

CONFIDENTIAL SETTLEMENT AGREEMENT AND MUTUAL RELEASE

In consideration of the commitments set forth below, the City of Broken Arrow (“City”) Contech, Inc. (“Contech”) and Employers Mutual Casualty Company (“EMCC”), enter into this Confidential Settlement Agreement and Mutual Release (“Agreement”). The foregoing entities are sometimes referred to herein individually as a “Party” or collectively as the “Parties.”

RECITALS

WHEREAS, on or about January 9, 2012, the City entered into a Professional Consultant Services Agreement with OJC Co. (“Design Contract”) pursuant to which OJC was to design a retaining wall (and related parts) to be constructed on property owned by the City and located generally at the southwest corner of Kenosha Street and Lynn Lane in Broken Arrow, Oklahoma (the “Property”); and

WHEREAS, on or about April 13, 2012, the City (as owner) entered into written Contract No. 101708 with Contech (as contractor) (“Prime Contract”) pursuant to which Contech was to build the retaining wall designed by OJC and perform such other related work as was stipulated in the Prime Contract and modified from time to time by change order so as to complete the Hillside Park Grading & Retaining Wall project (“Tiger Hill Wall”) (“Project”); and

WHEREAS, on or about April 13, 2012, in connection with the Prime Contract, Contech, as principal, and EMCC, as surety, executed a written performance bond in favor of the City as obligee relative to the Project (“Bond”); and

WHEREAS, in furtherance of its obligations under the Prime Contract, Contech entered into a written subcontract with Heartstone of Oklahoma, LLC (“Heartstone”) dated May 11, 2012 (Subcontract No. 201204012C.001) (“Subcontract”), pursuant to which Heartstone was to perform the scope of work stipulated in the Subcontract; and

WHEREAS, a dispute arose between the City and Contech regarding the quality of the work performed by Contech on the Project, the City and the Surety regarding the Surety’s obligations, if any, to the City under the Bond due to Contech’s work on the Project, the City and Heartstone regarding the quality of the work performed by Heartstone on the Project, and the City and OJC regarding the quality of the design work performed by OJC relative to the Project; and

WHEREAS, on or about January 13, 2016, the City made demand on EMCC and against the Bond relative to the quality of Contech’s work on the Project and the obligations of EMCC and Contech under the Bond; and

WHEREAS, on January 25, 2017, the City initiated Case No. CJ-2017-00295 in the Tulsa County District Court, separately asserting claims against Contech, EMCC, OJC and Heartstone (collectively the “Defendants”), relative to the roles of the respective Defendants in the design and construction of the Project (“Lawsuit”); and

WHEREAS, it is now the desire of the City, Contech and EMCC to fully and completely resolve and settle the disputes between them (*i.e.* between the City and Contech and the City and EMCC and not between the City and OJC or the City and Heartstone), as asserted in the Lawsuit or which the Parties could have asserted against one another in the Lawsuit and to avoid the continued expense and risk associated therewith.

NOW, THEREFORE, for and in consideration of the promises and mutual covenants and agreements contained herein, without admitting any liability or wrongdoing, and for good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

TERMS

1. AGREED PAYMENT: Within twenty (20) calendar days after execution of this Settlement Agreement, and in consideration for the promises made in this Agreement and incorporating the Recitals above as terms hereto, Contech shall deliver to the City settlement funds payable to the “City of Broken Arrow”, in the sum of Five Hundred Thousand and 00/100 Dollars (\$500,000.00) (the “Agreed Payment”).

2. RELEASE: In consideration of the Agreed Payment, the timely receipt by the City thereof, and the non-monetary terms of this Agreement, the Parties do hereby fully and finally settle and release any and all claims any Party has asserted against another Party in the Lawsuit or which any Party could have asserted against another Party in the Lawsuit (the “Claims”). Each Party expressly warrants and represents to each other Party that the Party has neither assigned, pledged, nor otherwise in any manner whatsoever sold or transferred any right, title or interest the Party may have in the Claims. The Parties each enter into this Agreement in good faith and acknowledge and agree that each Party has entered into this Agreement as a complete compromise and in full satisfaction of the Claims. Further, the Parties each hereby release, acquit, and forever discharge one another, as well as each Party’s respective past and present officers, directors, members, managers, council members, attorneys, employees, agents, subsidiaries, representatives, affiliates, heirs, successors, assigns, insurers, reinsurers and sureties, for any part of the Claims. It is the intention of the Parties to include within the scope of this release all Claims that any Party asserted or could have asserted against any other Party in the Lawsuit.

3. DISMISSAL: In additional consideration for timely delivery of the Agreed Payment to the City and the non-monetary terms of this Agreement, the City shall deliver to Contech in exchange for the Agreed Payment a Dismissal with Prejudice of all claims asserted by the City against Contech in the Lawsuit and by the City against EMCC in the Lawsuit.

4. ASSIGNMENT: In additional consideration for timely delivery of the Agreed Payment to the City and the non-monetary terms of this Agreement, the City shall deliver to Contech a form of assignment agreement, (the “Assignment”) assigning Contech’s rights of indemnity against Heartstone under the Subcontract and any and all contract rights Contech has with respect to Heartstone. Contech shall then promptly execute and deliver the Assignment to the City. The City shall be solely responsible for drafting the language of the Assignment. Providing the Assignment to Contech by the City shall be a condition precedent to Contech’s duty to deliver the executed Assignment. Contech shall not be responsible for the legal effectiveness, enforceability or validity of the Assignment after delivering the executed Assignment.

5. ATTORNEYS' FEES AND COSTS: It is expressly agreed by the Parties hereto that each Party shall be responsible for bearing its own attorneys’ fees and costs incurred as a result of or in connection with the Lawsuit or in settling the Claims and that no Party shall be deemed the prevailing party in the Lawsuit as a result of this settlement.

6. CONFIDENTIALITY: Each Party to this Agreement acknowledges and agrees that the terms of this Agreement and the nature and amount of the settlement provided for herein, as well as all

negotiations between the Parties with respect thereto, are and shall be kept confidential from and shall not be disclosed to any person or entity, save and except as may be required by law (including compliance with the Oklahoma Open Meetings Act with respect to approval of this Agreement), or to the extent a Party has need to disclose such information to its tax or legal professionals who, upon receiving such confidential information regarding this settlement, shall be bound by the confidentiality and nondisclosure provisions of this Agreement. No Party shall at any time in the future discuss, mention, address, or otherwise disclose to any person or entity in any manner the terms of this settlement or the amount paid or accepted in connection with this settlement, including, without limitation, through electronic media, print media and social media, except only as required by law or otherwise permitted above.

7. **TAXES:** It is agreed that the Parties and their counsel will make their own provisions regarding taxes, if any, on any sums paid or received under this Agreement and confirm that they have not relied upon any representation, express or implied, made by any opposing Party or opposing Party's attorneys or representatives as to the tax consequences of this Agreement.

8. **KNOWING AND VOLUNTARY:** The Parties represent that no promise or condition not herein specifically set forth has been made to any of them and that each Party is fully aware of the terms of this Agreement. Each Party separately and individually represents and warrants that it has not assigned or otherwise transferred to any person or entity by subrogation or otherwise, any right the Party may have with respect to the Claims, this Agreement or the Party's rights under this Agreement.

9. **BINDING EFFECT:** Each Party agrees this Agreement shall be final and binding upon the respective Parties hereto and their past and present heirs, executors, administrators, principals, representatives, parent companies, subsidiaries, affiliated firms or entities, shareholders, agents, servants, attorneys, officers, directors, employees, members, managers, council members, successors and assigns of whatever nature and description, and that no claim, be it derivative or otherwise, may ever be made against the Parties released with respect to the Claims covered by this Agreement.

10. **NO ADMISSION:** It is understood and agreed by each Party that the settlement provided for under this Agreement is a compromise of disputed claims among the Parties, that the Agreed Payment is not to be construed as an admission of liability on the part of any Party released hereunder, and that each of the Parties denies liability therefore and intends merely to settle the Parties' dispute to avoid further expense associated therewith. It is further understood and agreed that this Agreement will not be admissible as evidence in any legal or administrative proceeding, as an admission of liability by any Party.

11. **ADDITIONAL DOCUMENTS:** Each Party agrees to use best efforts to cooperate fully and to 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.

12. **COMPLETE AGREEMENT:** This Agreement comprises the complete and integrated agreement of the Parties with respect to the subject matter of this Agreement and, except as otherwise specifically provided for herein, supersedes all prior agreements, written or oral, with respect to the subject matter of this Agreement. Each term of this Agreement is contractual and not merely a recital. Each Party represents and warrants to each of the other Parties that there are no other agreements, oral or written, express or implied, regarding the Claims being resolved pursuant to this Agreement, except as to latent defects or deficiencies in the work provided on or in connection with the Project that have not yet been made manifest.

13. **NO ORAL MODIFICATIONS:** This Agreement shall not be modified in any way except in a writing executed by each Party that is to be bound thereby.

14. **READ AND UNDERSTOOD:** Each Party hereby agrees that the terms of this Agreement have been completely read and are fully understood and voluntarily accepted by the Party for the purpose of making a full and final settlement of the Claims and for the express purpose of resolving forever the Claims and any additional claims arising out of the aforesaid Claims which were or could have been asserted against another Party in the Lawsuit. Each Party separately represents to each of the other Parties that the Party has executed this Agreement freely, voluntarily and without coercion or duress.

15. **COUNTERPART EXECUTION:** This Agreement may be executed in counterparts, each of which will be deemed an original document, but all of which will constitute a single document. This document will not be binding on or constitute evidence of a contract between the Parties until such time as a counterpart of this document has been executed by each Party shown on the signature pages of this Agreement, and a copy of the signed signature page delivered to the other Parties to this Agreement.

16. **RIGHT TO CONTRACT:** Each Party to this Agreement represents and warrants that the Party is the legal and equitable owner and holder of the Claims resolved by way of this Agreement. Further, each Party to this Agreement represents and warrants that the Party is authorized to execute this Agreement and bind the Party thereto. This Agreement is intended to and shall cover the Claims arising between the Parties to this Agreement on or before the date of execution of this Agreement.

17. **LEGAL COUNSEL AND INFORMATION:** In deciding whether or not to compromise and settle the Claims and whether or not to execute this Agreement, each Party relied upon information and advice of an attorney of their own choosing, and/or upon the Party's own advice and experience or the advice and experience of others, but not upon any information or representation of any other Party to this Agreement (except as expressly set forth in this Agreement). Each Party similarly agrees that it has relied solely on its own investigation and analysis of facts and claims pertinent to this Agreement in agreeing to the terms of this Agreement and that this Agreement shall be valid and enforceable as between the Parties even in the event other information regarding the Claims that is not currently known is subsequently discovered. Furthermore, in this regard, the Parties hereto, and each of them, acknowledge and represent that they have participated in preparing and drafting the terms of this Agreement, and agree that in construing the terms of this Agreement no provision of the Agreement shall be interpreted against any Party more strongly than against any other Party because each provision of this Agreement and the Agreement as a whole has been prepared or approved by such Party or its counsel.

18. **SEVERABILITY:** Each part of this Agreement is intended to be several. If any term, covenant, condition or provision hereof is illegal, invalid or unenforceable for any reason whatsoever, such illegality, invalidity or unenforceability shall not affect the legality, validity or enforceability of the remaining parts of this Agreement.

19. **SURVIVAL OF PROVISIONS:** Each Party to this Agreement specifically understands and agrees that the agreements, promises, representations and covenants contained in this Agreement shall survive the execution of this Agreement.

20. **CHOICE OF LAW AND VENUE:** This Agreement shall be governed, interpreted, construed, and enforced in accordance with the laws of the State of Oklahoma, except for its choice of

laws rules, and each Party hereto agrees that the sole and exclusive jurisdiction to enforce this Agreement shall be Tulsa County District Court, State of Oklahoma.

21. **CAPTIONS:** The captions contained in this Agreement are intended to be an aid in locating the substantive portions of this Agreement. To the extent one or more captions conflict with any substantive portion of this Agreement, they shall be ignored.

22. **REMEDIES IN THE EVENT OF BREACH:** Each Party recognizes that irreparable injury will result to one or more of the other Parties in the event one of the Parties breaches or threatens to breach this Agreement. If any Party breaches or threatens to breach any term(s) of this Agreement, this Agreement may be enforced in accordance with Paragraph 20 above.

23. **EFFECTIVE DATE:** This Agreement shall be valid and enforceable commencing on the date the last Party executes this Agreement.

THE UNDERSIGNED HAVE CAREFULLY READ THE FOREGOING RELEASE, understand the contents thereof, and all sign the same as a result of their own free and voluntary acts.

**CITY OF BROKEN ARROW
a municipal corporation**

By: _____
Name: Debra Wimpee
Title: Mayor

STATE OF OKLAHOMA)
) ss
COUNTY OF TULSA)

This instrument was acknowledged before me on this ____ day of October, 2021, by _____, as _____ of the City of Broken Arrow, a municipal corporation of the State of Oklahoma.

Notary Public

My Commission Number: My Commission Expires:

ATTEST:

BY: _____
City Clerk

DATE: _____

CONTECH, INC.

Dated: _____

By: _____
_____(printed)
_____(title)

EMPLOYERS MUTUAL CASUALTY COMPANY

Dated: _____

By: _____
_____(printed)
_____(title)