

RESOLUTION NO. R-21-54

A RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE A SETTLEMENT AGREEMENT AND MUTUAL RELEASE WITH NORTH AMERICAN SPECIALTY INSURANCE COMPANY FOR FINAL PAYMENT IN THE AMOUNT OF \$25,524.42 FOR WORK COMPLETED ON THE 2019 WATER MAIN REPLACEMENT PROJECT WP1986.

WHEREAS, Blue Nile Contractors completed the 2019 Water Main Replacement Project in the amount of \$1,517,972.29 prior to going out of business; and

WHEREAS, North American Specialty Insurance Company is fulfilling the contractual obligations of Blue Nile Contractors and has requested that the City of Gladstone execute a settlement agreement and mutual release to make final payment in the amount of \$25,524.42 for work completed on the project.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF GLADSTONE, MISSOURI, AS FOLLOWS:

THAT, the City Manager of the City of Gladstone, Missouri is hereby authorized to execute the settlement agreement and mutual release and make final payment as follows:

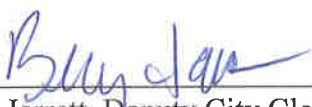
Revised Contract Amount:	\$ 1,517,972.29
Amount Paid to Date:	<u>1,492,447.87</u>
Total Amount Due Final Pay:	<u>\$ 25,524.42</u>

FURTHER, THAT, funds for such purpose are authorized from the Combined Waterworks and Sewerage System Fund.

INTRODUCED, READ, PASSED AND ADOPTED BY THE COUNCIL OF THE CITY OF GLADSTONE, MISSOURI, THIS 13th DAY OF DECEMBER 2021.


R.D. Mallams, Mayor

ATTEST:


Becky Jarrett, Deputy City Clerk



Request for Council Action

RES ☒ # 21-54

BILL ☐ # City Clerk Only

ORD # City Clerk Only

Date: 11/10/2021

Department: Public Works

Meeting Date Requested: 12/13/2021

Public Hearing: Yes ☐ Date: [Click here to enter a date.](#)

Subject: Settlement Agreement and Mutual Release, 2019 Water Main Replacement Project WP1986

Background: Blue Nile Contractors completed the 2019 Water Main Replacement Project at a cost of \$1,517,972.29 and the City of Gladstone accepted the work and authorized final payment by way of Resolution R-20-54. Prior to issuance of final payment, the City was notified that Blue Nile Contractors was no longer in business and their bonding company, North American Specialty Insurance Company (NAS), would be fulfilling their contractual obligations. The City is currently holding \$25,524.42 in retainage. Execution of this agreement will allow the City to release this final payment in care of NAS.

Budget Discussion: Funds for this contract were budgeted in the CWSS Fund.

Revised Contract Amount:	\$ 1,517,972.29
Amount Paid to Date:	1,492,447.87
Total Amount Due Final Pay:	\$ 25,524.42

Public/Board/Staff Input: City staff recommends that the City Council authorize the City Manager to execute the settlement agreement and mutual release and issue final payment in the amount of \$25,524.42

Provide Original Contracts, Leases, Agreements, etc. to: City Clerk and Vendor

Timothy A. Nebergall
Department Director/Administrator

City Attorney

City Manager

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE ("Agreement") is made and entered into by and between City of Gladstone ("Gladstone") and North American Specialty Insurance Company ("NAS"). Gladstone and NAS are collectively referred to as the "Parties".

WHEREAS, in May 2019, Blue Nile Contractors, Inc. ("Blue Nile") submitted a bid for the 2019 Water Main Replacement – WP1986 Project in Gladstone, Missouri and subsequently entered into a Contract in the amount of \$1,018,913.49 with Gladstone, on June 27, 2019, to perform the work (the "Contract"), as more specifically set forth in the Contract;

WHEREAS, the total value of the contract was increased by change order(s) to the agreed upon amount of \$1,517,972.29;

WHEREAS, Gladstone accepted the work of Blue Nile and authorized Final Payment by way of Resolution R-20-54 on December 14, 2020;

WHEREAS, NAS issued Performance & Maintenance Bond No. 2288966 and Payment Bond No. 2288966 for Blue Nile in connection with Blue Nile's work on the Project;

WHEREAS, the Performance Bond names Blue Nile as Principal, Gladstone as the Obligee, and NAS as Surety, for purposes of bonding the Contract work, and the Payment Bond names Blue Nile as Principal for purposes of covering payment for labor, materials, equipment and services supplied under agreement with Blue Nile to or for the Project;

WHEREAS, in connection with its issuance of the Performance Bond and the Payment Bond for the Project (and other bonds issued on other projects unrelated to the Project which is the subject of this Agreement), on April 18, 2012, Blue Nile Contractors, Inc., Aman Construction, Inc., Yana properties, LLC, Henok Tekeste and Radiy Hassen, ("Indemnitors") signed a General Indemnity Agreement ("GIA") with NAS, pursuant to which the Indemnitors have certain obligations, rights and duties to NAS all as specifically set out in the GIA;

WHEREAS, on February 4, 2021, Gladstone advised NAS, through its counsel, The Law Offices of T. Scott Leo, PC, that the work on the Project was 100% complete and that it was holding \$25,524.42 in Contract funds still owed to Blue Nile for the retainage on the work performed at the Project;

WHEREAS, Gladstone has further advised NAS that it is the City's intent to pay over to NAS the \$25,524.42 owed to Blue Nile;

WHEREAS the Parties desire to memorialize their agreements concerning the City's payment of the Contract funds still owed of \$25,524.42, as more specifically set forth in this Agreement.

NOW THEREFORE, in consideration of the promises, payments, mutual covenants, rights, obligations and releases contained herein, the sufficiency and receipt of which are hereby acknowledged, the Parties further agree as follows:

1. **Scope of Work.** As of the date of this Agreement, Blue Nile has completed 100% of the work required by the Contract documents and has been paid by Gladstone all but \$25,524.42 that Blue Nile is owed as retainage for having performed that work.

2. **Payment of Blue Nile Remaining Contract Funds.** Gladstone agrees to pay the \$25,524.42 in remaining Contract funds that are still owed for Blue Nile's work on the Project in care of NAS, as follows:

Mailing Instructions for Checks:

Moody's CPA'S & CFE'S, Inc.

Attn: Bob Moody

14510 Long Avenue

Midlothian, IL 60445

Or via wire as follows:

Instructions for Wires:

Bank Name:	Fifth Third Bank
Bank Address:	15330 S. Harlem Ave., Orland Park, Illinois
Phone Number:	866-475-0729
Swift Code:	FTBCUS3C
Incoming Routing No.:	042000314
Account No:	7241200810

3. **Release by NAS of Gladstone for Remaining Contract Funds.** Effective upon Moody's receipt of the \$25,524.42 in remaining Contract funds in strict accordance with the instructions provided in Paragraph 2 above, NAS and its employees, servants, agents, representatives, insurers, officers, directors, lenders, parents, sisters, sureties, successors and assigns shall release Gladstone and its councilmen/councilwomen, lawyers, employees, servants, agents, contractors, and insurers from any and all past or present claims, causes of action, or demands for payment of sums owed for the work performed by Blue Nile under the Contract.

4. **No Third-Party Claim Assignment.** Gladstone hereby expressly represents and warrants that its Claims herein released have never been assigned and that no person, firm, or corporation other than the releasing party has any interest therein.

5. **Binding Effect/No Third-Party Beneficiary.** The Parties agree and acknowledge that this Agreement shall bind the Parties to this Agreement and also their respective assigns, shareholders, officers, members, managers, heirs, councilmen and councilwomen, directors,

attorneys, servants, insurers, subsidiaries, divisions, affiliates, employees, agents, representatives, insurance carriers, predecessors, successors-in-interest, and related entities and shall inure to the benefit of the Parties released and their respective assigns, shareholders, officers, members, managers, heirs, devisees, directors, attorneys, servants, insurers, subsidiaries, divisions, affiliates, employees, agents, representatives, insurance carriers, predecessors, successors-in-interest, and related entities. However, the Indemnitors are not a third-party beneficiary of this Agreement; and nor is any person or entity a third-party beneficiary to this Agreement, other than the Parties to this Agreement.

6. **Reliance.** The Parties acknowledge and warrant that NAS has relied upon the statements of Gladstone that it owes no more than \$25,524.42 for the work performed by Blue Nile on the Project, and that all prior payments owed to Blue Nile have been made by Gladstone. Except as stated herein, no promises or inducements have been made or offered by the Parties for this Agreement and that this Agreement is executed by the Parties without reliance upon any other statements or representations made by these parties concerning the nature or merits of any claims that they might have had against each other. The Parties assume the risk that the facts or law may be otherwise than the Parties believe, except as represented and warranted herein by Gladstone and NAS.

7. **Modification and Waiver.** No modification or waiver of any provision of this Agreement nor consent to any departure therefrom, shall in any event be effective, unless the same shall be in writing and signed by the party to be charged therewith and then such modification, waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

8. **Counterparts.** This Agreement may be executed in any number of counterparts and by different Parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and each of which shall constitute but one and the same Agreement. Electronic signatures shall be deemed originals.

9. **Construction.** This Agreement has been arrived at based on the attorney of each Party advising such Party. The language of this Agreement is a product of the mutual effort of the Parties. This Agreement shall be construed fairly as to all Parties; it shall not be construed for or against any party on the basis or the extent to which that party participated.

10. **Severability.** In the event that any one or more of the provision or parts of a provision contained in the Agreement shall, for any reason, be held to be invalid, illegal or unenforceable in any respect, in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other provisions or part of a provision of this Agreement, but this Agreement shall be reformed and construed in any such jurisdiction as if such invalid or illegal or unenforceable provision or part of a provision had never been contained herein, and such provision or part shall be reformed so it would be valid, legal and enforceable to the maximum extent permitted in such jurisdiction.

11. **Future Cooperation.** Gladstone agrees to fully cooperate, to execute any and all supplementary documents (including additional assignments, etc. if needed), and to take all additional actions that may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement which are not inconsistent with its terms. Further, Gladstone agrees to produce documents and to make itself and its employees, agents, consultants, representatives and assigns reasonably available to NAS, upon reasonable request, with respect to any matters (including pending or future litigation) involving the Project or Blue Nile's work (or the amounts paid for Blue Nile's work) at the Project. NAS agrees to fulfill all contractual obligations of Blue Nile as outlined in the contract including warranty of the work against faulty materials or poor workmanship during the period of two (2) years after the City's acceptance of work which was December 14, 2020.

12. **Entire Agreement.** The Parties state that this Agreement contains the entire agreement between the Parties, and there are no other oral, written, express or implied promises, agreements, representations or inducements not specified in this Agreement. The Parties also agree that all of the terms of this Agreement are contractual and not a mere recital.

13. **Governing Law.** This Agreement shall be interpreted in accordance with and governed by the laws of the State of Missouri, without giving effect to conflicts of law principles.

14. **Authority to Execute.** Each individual executing this Agreement on behalf of a party hereto represents and warrants that all actions necessary to authorize its execution on behalf of that party have been duly performed; that such individual has authority to execute this Agreement on behalf of such party; and that such party shall be legally bound hereby. NAS has the full authority to sign this Agreement on behalf of Blue Nile pursuant to its rights under the GIA, should it decide to do so.

15. **Recitals and Captions.** The introductory factual recitals of this Agreement are an integral part hereof. The captions of the paragraphs of this Agreement are for convenience only, and shall not be construed as impacting the covenants, conditions, terms and provisions hereof.

IN WITNESS WHEREOF, the Parties have subscribed their names on the day and year written below.

[SIGNATURE PAGES TO FOLLOW]

CITY OF GLADSTONE

By: _____

Scott Wingerson

City Manager

STATE OF)
) SS.
COUNTY OF)

On this _____ day of November, 2021, before me, the undersigned, a Notary Public within and for said County and State, personally appeared _____, to me personally known who being by me duly sworn, did say that he/she is the _____ of City of Gladstone, and that he/she has been and is duly authorized to execute this Agreement on its behalf.

IN TESTIMONY WHEREOF, I have unto set my hand and affixed my Notarial Seal the day and year in this certificate last above written.

Notary Public

My Commission Expires:

**NORTH AMERICAN SPECIALTY
INSURANCE COMPANY**

By: Marcelo Virgili

Name (Printed): Marcelo Virgili

Title: Vice President

**NORTH AMERICAN SPECIALTY
INSURANCE COMPANY**

By: Ken Mastny

Name (Printed): Ken Mastny

Title: Vice President