SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into by and among the United States of America, acting through the United States Department of Justice, United States Attorney's Office for the District of New Jersey (collectively the "United States") and Kiewit Constructors, Inc. ("KCI"), through their authorized representatives.

RECITALS

A. Kiewit Constructors, Inc. is a Delaware Corporation, with its principal place of business in Woodcliff Lake, New Jersey.

B. On August 25, 2009, the Long Island Rail Road ("Railroad") and KCI entered into Contract No. 6040 to design and implement Phase II of the Atlantic Avenue Viaduct ("AAV") Rehabilitation Project (the "Contract"). The Atlantic Avenue Viaduct is an approximately 1.5 mile-long bridge connecting Jamaica, New York, with Brooklyn, New York. Under the Contract, KCI's work included the furnishing (i.e., supplying and fabricating) and installation of new steel girders and spans and related steelwork.

C. The Contract was funded, in part, by funds originating from a grant received by the Railroad pursuant to the American Recovery and Reinvestment Act of 2009 ("ARRA"). When using these federal ARRA funds, the Railroad was required to establish a program that would require its contractors to subcontract with Disadvantaged Business Enterprises ("DBEs"). The United States expected the Railroad to establish DBE contract goals and to ensure that contractors make "good faith efforts" to meet those goals.

D. Accordingly, the Contract included a DBE subcontracting goal and required KCI to employ good faith efforts to satisfy the DBE goal requirement. For payments to a DBE subcontractor to qualify toward the DBE goal, the DBE subcontractor was required to perform a "commercially useful function."

E. To achieve its DBE goal, KCI entered into a subcontract with Iron Eagle Construction Corp. ("Iron Eagle"), an established steel erection company certified as a DBE by the State of New York, to furnish and install the steel spans for the Contract (the "DBE Subcontract"). Under the DBE Subcontract, Iron Eagle was obligated to manage the steel fabrication process, conduct inspections, coordinate steel delivery schedules, and ultimately install the spans.

F. The United States acknowledges that Iron Eagle successfully performed the obligations of the DBE Subcontract related to the installation of the replacement steel spans. However, the United States contends that Iron Eagle did not perform a "commercially useful function," as that term is defined in 49 C.F.R. § 26.55(c), for the furnishing of the steel spans under the DBE Subcontract. Specifically, the United States asserts that Iron Eagle did not adequately furnish the steel in that it did not sufficiently manage the steel fabrication process, conduct the necessary inspections, or coordinate steel delivery schedules. The United States also contends that KCI did not take contractually-required steps to address Iron Eagle's failure to perform a commercially useful function. As a result, the United States contends that KCI failed to meet its DBE obligations under the Contract. The conduct described in Paragraphs A through G are referred to below as the "Contract Dispute."

G. The United States contends that the Contract Dispute constituted a breach of KCI's duties under the Contract, and that KCI's breach caused the Railroad to fail to meet its own regulatory obligation to the United States with respect to its DBE obligations, thereby causing harm to the federal DBE program.

H. Under the Contract, KCI agreed to indemnify and hold harmless the Railroad "from any and all claims or judgments for damages and from costs and expenses to which the Railroad may be subjected or which it may suffer or incur by reason of the Contractor's failure to promptly comply with the Railroad's directions."

I. Accordingly, it is the United States' contention that KCI bears ultimate responsibility for any harm to the federal DBE program arising out of the failure to meet the DBE goals and obligations as required in the Contract.

J. KCI denies the United States' contentions and maintains that it met the Contract's DBE goals, as directed by the Railroad. Kiewit contends that Iron Eagle performed a commercially useful function on all aspects of its obligations under the DBE Subcontract. KCI also contends that it demonstrated good faith efforts to comply with its obligations under the Contract.

K. This Agreement is made in compromise of disputed claims and is neither an admission of liability by KCI nor a concession by the United States that its claims are not well founded. KCI expressly denies the allegations of the United States as set forth herein. Neither this Agreement, its execution, nor the performance of any obligations under it, including any payments, nor the fact of the settlement is intended to be, or shall be understood as, an acknowledgment of responsibility, or admission of liability or wrongdoing by KCI.

L. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. The Recitals to this Agreement are hereby incorporated by reference into this Agreement as if fully set forth herein.

2. In connection with and to resolve the Contract Dispute conduct, KCI shall pay to the United States a total of One Million, Eight Hundred and Seventy Thousand Dollars ($1,870,000) (the "Settlement Amount") and interest on the Settlement Amount at a rate of 2% per annum, calculated from 45 days after this Agreement is fully executed until payment in full, to compensate for any harm to the federal DBE program by electronic funds transfer pursuant to written instructions to be provided by the Office of the United States Attorney

for the District of New Jersey. In the event that KCI fails to pay the Settlement Amount in the manner and within the time frame described above, the United States may declare KCI to be in default, and may take any necessary action to enforce the terms of this agreement. If the United States is required to take legal action to collect the full Settlement Amount under this Agreement, KCI shall pay to the United States all reasonable costs and fees associated with enforcing this Agreement.

3. Subject to the exceptions in Paragraph 3 (concerning excluded claims) below, and conditioned upon KCI's full payment of the Settlement Amount, the United States releases KCI, together with each of its current and former direct and indirect parent corporations; direct and indirect subsidiaries; brother or sister corporations; divisions and affiliates; current or former corporate owners; and any corporate successors and assigns (the "Corporate Released Parties"), from any civil or administrative monetary claim the United States has or may have for the conduct constituting the Contract Dispute under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109; the Byrd Amendment, 31 U.S.C. § 1352; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; or any other statute creating causes of action for civil damages or civil penalties that the United States Department of Justice has actual and present authority to assert and compromise pursuant to 28 C.F.R. Part O, Subpart I, § 0.45(d)(1999), and the common law theories of breach of contract, payment by mistake, unjust enrichment, and fraud.

4. Notwithstanding the release given in Paragraph 2 of this Agreement, or any other term of this Agreement, the following claims of the United States are specifically reserved and are not released:

a. Any civil, criminal, or administrative liability arising under Title 26, U.S. Code (Internal Revenue Code);

b. Any criminal liability;

c. Except as explicitly stated in this Agreement, any administrative action or liability, including the suspension and debarment rights of any federal agency;

d. Any liability to the United States (or its agencies) for any conduct other than the conduct constituting the Contract Dispute;

e. Any liability based upon obligations created by this Agreement;

f. Any liability of individuals;

g. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services, except to the extent of the Contract Dispute;

h. Any liability for failure to deliver goods or services due, except to the extent of the Contract Dispute; and

i. Any liability for personal injury or property damage or for other consequential damages arising from the Contract Dispute.

5. KCI waives and shall not assert any defenses KCI may have to any criminal prosecution or administrative action relating to the Contract Dispute that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action. Nothing in this paragraph or any other provision of this Agreement constitutes an agreement by the United States concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

6. KCI fully and finally releases the United States, its agencies, officers, agents, employees, and servants (together with the Corporate Released Parties, the "Releasees"), from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that KCI has asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, agents, employees, and servants, related to the Contract Dispute, including the United States' investigation, prosecution, or settlement thereof, provided that the United States adheres to the terms of this Agreement.

7. a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47) incurred by or on behalf of KCI, and their present or former officers, directors, employees, shareholders, and agents in connection with:

(1) the matters covered by this Agreement;

(2) the United States' audit(s) and civil investigation(s) of the matters covered by this Agreement;

(3) KCI's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil and any criminal investigation(s) in connection with the matters covered by this Agreement (including attorney's fees);

(4) the negotiation and performance of this Agreement;

(5) the payment KCI makes to the United States pursuant to this Agreement,

are unallowable costs for government contracting purposes (hereinafter referred to as Unallowable Costs).

b. Future Treatment of Unallowable Costs: Unallowable Costs will be separately determined and accounted for by KCI, and KCI shall not charge such

Unallowable Costs directly or indirectly to any contract with the United States or seek payment for such unallowable costs through any cost report, cost statement, information statement, or payment request submitted by KCI or any of its subsidiaries or affiliates to the United States.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 days of the Effective Date of this Agreement, KCI shall identify and repay any Unallowable Costs included in payments previously sought by KCI or any of their subsidiaries or affiliates from the United States. KCI agrees that the United States, at a minimum, shall be entitled to recoup from Defendants any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine KCI's books and records and to disagree with any calculations submitted by KCI or any of their subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by KCI, or the effect of any such Unallowable Costs on the amount of such payments. Nothing in this Agreement shall constitute a waiver of the rights of the United States to examine or reexamine the unallowable costs referenced in this Paragraph.

8. This Agreement is intended to be for the benefit of the Parties and the Releasees only.

9. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

10. Each party and signatory to this Agreement represents that it freely and voluntarily enters in to this Agreement without any degree of duress or compulsion.

11. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the District of New Jersey. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

12. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

13. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

14. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

15. This Agreement is binding on KCI's successors, transferees, heirs, and

assigns.

16. All parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public.

17. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

18. The illegality or unenforceability of any non-dependent provision, or any part of any non-dependent provision, of this Agreement shall not affect or impair the validity, legality, or enforceability of any other non-dependent provision or any part of any non-dependent provision herein.

UNITED STATES OF AMERICA:

CRAIG CARPENITO
United States Attorney

By: ______________________ Dated: November 1, 2018

Mark C. Orlowski
U.S. Attorney's Office for the
District of New Jersey
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Newark, New Jersey 07102
Counsel for the United States of America

FOR KIEWIT CONSTRUCTORS, INC.

By: ______________________ Dated: November 1, 2018

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