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August 13, 2026

Board of City Commissioners  
City Hall  
225 4<sup>th</sup> Street N.  
Fargo, ND 58102

**RE: Settlement Agreement between City of Fargo and Phoenix Fabricators and Erectors, LLC  
Fargo Project No. WA1910**

Dear Commissioners:

In accordance with the executive session of August 3, 2026, enclosed for your consideration and approval is the Settlement Agreement and Release, which has been executed by Phoenix Fabricators and Erectors, LLC. This Settlement Agreement and Release resolves the dispute and will allow Fargo Project No. WA1910, involving construction of the Downtown Water Tower, to be closed out.

Recommended Motion: Move to accept and approve the Settlement Agreement and Release with Phoenix Fabricators and Erectors, LLC.

Sincerely,

SERKLAND LAW FIRM

A handwritten signature in blue ink, appearing to read 'K. McNary', is written over the printed name of Kasey D. McNary.

Kasey D. McNary  
[kmcnary@serklandlaw.com](mailto:kmcnary@serklandlaw.com)

Enclosure

## SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter "Agreement") is made and entered into by and between the City of Fargo, a North Dakota municipality ("City"), and Phoenix Fabricators and Erectors, LLC, an Indiana limited liability company ("Phoenix"). The above-named parties shall be collectively referred to herein as "the Parties."

### RECITALS

- A. The City and Phoenix entered into a contract for Fargo Project No. WA1910, which consisted of construction of a new 2.5 million gallon composite elevated water storage tank, site building demolition, site utilities, mechanical, electrical, demolition of an existing 0.5 million gallon multi-leg elevated water storage tank and associated appurtenances (the "Project"). The constructed water storage tank is known as the "Downtown Water Tower".
- B. The effective date of the contract between the City and Phoenix was March 9, 2021, and was approved by the Fargo City Commission on April 19, 2021 (the "Contract"). The Contract provided a substantial completion date of October 15, 2023, with a final completion date of June 14, 2024. The Contract included a provision for the City to recover \$2,500 for each day that expired beyond the substantial and final completion dates stated in the Contract. The Contract also provided for progress payments to be made to Phoenix with a retainage amount of ten percent (10%).
- C. Phoenix did not complete the Project by the substantial completion date or final completion date provided in the Contract. A dispute arose between the City and Phoenix regarding the amount of final payment, liquidated damages, cause of delays, and other related matters.
- D. Phoenix contends it is owed the total amount of \$845,226.30 as final payment to close out the Project under the Contract. The City contends it is owed liquidated damages in an amount exceeding the final payment. The City is currently holding the amount of \$791,678.25 as retainage.
- E. The Parties disagree as to the validity, extent, and amount of the claims and wish to avoid the uncertainty, expense, and delay of litigation or other dispute resolution proceedings.
- E. The Parties mediated the dispute by private mediation held on May 12, 2026, in Fargo. The Parties were initially unable to reach a settlement during the mediation. Phoenix presented a post-mediation offer of settlement by letter dated July 10, 2026.
- F. The Parties now desire to enter into this Agreement to provide for a comprehensive and complete settlement and discharge of all claims and defenses which any party made or could have made by reason of the events described above and upon the terms and conditions set forth below.

## AGREEMENT

The Parties agree as follows:

### **1.0 Release and Discharge**

**1.1** In consideration of the financial terms set forth below, Phoenix hereby releases and forever discharges, the City, its insurers, agents, representatives and employees, from any and all past, present, and future claims, demands, obligations, actions, causes of action, rights, damages, costs, interest, attorney's fees, expenses and compensation of any nature whatsoever related to the Project and the Contract, which Phoenix might have brought against the City and which could, in any way, arise out of the events described in the Recitals above.

**1.2** In consideration of the financial terms set forth below, the City hereby releases and forever discharges Phoenix, its shareholders, directors, officers, members, governors, agents, representatives, and employees, from any and all past, present, and future claims, demands, obligations action, causes of action, rights, damages, costs, interest, attorney's fees, expenses and compensation of any nature whatsoever related to the Project and the Contract, which the City might have brought against Phoenix and which could, in any way, arise out of the events described in the Recitals above.

Provided, however, that the Parties hereby mutually agree that this release shall not extend to the warranty work Phoenix is obligated to complete under the terms of the Project and/or Contract, and Phoenix hereby agrees that it will complete the warranty work in a timely and satisfactory manner.

**1.3** The Parties acknowledge and agree that the release and discharge set forth above is a waiver of all claims and defenses the Parties might have asserted, and a general release regarding causes of action they might have brought regarding the events described in the above Recitals, including any obligation to pay damages, attorney's fees, and costs. It is understood and agreed by the Parties that this settlement is a compromise reached in order to resolve the disputes described in the Recitals above.

**1.4** The Parties waive the provisions of N.D.C.C. § 9-13-02, or any similar or other applicable state or federal statute or regulation, which provides that a general release does not extend to claims a creditor does not know or suspect to exist in its favor at the time of executing the release, which if known by it, would have materially affected the settlement with the debtor.

**1.5** This Agreement is entered solely for the purpose of compromising disputed claims and avoiding the expense and uncertainty of litigation. Nothing contained in this Agreement shall be construed as an admission by either of the Parties of any liability, fault, wrongdoing, breach of contract, or violation of law. Each party expressly denies any such liability, fault, wrongdoing, breach, or violation.

## **2.0 Financial Terms**

- 2.1 The City will release to Phoenix a total amount of Four Hundred Thousand Dollars and No/Cents (\$400,000.00) from the funds currently being held by the City as retainage on the Project (the "Close Out Payment"). The Close Out Payment will be issued to Phoenix within ten (10) business days following final approval of this Agreement by the Fargo City Commission. A final change order showing the adjusted final payment to close out the Project shall be included with the Close Out Payment. No other payments shall be made by the City to Phoenix.
- 2.2 The City will retain the remaining amount of the retainage in the amount of Three Hundred Ninety-One Thousand Six Hundred Seventy-Eight Dollars and 25/Cents (\$391,678.25).
- 2.3 Any statutory liens or encumbrances, including but not limited to mechanic's liens, materialman's liens, and construction liens, which Phoenix may have been permitted to file or record against the Project are hereby released and forever discharged.
- 2.4 To the extent Karen Klein Mediation, LLC has not yet been paid for providing mediation services to the Parties in regard to this matter, Phoenix shall pay for the mediation services within ten (10) business days after final execution of this Agreement.

## **3.0 Completion of Warranty Work**

Phoenix hereby acknowledges and agrees that it will complete the warranty work on the Project as required by the terms and conditions of the Contract. Phoenix hereby acknowledges that it is in receipt of the warranty inspection report from the City and agrees to complete the warranty work before October 31, 2026.

## **4.0 Representation of Comprehension of Document**

In entering into this Settlement Agreement and Release, the Parties represent that they have relied upon the advice of their attorneys, who are attorneys of their own choice, concerning the legal consequences of this Agreement; that the terms of this Agreement have been completely read and explained by their attorneys; and that the terms of this Agreement are fully understood and voluntarily accepted.

## **5.0 Warranty of Capacity to Execute Agreement**

Phoenix represents and warrants that no other person or entity has any interest in the Contract, rights to payment, claims, or defenses referred to in this Agreement, and that Phoenix has the sole right and exclusive authority to execute this Agreement and receive the sum specified herein.

## 6.0 Governing Law

This Agreement shall be construed and interpreted in accordance with the laws of the State of North Dakota.

## 7.0 Additional Documents

The Parties agree to cooperate fully and approve 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 Agreement.

## 8.0 Entire Agreement and Successors in Interest

This Settlement Agreement and Release contains the entire agreement between the Phoenix, its directors, officers, shareholders, members, governors, agents, representatives, and employees, and the City of Fargo, its insurers, employees, agents and representatives with regard to the matters set forth in it and shall be binding upon and inure to the benefit of the beneficiaries, executors, administrators, personal representatives, heirs, successors and assigns of each. This Agreement may not be amended, modified, or supplemented except by a written instrument signed by both Parties.

## 9.0 Effectiveness

- I. This Settlement Agreement and Release shall become effective immediately following execution by each of the Parties. Notwithstanding the foregoing releases, nothing in this Agreement shall release or discharge the Parties from their respective obligations hereunder or preclude either party from bringing an action to enforce the terms of this Agreement.

**THIS IS A RELEASE. READ BEFORE SIGNING.**

Dated: 08/13/2026

  
Phoenix Fabricators and Erectors, LLC

By: Dallas Green

Its: CEO

Dated: \_\_\_\_\_

\_\_\_\_\_  
**City of Fargo**

By: Joshua Boschee

Its: Mayor

ATTEST:

\_\_\_\_\_  
Angie Bear

Deputy Auditor on behalf of City Auditor