

TO: JAMES L. APP, CITY MANAGER
FROM: JOHN R. McCARTHY, DIRECTOR OF PUBLIC WORKS
SUBJECT: TACTILE TILE REPAIR AT NORTH COUNTY TRANSPORTATION CENTER - SETTLEMENT AGREEMENT

DATE: OCTOBER 19, 1999

Needs: For the City Council to accept the offered settlement from Carroll Building and authorize the City Manager to sign the settlement agreement on behalf of the City.

- Facts:**
1. The original tiles were installed in 1996. Within a year, defects in the tile installation were discovered and portions replaced by the contractor.
 2. Some time in March/April 1998, a work crew from Union Pacific came to the City to perform maintenance work on the railroad tracks.
 3. In May 1998, it was discovered that some of the tactile tiles started "popping out", which became a trip hazard. In addition, "bumps" on the tiles were damaged and a 1-inch deep gouge ran along the entire length of the platform. It appeared that a piece of heavy equipment was dragged along the tiles.
 4. In June 1998, the City sent a claim to Union Pacific for these damages, which was denied in October, 1998.
 5. The City received notices from Caltrans Rail Division and Amtrak requesting that the damaged tiles be repaired to insure public safety.
 6. The City undertook the tile replacement as a safety measure in July at a cost of \$36,200.
 7. In September, the City's Attorneys Office negotiated a settlement with Carroll Building in the amount of \$20,000.

Analysis and Conclusion:

The original tiles installed at the train station in 1996 were found to be defective and portions were replaced by the contractor. In 1998, a work crew from Union Pacific performed maintenance work on the railroad. Soon after, damages to the tactile tiles were discovered. The City diligently pursued repair of these tiles and contacted several agencies for reimbursement for the damage.

The City attorney has negotiated a settlement with the Carroll Building in the amount of \$20,000 and now needs authorization to accept the settlement and for the City Manager to sign the Agreement on the City's behalf.

Policy Reference: None

Fiscal Impact: None

- Options:**
- A. That the City Council accept the settlement and authorize the City Manager to sign the settlement agreement on behalf of the City.
 - B. That the City Council amend, modify or reject the above option.

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LINDA R. BECK

September 9, 1999

VIA TELECOPIER

James App
City of El Paso de Robles
1000 Spring Street
Paso Robles, CA 93446

Re: Tactile Tile Repair at Amtrak Station

Dear Jim:

As you may know, we have negotiated a settlement with the contractor who built the Amtrak Station for the cost of replacing the tactile tile. Carroll Building has agreed to pay \$20,000 toward the replacement cost, and the City's insurance company is contributing another \$9,700. The City's cost for this work was \$36,200, including attorneys' fees and administrative costs.

We have received the enclosed settlement agreement from the contractor's attorney, and enclose the agreement for your review. We have received the check for Carroll's portion of the settlement, but are required to hold it until the settlement agreement is finalized.

Please review the agreement and call me with any comments that you have. At Iris' suggestion, I am also sending the agreement to John McCarthy and Mike Compton for their comments.

If you find the agreement acceptable, please put it on the agenda for acceptance at the next City Council meeting. I can assist in preparing any necessary staff report.

James App
September 9, 1999
Page 2

Please do not hesitate to call if you have any questions.

Very truly yours,


Linda R. Beck

LRB:jc
Enclosure

cc: John McCarthy (w/enclosure)
Mike Compton (w/enclosure)
Iris Yang (w/o enclosure)

SETTLEMENT AGREEMENT AND RELEASE

The parties to this Settlement Agreement and Release ("Agreement") are City of El Paso de Robles, (hereinafter "City") and Carroll Building Company (hereinafter "Carroll").

RECITALS

A. The City and Carroll entered into a written contract wherein Carroll agreed to construct the City of El Paso de Robles Multi Modal Transportation Center (hereinafter "Transportation Center"), located at 800 Pine Street, City of El Paso de Robles. Subsequent to completion of the Transportation Center, the City notified Carroll of lifting and breaking of the warning tactile tiles used in construction of the train platform at the Transportation Center.

B. The City submitted a claim to Carroll for the alleged improper selection, supply and installation of warning tactile tiles used in construction of the train platform at the Transportation Center.

C. Without any party admitting liability to the other, and for purposes of avoiding delay, expense and uncertainty of litigation, the parties now wish to resolve, as between themselves, their existing claims and disputes.

AGREEMENT

In consideration of the foregoing Recitals, which are an integral part of this agreement, and in consideration of the respective promises and representations contained herein, the parties agree as follows:

1. Travelers Property Casualty shall pay to the City, on behalf of Carroll, the sum of Twenty Thousand (\$20,000.00) made payable to The City of El Paso de Robles.

2. Release Of All Claims by City. Upon the effective date of this Agreement, the City will fully, finally and forever release, waive and discharge Carroll, their predecessors, successors, beneficiaries, officers, directors, shareholders, partners, agents, employees, representatives, heirs, grantees, insurers and attorneys, and their respective successors and assigns, of and from any and all claims, demands, actions, causes of action, obligations, damages and liabilities of every nature whatsoever, whether matured or contingent, and whether known or unknown, suspected or claimed, which the City had in the past, now has, or claims to now have against Carroll for the warning tactile tiles at the edge of the train platform, their component parts and component materials, their selection, their supply and their installation, at the Multi Modal Transportation Center, located at 800 Pine Street, City of El Paso de Robles.

The City fully, finally and forever releases, waives and discharges Carroll, and the above enumerated persons and entities, of and from any and all claims, demands, actions, causes of action, obligations, damages and liabilities of every nature whatsoever, whether matured or contingent, and

...ing to the removal, repair and replacement by Interlock San Diego of the warning tactile tiles at the train platform at the Multi Modal Transportation Center, located at 800 Pine Street, City of El Paso de Robles.

Release Of Unknown Claims. The parties agree that it is within their contemplation that they may have defenses, claims, demands, actions, causes of action, obligations, damages and liabilities against each other, of which, at the time of the execution of this Agreement, they had no knowledge or suspicion relating to this claim. The parties nevertheless agree that this Agreement extends to all claims, demands, actions, causes of action, obligations, damages, losses, costs, liabilities, acts, causes, matters or things of whatsoever kind or nature, whether or not now known, or claimed or suspected, against Carroll, arising from or relating to the warning tactile tiles at the edge of the train platform, their component parts and component materials, their selection, their supply and their installation at the Multi Modal Transportation Center, located at 800 Pine Street, City of El Paso de Robles, their prosecution or defense. This Agreement specifically releases and extinguishes forever all rights of the parties which might otherwise accrue pursuant to California Civil Code §1542 and any comparable state or federal statute or rule of law to the extent it applies to the selection, supply, installation, removal, repair and/or replacement of the warning tactile tiles at the edge of the train platform. California Civil Code §1542 provides:

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

The parties to this Agreement expressly assume the risk that, after the execution of the Agreement, additional or further damages, which are currently unknown or undiscovered, may manifest at the warning tactile tiles installed at the edge of the train platform of the Multi Modal Transportation Center which is the subject of this Agreement. This Agreement is intended to cover and include all future defects and damages in the warning tactile tiles at the edge of the train platform, including all rights, claims and causes of action arising therefrom. This Agreement specifically releases and extinguishes forever all claims relating to the warning tactile tiles installed in construction of the platform at the Multi Modal Transportation Center, against Carroll of every kind, nature and description whatsoever, known or unknown, suspected or unsuspected, and any and all rights of the parties which might otherwise accrue pursuant to California Civil Code Section 1542 and any comparable state or federal statute or rule of law. By this Agreement, the parties expressly acknowledge that they are familiar with and expressly waive and relinquish the benefits and protections afforded by Civil Code Section 1542 and any comparable state or federal statute or rule as to the claims described.

3. **No Prior Assignment of Claims.** The City warrants that they have not, prior to the execution of this Agreement, assigned to any other person or entity any of the claims being settled, released or waived by the terms of this Agreement. If any person or entity not a party to this Agreement hereafter makes any claim against a party hereto, and such claim arises as a result of any assignment (whether in fact or by operation of law), or purported subrogation to the rights of any parties hereto, then such party

through whom that third party's claim is made agrees to hold harmless and indemnify the other party to this Agreement against any and all losses, costs, expenses, attorney's fees, obligations or other liabilities at the time such losses are incurred arising out of or relating to any such purported claims asserted by any such third party.

4. No Other Claims or Actions. The City hereby warrants that, to its actual knowledge and belief, there is no action, suit, claim, cause of action, or proceeding at law or in equity (or by or before any governmental agency, or official, commission, board, bureau, instrumentality or authority of any local, state or federal government) now pending or threatened against or affecting the other party. The City further warrants that to its actual knowledge or belief, there is no action, suit, claim, cause of action, or proceeding at law or in equity (or before any governmental agency, or official, commission, board, bureau, instrumentality or authority of any local, state or federal government) now pending or threatened against or affecting it that will directly affect their ability to perform this Agreement.

5. Representation in Negotiations. The parties have been represented in negotiations for and in the preparation of this Agreement by independent counsel. The parties hereby acknowledge that it has had this Agreement fully explained to them by their own counsel and are fully aware of its contents and legal effect. Each party shall bear its own attorney's fees and costs incurred in connection with the underlying dispute and preparation and negotiation of this Agreement.

6. No Reliance on Representations by Others. The parties represent that they have relied on their own investigation and judgment in regard to all matters contained herein, including the consequences of this transaction as the result of application of any federal or state tax law, that they have not relied on any representations made by any other party, that this Agreement is entered into by them of their own volition, and that they entered into this Agreement free of any duress, coercion, or undue influence of any source whatsoever.

7. Entire Agreement. This Agreement contains the entire understanding between and among the parties with regard to the matters herein set forth. There are no representations, warranties, agreements, arrangements, undertakings, oral or written, between or among the parties hereto relating to the subject matter of this Agreement which are not fully expressed herein.

8. Modifications. This Agreement may not be altered, amended, modified or otherwise changed in any respect or particular whatsoever, except by a writing duly executed by all of the parties affected by such modification or by their authorized representatives. A modification or waiver of any one provision shall not constitute a waiver or modification of any other provision not expressly waived or modified.

9. Further Action. The parties shall take such further action and execute such further documents as may be necessary to carry out the purposes and intent of this Agreement.

10. No Admission of Liability. This Agreement is a compromise of disputed claims between the

ies, liability for which is expressly denied, and it is not to be construed as an admission of liability to each or to third parties.

11. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, grantees, relatives, trustees, beneficiaries, predecessors, successors, assigns, shareholders, partners, affiliated and related entities, officers, directors, agents, employees and representatives.

12. **Enforcement of This Agreement.** In the event an action is brought by any party to enforce this Agreement, the prevailing party in such action shall be entitled to recover attorney's fees and costs actually incurred in connection with such later action.

13. **Preparation of This Agreement.** This Agreement is the product of negotiation and preparation by and among each party and its respective attorneys. The parties hereto acknowledge and agree that this Agreement shall not be deemed prepared or drafted by one party or another and shall be construed accordingly.

14. **Governing Law.** This Agreement shall be interpreted in accordance with and governed in all respects by the laws of the State of California.

15. **Counterparts.** This Agreement and all exhibits hereto may be executed by facsimile in any number of counterparts and signature pages and by different parties on separate counterparts and signature pages, each of which, when so executed and delivered, shall be an original, and all such counterparts shall together constitute one and the same instrument.

16. **Representations.** By execution of this Agreement, each party warrants that:

(a) If such party is not an individual, this Agreement is executed on behalf of a valid and subsisting legal entity;

(b) Such entity has full right and authority to undertake any action contemplated by this Agreement;

(c) The execution of this Agreement has been duly and properly authorized by the party on whose behalf said Agreement is executed in accordance with all applicable laws, regulations, agreements and procedures governing the authority of such person or entity to execute this Agreement on behalf of such party; and

(d) The consent of all persons or entities whatsoever necessary to the due execution of this Agreement has been obtained

17. **Severability.** Should any provision of this Agreement, including exhibits hereto, be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms or

provisions shall not be affected thereby and said illegal or invalid part, term or provision shall not be deemed to be part of this Agreement.

18. Use of Terms. Wherever the context of the Agreement requires, the masculine gender includes the feminine or neuter, and the singular number includes the plural.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date, which appear opposite their signatures. This Agreement shall be deemed to take effect on the date the last signatory hereto executed this Agreement.

THE CITY OF EL PASO DE ROBLES

Signature

Title

Dated

CARROLL BUILDING COMPANY

Signature

Title

Dated

APPROVED AS TO FORM AND CONTENT:

DATED: _____

McDONOUGH, HOLLAND & ALLEN
BY: Linda R. Beck

DATED: _____

MOLFETTA & ASSOCIATES
BY: Theresa L. Diederich