

**PORT OF SEATTLE**  
**MEMORANDUM**

**COMMISSION AGENDA**

Item No. 4e

**ACTION ITEM**

**Date of Meeting** October 27, 2015

**DATE:** October 20, 2015  
**TO:** Ted Fick, Chief Executive Officer  
**FROM:** Craig Watson, General Counsel  
**SUBJECT:** 2015 Addendum Agreement to 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 (GAIC)

**ACTION REQUESTED**

Request Commission authorization for the Chief Executive Officer to execute the proposed 2015 Addendum Agreement to the 2014 Duty to Defend Settlement Agreement and Partial Release between the Port of Seattle and GAIC.

**SYNOPSIS**

The Port Commission is being asked to approve a proposed settlement agreement and release between the Port and one of its liability insurers, GAIC, relating to certain environmental response costs incurred by the Port from 2013 through 2014, which the Port claims GAIC is obligated to pay pursuant to its duty to defend under the liability policies it issued to the Port, and which GAIC contends it has no obligation to pay. The proposed agreement will be incorporated as an addendum to the 2014 Agreement and provides that GAIC will pay \$350,000 to the Port to fully and finally settle claims relating to the certain categories of costs incurred from January 2013 through December 2014; this \$350,000 will be payable within 45 days after the second party to sign the agreement has signed it ("Effective Date").

The proposed settlement agreement and release is attached and is titled "Addendum to 2014 Duty to Defend Settlement Agreement and Partial Release." As enumerated in paragraph IV.B. of the Agreement, the categories include invoices for which GAIC contends the specific work done cannot be determined ("GAIC Indeterminate"), Port overhead and employee costs, legal expense that GAIC has refused to pay because it exceeds the insurer's billable rate caps, and interest and taxes. The specific amounts being released are described with particularity in Attachments to the Agreement. The Port is settling only its claim for those costs itemized on the Attachments. The Port is reserving all other claims.

## **BACKGROUND, KEY DETAILS AND JUSTIFICATION**

Counsel for the Port recommends that the proposed 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 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 and demands for payment of defense costs to GAIC under insurance policies issued from the 1960s into the 1980s. 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. The 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 out of the Port's alleged acts, omissions and liability as a generator, disposer, manufacturer, distributor, transporter, lessor, lessee, or (primarily) owner of contaminated real property. GAIC issued insurance policies to the Port providing general liability coverage. Under these policies, we believe GAIC owes to the Port a duty to defend the Port.

The Port and GAIC 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, GAIC agreed to pay certain past incurred defense costs (incurred prior to 1997 Agreement). In the 1997 Agreement, GAIC 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; GAIC disputed payment of some of those costs.

In July 2014, the Port entered into a 2014 Duty to Defend Settlement Agreement and Partial Release resolving certain defense costs incurred after the 1997 Agreement but on or before December 31, 2012. GAIC agreed to pay the Port \$1.4 million in exchange for a release of "Certain Past Incurred Defense Costs" (as defined in the 2014 Agreement) and claims for GAIC's alleged previous refusal to accept and pay for such costs. GAIC and the Port expressly reserved, among other things, the right to litigate GAIC's duty to defend the Port with respect to costs for work performed after December 31, 2012.

The proposed Addendum Agreement includes a partial release in consideration of the \$350,000 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 2015 Addendum

Agreement) and claims arising out of the alleged refusal by GAIC to accept and pay for the specified categories of costs. The Addendum preserves the Port's right to pursue the following claims: GAIC's duty to defend the Port with respect to all defense costs incurred after December 31, 2014; GAIC's duty to defend the Port with respect to costs that are outside the specific categories of costs referenced in the 2014 Agreement or the 2015 Addendum Agreement - even if cost was for work performed before January 1, 2015; and the Port's claims for indemnity.

### **ALTERNATIVES AND IMPLICATIONS CONSIDERED**

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

### **ATTACHMENTS TO THIS REQUEST**

- Addendum to 2014 Duty to Defend Settlement Agreement and Partial Release.
- Attachment 1: GAIC Indeterminate 2013-2014 - summary, spreadsheets.
- Attachment 2: Employee time 2013-2014 - summary, spreadsheets.
- Attachment 3: Overhead 2013-2014 - summary, spreadsheets.
- Attachment 4: Legal overage (defense counsel) 2013-2014 - summary, spreadsheets.

### **PREVIOUS COMMISSION ACTIONS OR BRIEFINGS**

On August 19, 2014, the Port Commission authorized the CEO to execute the 2014 Duty to Defend Settlement Agreement and Partial Release.