



**COMMISSION
AGENDA MEMORANDUM**

Item No. 6e

ACTION ITEM

Date of Meeting May 22, 2018

DATE: May 4, 2018

TO: Stephen P. Metruck, Executive Director

FROM: Elizabeth Black, Senior Port Counsel

SUBJECT: Insurance Settlement between the Port of Seattle and Great American Insurance Company for Defense Costs Related to Environmental Investigation and Cleanup

Amount of this request: N/A

Total estimated project cost: N/A

Amount of settlement: \$5,146,167.84

ACTION REQUESTED

Request Commission authorization for the Executive Director to execute a proposed settlement agreement with Great American Insurance Company to resolve remaining claims relating to defense costs for environmental investigation and cleanup incurred through December 31, 2014.

EXECUTIVE SUMMARY

The Port has commercial general liability (CGL) insurance coverage from Great American Insurance Company and Great American Insurance Company of New York (collectively, GAIC) dating back to the 1960s. The Port Commission is being asked to approve a proposed settlement agreement and release between GAIC relating to certain environmental response costs incurred by the Port 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. The GAIC policies provide coverage for certain defense and indemnity costs related to the Port's ongoing environmental investigation and cleanup activities. GAIC has disputed whether certain costs are subject to reimbursement under its duty to defend; this settlement resolves that dispute for defense costs incurred through December 31, 2014. GAIC will pay the Port \$5,146,167.84 within 45 days after execution of the agreement.

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

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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, GAIC owes a duty to defend to the Port.

Great American has paid approximately \$11,262,650 for claimed non-attorney defense costs through 2016 that were not disputed by the insurer. Great American also paid the Port's attorney fee defense costs through that time period in the amount of \$6,753,797. Other defense expenditures have been disputed by Great American, either because the insurer contends the costs are not covered or because if covered the insurer contends the expenditure constitute indemnity rather than defense costs. With this settlement, all remaining disputes regarding the Port's defense cost claims through 2014 will be resolved.

Some of the disputed cost claims have already been settled. 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, the 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.

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In October 2015, the Port entered into an Addendum to the 2014 Duty to Defend agreement with GAIC that included a partial release in exchange for \$350,000 incurred during 2014 and paid by GAIC in 2015. Subsequent similar Addenda were entered into in 2016 (\$142,000 for certain 2015 costs) and 2017 (\$119,000 for certain 2016 costs). These Addenda preserved the Port's right to pursue the following claims: GAIC's duty to defend the Port with respect to all defense costs that are outside the specific categories of costs referenced in the agreements, even if cost was for work performed before January 1, 2015; and the Port's claims for indemnity. The settlement agreement now proposed resolves GAIC's duty to defend with respect to all costs incurred prior to December 31, 2014. Disputes regarding costs incurred after that date and with regard to indemnity costs will be resolved at a later date.

The proposed settlement agreement is attached to this memo. The settlement provides an amicable resolution of a matter that could otherwise be subject to lengthy and costly litigation. Commission approval of the settlement is required because the amount of the settlement is greater than \$300,000.

ALTERNATIVES AND IMPLICATIONS CONSIDERED

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

ATTACHMENTS TO THIS REQUEST

- (1) Proposed Settlement Agreement

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.

On October 27, 2015, the Port Commission authorized the CEO to execute the 2015 Addendum to the 2014 Duty to Defend Settlement Agreement and Partial Release.