regard to conflict-of-law provisions that would require application of other law or laws.

4.3 Attorneys' Fees. In the event of any litigation arising from or in any way relating to this Agreement, or any breach thereof, the prevailing party will not be entitled to recover from the losing party its reasonable costs, including attorneys' fees.

4.4 No Admission of Liability. Liability for the matters included in this Agreement is disputed, and nothing in this Agreement shall be construed as an admission thereof.

4.5 Responsibility for Payments to the ICC Parties' Employees, Subcontractors, and Suppliers. Notwithstanding the mutual releases set forth above, the ICC Parties shall remain responsible to pay for any and all labor, materials, equipment, and services provided by its employees and/or from all subcontractors and suppliers, of every tier, relating to the Dyer Reservoir Project (DWR Spec. No. 09-01) that is the subject of the Actions. The indemnification obligations expressed in the prime contract for the Dyer Reservoir Project shall remain unaffected by this Agreement. The Parties represent and warrant that they are not aware of any known or threatened claim triggering this clause as of the Effective Date.

4.6 Counterparts. This Agreement may be executed in any number of counterparts, each of which so executed shall be deemed to be an original, and such counterparts shall together constitute one and the same Agreement. The Parties agree to accept electronic signatures.

4.7 Headings. Headings contained in this Agreement are for convenience only and shall not be considered for any purpose in construing this Agreement.

4.8 Right to Consult With Attorneys; Terms Understood. The Parties to this Agreement acknowledge that each has read this Agreement; that each fully understands its or his rights, privileges, and duties under this Agreement; and that each enters into this Agreement freely and voluntarily. Each Party further acknowledges that it has had the opportunity to consult with an attorney of its choice who has explained the terms of this Agreement and the consequences of signing it.

4.9 Entire Agreement. This Agreement states the entire agreement between the Parties and supersedes all proposals, oral or written, and all other communications between or among the Parties respecting the subject matter hereof, and supersedes any and all prior understandings, representations, warranties, or agreements (whether oral or written) between or among the Parties respecting the subject matter hereof.

4.10 No Presumption against Drafting Party. This Agreement and its provisions contained therein shall not be construed or interpreted for or against any party to this Agreement because said Party drafted or caused the Party’s legal representative to draft any of its provisions.


4.11 Modification of Agreement. This Agreement cannot be modified or amended in any way, except in writing, signed by all of the Parties hereto.

4.12 Cooperation. Each Party hereto agrees that such Party will not take any action that would interfere with the performance of this Agreement by any of the Parties or which would adversely affect any of the rights provided for herein. The Parties shall cooperate with one another and shall promptly execute any and all documents and perform any and all actions necessary to effectuate this Agreement.

4.13 Choice of Forum. Any dispute arising under this Agreement shall be venued in Sacramento County, California.


IN WITNESS WHEREOF, the persons named below have signed this Agreement on the dates shown below, and by signing below, the undersigned acknowledges that this Agreement is executed voluntarily and without duress or undue influence on the part of, or on behalf of, the Parties or any other person, firm or entity.

**STATE OF CALIFORNIA
DEPARTMENT OF WATER
RESOURCES,**

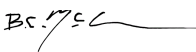
By: 
Dale Brown, Manager
Division of Engineering

Date: 2/9/2024

Approval as to form by counsel for State of California Department of Water Resources

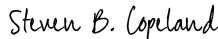
MEYERS NAVE
By: 
Eric Firstman

**D.A. MCCOSKER CONSTRUCTION
CO., DBA INDEPENDENT
CONSTRUCTION COMPANY**

By: 
Brian McCosker, President

Date: 2/9/2024

Approval as to form by counsel for D.A. McCosker Construction Co., dba Independent Construction Company

COPELAND LAW FIRM APC
By: 
Steven B. Copeland

**FIDELITY & DEPOSIT CO. OF
MARYLAND**

By: Steven A. Hauck
Steven A. Hauck
Sr. Claims Professional

Date: 2/9/2024

Approval as to form by counsel for
Fidelity & Deposit Co. of Maryland

MCGILL LAW FIRM APC

By: John P. McGill
John P. McGill