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June 20, 2013

The Honorable Common Council  
City of Milwaukee  
Milwaukee City Hall

Re: Resolution to approve settlement of the City of Milwaukee's claims against J. P. Cullen & Sons, Inc. in the matter of *City of Milwaukee v. Simpson, Gumpertz & Heger, Inc., et al*, Milwaukee County Circuit Court Case No. 12 CV 004989.

Dear Council Members:

Enclosed is Substitute One to File No. 130163, Resolution to approve settlement of the City of Milwaukee's claims against J. P. Cullen & Sons, Inc. in the matter of *City of Milwaukee v. Simpson, Gumpertz & Heger, Inc., et al*, Milwaukee County Circuit Court Case No. 12 CV 004989.

On May 12, 2012, the City Attorney filed the above referenced lawsuit against Simpson, Gumpertz & Heger, Inc. (SGH), Engberg Anderson, Inc. (EA), Bloom Companies, LLC, J. P. Cullen & Sons, Inc. (JPC), and numerous insurance carriers because terra cotta on the Milwaukee City Hall façade had cracked, spalled and fallen. The deteriorating terra cotta had been part of the renovations completed in December 2008. EA, SGH and Boom Companies were part of the design team for the renovation project. JPC was the general contractor.

On June 14, 2013, SGH filed a cross claim against JPC and its insurers, alleging that JPC may be liable to SGH for contribution or indemnification if SGH is found to be liable to the City. On the same date, SGH also filed third party complaints against Gladding McBean, and its parent company, PABCO Clay Products, LLC, and against Eugene Matthews, Inc. for contribution and indemnification. Gladding McBean was JPC's supplier for the terra cotta installed on City Hall, and Eugene Matthews was one of JPC's subcontractors with respect to some terra cotta work.

The Department of Public Works engaged Wiss, Janney, Elstner Associates, Inc. (WJE) to prepare plans and specification for the repairs to and replacement of terra cotta which is now necessary as a result of the cracks, spalls and other deterioration of terra cotta on the City Hall façade. The City Attorney obtained a detailed, independent estimate of the cost of performing the scope of work specified by WJE. The cost of repairs, according to the estimate, is \$14,600,000. In addition to the cost of performing these repairs, the City has also incurred past costs of \$1,876,773 for sidewalk protection, equipment rental, staff resources, safety inspection work and WJE's design work. The Department of Public Works further anticipates additional costs for repair contract oversight services and future inspections for an additional \$2,081,797. This would bring the total of past and future additional damages to approximately \$4,000,000. The estimated damages in the litigation based upon currently available information, is therefore approximately \$18,600,000.

JPC has offered to perform the repair work in accordance with the WJE plans and specifications for a contract price of \$6,707,000, and to provide a new three year warranty on the terra cotta units to be installed under the repair contract. In exchange for this cost savings to the City, the City would release JPC from all claims that have been or could be asserted against JPC in connection with the underlying lawsuit. The release would include any claim by any party against JPC or its insurers, suppliers and subcontractors. The settlement will mean that the City will have given up and released whatever portion of responsibility for damages the jury or judge attributes to JPC, Gladding McBean, Eugene Matthews and any other JPC supplier or subcontractor who may be found responsible in the remaining litigation. While the lawsuit will continue against SGH, EA and Bloom Companies and their insurers (unless they individually settle with the City), the remaining defendants will only be responsible for that portion of the damages which is attributed to them by the jury or judge based on that defendant's individual fault or responsibility.

The City Attorney recommends this settlement for the several reasons. While the full cost of the repairs and the full amount of the City's damages are currently unknown, this partial settlement will provide the City with the ability to complete the repairs in a timely fashion at a greatly reduced cost. JPC has been cooperative in regard to the City's investigation of the cause of the terra cotta distress since the problem was discovered in 2011, and JPC is extremely familiar with the work. The City's consulting engineers, WJE, have opined that the root cause of the distress was the design to fully grout terra cotta units. This places primary responsibility on SGH and EA, the engineering and architectural firms responsible for those specifications. The claims against JPC are that JPC put more water into the grout than was necessary for it to achieve the consistency of the grout that was specified in the contract; however, JPC's defense is that it followed the specifications on the consistency of the grout. Further, JPC's consulting engineering firm has opined that it was defective design to specify grout in the first place—a proposition that WJE supports. SGH also claims that the terra cotta material supplied by Gladding McBean was insufficient for the project; however, Gladding McBean and JPC dispute

The Honorable Common Council

June 20, 2013

Page 3

this, pointing out that the material met all of SGH's contract specifications for the material. Finally, the distress (cracks and significant spalling) is highly correlated to the grouted units.

The outcome of litigation is always unknown until the case is tried. We do not know the full amount of damage; it may be more or it may be less than the 18.6 million dollar estimate. Further, the percent or portion of responsibility that may be attributed to each party by a jury or judge at trial is unknown. Given the uncertainties, the City Attorney recommends this partial settlement in order to control costs and move forward with the needed repairs.

Very truly yours,

Grant F. Langley,  
City Attorney

Miriam R. Horwitz  
Assistant City Attorney

MRH/MRH

1081-2012-1217

c: Ghassan Korban, Commissioner of Public Works