

PORT OF SEATTLE
MEMORANDUM

COMMISSION AGENDA
ACTION ITEM

Item No.	<u>4e</u>
Date of Meeting	<u>August 19, 2014</u>

DATE: August 11, 2014

TO: Tay Yoshitani, Chief Executive Officer

FROM: Craig Watson, General Counsel
Soojin Kim, Senior Port Counsel

SUBJECT: 2014 Duty to Defend Settlement Agreement and Partial Release between the Port of Seattle and Great American Insurance Company and Great American Insurance Company of New York (“Great American Companies”)

Settlement amount: \$1,500,000.00 payable to the Port of Seattle within 45 days after Agreement’s Effective Date.

Subject of settlement: Settle the Port’s claims relating to certain categories of environmental response costs incurred by the Port from 1997 through 2012, which the Port claims Great American is obligated to pay pursuant to its duty to defend under liability policies it issued to the Port and which Great American contends it has no obligation to pay.

ACTION REQUESTED

Request Commission authorization for the Chief Executive Officer to execute the proposed 2014 Duty to Defend Settlement Agreement and Partial Release between the Port of Seattle and Great American Insurance Company and Great American Insurance Company of New York.

SYNOPSIS

The Port Commission is being asked to approve a proposed partial settlement agreement and release between the Port and one of its liability insurers, Great American Insurance Company, relating to certain environmental response costs incurred by the Port from 1997 through 2012, which the Port claims Great American is obligated to pay pursuant to its duty to defend under the liability policies it issued to the Port, and which Great American contends it has no obligation to pay. The proposed agreement provides that Great American will pay \$1,500,000 to the Port to fully and finally settle claims relating to the certain categories of costs incurred through 2012; this \$1,500,000 will be payable within 45 days after the second party to sign the agreement has signed it (“Effective Date”).

The proposed partial settlement agreement and release is attached and is titled “2014 Duty to Defend Settlement Agreement and Partial Release between the Port of Seattle and Great American Insurance Company and Great American Insurance Company of New York (“Great American Companies”). As enumerated in paragraph II.E. of the Agreement, the categories

COMMISSION AGENDA

Tay Yoshitani, Chief Executive Officer

July 25, 2014

Page 2 of 3

include invoices for which the specific work done cannot be determined, Port overhead and employee costs, costs billed by mistake, some legal expense, and interest. The specific claims being released are described with particularity in Attachments 1 through 9 to the Agreement. The Port is settling only its claim for those costs itemized on Attachments 1 through 9. The Port is reserving all other claims, including claims for costs incurred from 1997 through 2012 that are not listed in the attachments to the Agreement. Attachments 1 through 9 (constituting several hundred pages are also attached).

BACKGROUND, KEY DETAILS AND JUSTIFICATION

Counsel for the Port recommends that the proposed partial settlement and release be approved. The settlement eliminates the need for future attorney fees and potential litigation expense relating to categories of costs for which there is a genuine coverage dispute between the Port and its insurer. In exchange for a substantial cash payment now, the Port resolves the uncertainty regarding whether it is entitled to reimbursement for the disputed claims. The partial settlement also significantly narrows the remaining areas of dispute between the Port and its insurer, and permits the parties to focus their future efforts on those remaining disputes, without the distraction of the claims being settled now.

The Port has tendered numerous claims/demands to Great American under insurance policies issued over the years (dating back to the 1960s) for payment of defense costs. These defense costs have been incurred because of claims and notices asserted against the Port by the U.S. Environmental Protection Agency (EPA) and other agencies. These agencies have asserted claims against the Port because of alleged contamination of land, groundwater and sediments at or adjacent to certain sites such as East Waterway and West Waterway (cleanup claims), Terminal 91, Elliott Bay/Duwamish River (natural resource damage claim), and Lower Duwamish Waterway (cleanup claims).

The Port's liability arises from alleged property damage, cleanup, and remediation arising out of the Port's alleged acts, omissions and liability as a generator, disposer, manufacturer, distributor, transporter, lessor, lessee, or owner of real property. Great American issued insurance policies to the Port providing general liability coverage. Under these policies, we believe Great American owes to the Port a duty to defend the Port.

The Port and Great American entered into a Duty to Defend Settlement Agreement and Partial Release on February 12, 1997 (1997 Agreement) resolving certain defense obligations. In the 1997 Agreement, Great American agreed to pay certain past incurred defense costs (incurred prior to 1997 Agreement). In the 1997 Agreement, Great American also agreed to pay certain defense costs to be incurred after February 12, 1997 - subject to a reservation of the right to challenge all claimed defense costs for reasonableness, necessity, characterization as defense or indemnity costs and relationship to defense of environmental actions. Following the 1997 Agreement, Port submitted claims for defense costs incurred since that Agreement; Great American has been disputing payment of some of those costs, but is willing to settle certain

COMMISSION AGENDA

Tay Yoshitani, Chief Executive Officer

July 25, 2014

Page 3 of 3

categories of these disputed costs and pay the Port \$1.4 Million this year in consideration for a release.

This proposed 2014 Agreement would settle certain costs claimed by the Port for defense work performed on or before December 31, 2012. GAIC and the Port are reserving rights in the following/not settling: GAIC's duty to defend the Port with respect to costs for work performed after December 31, 2012; GAIC's duty to defend the Port with respect to certain costs that are outside the categories referenced in the 2014 Agreement - even if cost was for work performed before January 1, 2013; the Port's claims for indemnity.

The 2014 Agreement includes a release in consideration of the \$1.5 Million to be paid by GAIC this year. The release would cover all claims under insurance policies issued to the Port for "Certain Past Incurred Defense Costs" (as defined in the 2014 Agreement) and claims arising out of the alleged previous refusal by GAIC to accept and pay for such costs.

ALTERNATIVES AND IMPLICATIONS CONSIDERED

Alternatives and implications have been considered as discussed in attorney-client privileged communications.

ATTACHMENTS TO THIS REQUEST

- 2014 Duty to Defend Settlement Agreement and Partial Release and its Exhibits A and B.
- Attachment 1: GAIC Indeterminate 1997-2012 – summary, spreadsheets (47 pp).
- Attachment 2: Employee time 1997-2012 – summary, spreadsheets (297 pp).
- Attachment 3: Overhead 1997-2012 – summary, spreadsheets (53 pp).
- Attachment 4: Legal overage (defense counsel) 1997-2012 – summary, spreadsheets (10 pp).
- Attachment 5: Other sites 1997-2012 – summary, spreadsheets (4 pp).
- Attachment 6: Past due/Dupe billing 1997-2012 – summary, spreadsheets (4 pp).
- Attachment 7: Interest 1997-2012 – summary, spreadsheets (4 pp).
- Attachment 8: Paid vendor charges 1997-2012 – summary, spreadsheets (4 pp)
- Attachment 9: Gradient Indeterminate 1997-2012 – summary, spreadsheets (27 pp).

PREVIOUS COMMISSION ACTIONS OR BRIEFINGS

- None.