

**CITY OF LA VISTA  
MAYOR AND CITY COUNCIL REPORT  
SEPTEMBER 3, 2024 AGENDA**

<b>Subject:</b>	<b>Type:</b>	<b>Submitted By:</b>
RELEASE AND SETTLEMENT AGREEMENT – THE LINK	◆ RESOLUTION ORDINANCE RECEIVE/FILE	PAT DOWSE CITY ENGINEER

**SYNOPSIS**

A resolution has been prepared to approve a Release and Settlement Agreement for the “City of La Vista Central Park Pavilion and Site improvements” project also known as the Link as to settle a previously disputed amount by the City for certain items of work with an overall cost increase of \$750,000 for a total contract amount not to exceed \$17,391,774.

**FISCAL IMPACT**

The FY23/FY24 Biennial Budget provides funding for this project.

**RECOMMENDATION**

Approval.

**BACKGROUND**

On October 8, 2021, Council approved an Agreement with JE Dunn Construction to act as Construction Manager for the aforementioned project. On March 15, 2022 Council approved Amendment No. 1 setting a guaranteed maximum price of \$15,955,803. On June 6, 2023 a change order was approved by Council increasing the contract price to \$16,641,774.

At that time Council was also informed there were unresolved issues regarding the costs of certain items of work which were being disputed by the City. JE Dunn requested a change order in the amount of \$1,212,188 and over the course of the last year negotiations between the City and JE Dunn have resulted in the proposed settlement agreement in the amount of \$750,000 for the unresolved costs.

A final pay application request which includes the settlement agreement amount of \$750,000, as well as the outstanding retainage the City has been holding in the amount of \$200,209 has been submitted and is being recommended for approval. Total final project cost is \$17,391,774.

The Release and Settlement Agreement, Paragraph 5, addresses the Final Pay Application, which is also included on this Council agenda. Upon approval of the Release and Settlement Agreement, staff recommends the Final Pay Application (Pay Application #19) also be approved.

**RESOLUTION NO. \_\_\_\_\_**

A RESOLUTION OF THE MAYOR AND CITY COUNCIL OF THE CITY OF LA VISTA, NEBRASKA AUTHORIZING THE RELEASE AND SETTLEMENT AGREEMENT FOR THE LINK TO SETTLE A PREVIOUSLY DISPUTED AMOUNT FOR CERTAIN ITEMS OF WORK WITH AN OVERALL COST INCREASE OF \$750,000 FOR A TOTAL CONTRACT AMOUNT NOT TO EXCEED \$17,391,774.

WHEREAS, the City Council of the City of La Vista has determined that the release and settlement agreement for The Link is necessary; and

WHEREAS, the FY23/FY24 Biennial Budget provides funding for this project; and

WHEREAS Subsection (C) (9) of Section 31.23 of the La Vista Municipal Code requires that the City Administrator secures Council approval prior to authorizing any purchase over \$5,000.00.

NOW, THEREFORE, BE IT RESOLVED, that the Mayor and City Council of La Vista, Nebraska authorize the release and settlement agreement for The Link to settle a previously disputed amount for certain items of work with an overall cost increase of \$750,000 for a total contract amount not to exceed \$17,391,774.

PASSED AND APPROVED THIS 3RD DAY OF SEPTEMBER 2024.

CITY OF LA VISTA

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Douglas Kindig, Mayor

ATTEST:

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Pamela A. Buethe, MMC  
City Clerk

## **RELEASE AND SETTLEMENT AGREEMENT**

This Release and Settlement Agreement (“Agreement”) is entered into by and between the City of La Vista, Nebraska (“City”) and J. E. Dunn Construction Company (“Construction Manager”). City and Construction Manager may be collectively referred to herein as the “Parties” and each individually as a “Party.”

### **RECITALS**

A. City and Construction Manager previously entered into a contract for construction of the Central Park Pavilion and Site Improvements, 9302 City Centre Drive, La Vista, Nebraska (the “Project”), pursuant to AIA Document A133-2019, Standard Form of Agreement Between Owner and Construction Manager as Constructor, dated October 8, 2021, as amended by an Amendment No. 1 to the Agreement Between Owner and Construction Manager – Guaranteed Maximum Price Amendment dated March 15, 2022 (“Amendment No. 1”), and further amended by Change Order No. OWNER001 approved June 6, 2023 (collectively, the “Construction Contract”);

B. The Construction Contract included certain provisions requiring Construction Manager to perform work contained within the outlined scope of the Project for a guaranteed maximum price of \$16,641,774.00, as initially provided in Amendment No. 1 and amended by Change Order No. OWNER001 (the “Amended Guaranteed Maximum Price”). The Construction Contract also included certain provisions designating specific allowances and assumptions for the Project;

C. A dispute arose between City and Construction Manager concerning the portion, if any, of certain costs totaling \$1,212,188.00 (the “Disputed Amount”) incurred by Construction Manager during the course of the Project to be included in the final payment by the City to the Construction Manager; specifically whether or not such costs were included within the allowances, assumptions, outlined scope of the Project, Contract Sum and Amended Guaranteed Maximum Price, and whether or not such costs must be paid by City in addition to the balance remaining on the Amended Guaranteed Maximum Price (the “Dispute”); and

D. City and Construction Manager desire to resolve, settle and release all claims concerning the Disputed Amount, Dispute, balance remaining to be paid by City to Construction Manager and final payment under the Construction Contract.

### **AGREEMENT**

NOW, THEREFORE, in consideration of the mutual promises and obligations set forth in this agreement, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Approval by Council and Mayor. The Parties acknowledge and agree this Agreement shall be subject to approval of the City Council at a public meeting in accordance with the requirements of Nebraska Statutes including, without limitation, NEB. REV. STAT. § 84-713, and execution by both Parties, and shall not be valid and binding unless and until so approved and executed.

2. Settlement Amount. The Parties agree that the City shall pay Construction Manager the sum of seven hundred fifty thousand dollars (\$750,000.00) ("Settlement Amount") in settlement of the Disputed Amount and the Dispute, all subject to the terms and conditions of this Agreement.

3. Amendment of Contract. This Agreement shall constitute an amendment to the Construction Contract increasing the Contract Sum, as that term is defined in the Construction Contract, by the sum of seven hundred fifty-thousand dollars (\$750,000.00) which shall result in the final Contract Sum being equal to seventeen million three hundred ninety-one thousand seven hundred seventy four dollars (\$17,391,774.00).

4. Waiver of Audit. City hereby waives an audit of the Construction Manager's final accounting in connection with the Settlement Amount pursuant to section 11.2.2 of the Construction Contract and this Agreement shall serve as notice to the Architect of such waiver.

5. Payment to Construction Manager. Within thirty (30) days following: (a) approval of this Agreement as set forth in paragraph 1 above along with City Council approval of the Final Application and Certificate for Payment, (b) execution of this Agreement by the Parties, (c) Construction Manager providing to City a final accounting and other required submissions, including lien waivers, set forth in section 11.2.1 of the Construction Contract, City shall pay to Construction Manager the sum of nine hundred fifty thousand and two hundred and nine dollars (\$950,209.00), consisting of seven hundred fifty thousand dollars (\$750,000.00) for the Settlement Amount and two hundred thousand and two hundred and nine dollars (\$200,209.00) for the Project's withheld retainage and prior balance, as the final payment and full and final satisfaction of all amounts due or owing or alleged to be due or owing from City to Construction Manager pursuant to the Construction Contract, which shall specifically include without limitation the full Contract Sum, the Cost of the Work and the Construction Manager's Fee as those terms are defined in the Construction Contract, and all other costs or expenses incurred by or at the direction of Construction Manager in connection with the Work, the Project, the Disputed Amount, or the Dispute. Payment shall be made payable to Construction Manager and delivered to its counsel, Brent Meyer, Husch Blackwell, 14606 Branch Street, Suite 200, Omaha, NE 68154.

6. Release of Liability. Each Party hereby releases and hold harmless the other Party and, as applicable, such other Party's directors, officers, employees, elected officials, attorneys, agents and assigns (together referred to as "Related Parties"), and each of them, from and against all liabilities, losses, claims, costs, expenses, and damages of every kind, including without limitation attorney fees and court costs, arising out of or relating to the Dispute, the Disputed Amount, any balance remaining to be paid by City to Construction Manager or final payment under the Construction Contract, including all past, present, and future liabilities, losses, claims, costs, expenses and damages, whether or not currently known, anticipated, or existing. The Parties acknowledge the Dispute, the Disputed Amount, any balance remaining to be paid by City to Construction Manager and final payment under the Construction Contract are the subjects of this Agreement and matters at issue, settled and released pursuant to this Agreement. Except as expressly provided in this Agreement, all rights and obligations of the Parties under the Construction Contract shall remain in full force and effect, including but not

limited to the right of City to assert any claims in connection with any latent defects, breach of warranties, or other similar claims pursuant to the Construction Contract.

7. Bar to Actions. The Parties agree that all claims or causes of action, whether known or unknown, by any Party or anyone on a Party's behalf, arising out of or relating to the Dispute, the Disputed Amount, final payment or any balance remaining to be paid by City to Construction Manager under the Construction Contract shall be forever barred and, if already pending, shall be dismissed with prejudice.

8. Indemnification and Hold Harmless. Construction Manager agrees that all subcontractor claims for payment, liens, or other derivative claims related to lack of payment of any kind (together "Third Party Claims"), whether known or unknown, which in any way relate to the Dispute, shall be paid by Construction Manager out of the payment made pursuant to this Agreement and Construction Manager agrees to defend, indemnify, and hold harmless the City and any Related Parties, as more fully set forth in paragraph 6 above, and each of them, from and against all such Third Party Claims, including without limitation all costs, expenses, and attorneys' fees.

9. No Admissions. Nothing in this Agreement shall be deemed to make, nor shall the negotiation, execution, or performance of this Agreement constitute, any representations, admissions, or concessions concerning any liability or wrongdoing on the part of any of the Parties or concerning the extent and nature of the losses, expenses, or damages allegedly sustained by any of the Parties. Any such liability, wrongdoing, or damage is expressly denied.

10. Mistake of Fact or Law. Each Party acknowledges it has not relied on any representations of the other Party in entering into this Agreement, and this Agreement shall be binding even if a Party should discover that any fact it relied upon in entering this Agreement is not true, or that its understanding of the facts or law was incorrect.

11. Entire Agreement. This Agreement constitutes the entire agreement among the Parties concerning the Dispute, the Disputed Amount, any final payment or balance remaining to be paid by City to Construction Manager under the Construction Contract, provided, however, except as expressly provided by this Agreement, all rights and obligations of the Parties under the Construction Contract shall remain in full force and effect, including but not limited to the right of City to assert any claims in connection with any latent defects, breach of warranties, or other similar claims pursuant to the Construction Contract. The terms of this Agreement are contractual and not mere recitals.

12. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Nebraska.

13. Counterparts. This Agreement may be executed in one or more counterparts and exchanged by paper or electronic transmission, each such counterpart to be deemed an original, but all of which together shall constitute one and the same agreement.

BY SIGNING BELOW, EACH PARTY WARRANTS THAT IT HAS READ THIS AGREEMENT, DISCUSSED IT WITH LEGAL COUNSEL, FULLY UNDERSTANDS ITS TERMS, FREELY AND VOLUNTARILY SIGNS IT, AND HAS FULL ACTUAL AUTHORITY TO DO SO.

Effective as of the latest date below.

CITY OF LA VISTA, NEBRASKA

J. E. DUNN CONSTRUCTION COMPANY

By: \_\_\_\_\_  
Douglas Kindig, Mayor

By: \_\_\_\_\_  
Chris Pesek, Senior Vice President

Date: \_\_\_\_\_

Date: \_\_\_\_\_

ATTEST:

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Pamela A. Buethe, MMC  
City Clerk

Date: \_\_\_\_\_

# APPLICATION AND CERTIFICATE FOR PAYMENT

Page: 1 of 3

TO OWNER: CITY OF LA VISTA NE  
8116 PARK VIEW BLVD  
LA VISTA, NE 68128

PROJECT: Central Park Pavilion and Site Improvements  
8116 PARK VIEW BLVD  
LA VISTA, NE 68128

APPLICATION NO : 18

Distribution to:

FROM CONTRACTOR: J.E. Dunn Construction Company  
1001 Locust St  
Kansas City, MO 64106

ARCHITECT: Bruce Niedermeyer  
301 GRAND AVE  
DES MOINES, IA 50309

PERIOD TO : 08-30-2024  
PROJECT NOS.: 21046300  
INVOICE NO.: 21046300019

OWNER  
 ARCHITECT  
 CONTRACTOR

CONTRACT DATE : 05-10-2022

CONTRACT FOR: Central Park Pavilion and Site Improvements

## APPLICATION AND CERTIFICATE FOR PAYMENT

Application is made for payment, as shown below, in connection with the Contract. Continuation sheet is attached.

1. ORIGINAL CONTRACT SUM .....	\$ 15,955,803
2. Net change by change orders .....	\$ 1,435,971
3. CONTRACT SUM TO DATE (Line 1 +/- 2) .....	\$ 17,391,774
4. TOTAL COMPLETED & STORED TO DATE ....	\$ 17,391,774

(Column G on G703)

### 5. RETAINAGE:

(Total retainage Column I of G703) .....	\$ 0
6. TOTAL EARNED LESS RETAINAGE .....	\$ 17,391,774

(Line 4 less Line 5 Total)

### 7. LESS PREVIOUS CERTIFICATES FOR PAYMENT

(Line 6 from prior Certificate) .....	\$ 16,441,565
8. CURRENT PAYMENT DUE .....	\$ 950,209

### 9. BALANCE TO FINISH, INCLUDING RETAINAGE

(Line 3 less Line 6) .....	\$ 0
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The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief the work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for payment were issued and payments received from the Owner, and that current payment shown herein is now due.

**WARNING: DO NOT CHANGE ESTABLISHED PAYMENT INSTRUCTIONS FOR PAYMENTS TO J.E. DUNN CONSTRUCTION COMPANY.** J.E. Dunn Construction Company does not change its bank routing or account numbers. Do not accept or rely upon emails or correspondence requesting changes to J.E. Dunn Construction Company's established payment instructions. Any change to J.E. Dunn Construction Company's payment instructions can only be made by a fully executed Change Order to the Agreement between Owner and J.E. Dunn Construction Company.

Contractor: J.E. Dunn Construction Company

By:

Date:

8/27/24

State of:

Nebraska

County of:

Douglas

Subscribed and sworn to before

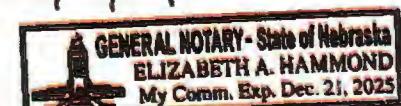
me this

27<sup>th</sup> day of August 2024

Notary Public:

My Commission expires:

12/21/2025



## ARCHITECT'S CERTIFICATE FOR PAYMENT

In accordance with the Contract Documents, based on on-site observations and the data comprising the above application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated, the quality of Work is in accordance with the Contract Documents, and the Contractor is entitled to the payment of the AMOUNT CERTIFIED.

AMOUNT CERTIFIED.....\$ 950,209

*Pay This Amount*

(Attach explanation if amount certified differs from the amount applied for. Initial figures on this Application and on the Continuation Sheet that are changed to conform to the amount certified.)

ARCHITECT: Bruce Niedermeyer

By:

Date: 8/28/2024

This Certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the Contractor named herein. Issuance, payment and acceptance of payment are without prejudice to any rights of the Owner or Contractor under this Contract.

*PAYMENT CONTINGENT UPON APPROVAL OF RELEASE & SETTLEMENT  
AGREEMENT WITH J.E. Dunn - PMO 8/28/24  
16.71.0917.000 - PARK 18001*

AIA DOCUMENT G702 - APPLICATION AND CERTIFICATE FOR PAYMENT THE AMERICAN INSTITUTE OF ARCHITECTS 1735 NEW YORK AVENUE NW WASHINGTON DC 20006

J.E. Dunn Construction Company

CONTINUATION SHEET

AIA DOCUMENT G703

AIA DOCUMENT G702, APPLICATION AND CERTIFICATE FOR PAYMENT, containing  
Contractor's signed Certification is attached.  
In tabulation below, amounts are stated to the nearest dollar.  
Use Column I on Contracts where variable retainage for line items may apply.

Page: 2

APPLICATION NUMBER: 19

APPLICATION DATE: 08-27-2024

INVOICE NO.:

PERIOD TO: 08-30-2024

21046300019

PROJECT NO: 21046300

A ITEM NO.	B DESCRIPTION OF WORK	C			D		F MATERIAL PRESENTLY STORED	G TOTAL COMPLETED AND STORED TO DATE	H BALANCE TO FINISH	I RETAINAGE				
		SCHEDULED VALUE			WORK COMPLETED (D+E)									
		ORIGINAL	CHANGE ORDERS	CURRENT	FROM PREVIOUS APPLICATION	THIS PERIOD								
01	PRECONSTRUCTION	14,300	0	14,300	14,300	0	0	14,300	100	0				
		14,300	0	14,300	14,300	0	0	14,300	100	0				
02	GENERAL CONDITIONS	1,045,767	-173,746	872,022	867,440	4,581	0	872,022	100	0				
		1,045,767	-173,746	872,022	867,440	4,581	0	872,022	100	0				
03	PERMITS, BONDS, & INSURANCE	308,977	188,607	497,584	483,912	33,672	0	497,584	100	0				
		308,977	188,607	497,584	483,912	33,672	0	497,584	100	0				
04	DIRECT COSTS													
02330	Earthwork	337,026	102,911	439,937	522,971	-83,034	0	439,937	100	0				
02455	Pipe Piles	0	156,050	156,050	156,050	0	0	156,050	100	0				
02500	Site Utilities	679,094	170,981	850,075	841,837	8,237	0	850,075	100	0				
02790	Athletic Surfacing	96,311	-61,959	34,352	34,352	0	0	34,352	100	0				
02810	Lawn Sprinklers	62,140	151,909	214,049	211,416	2,634	0	214,049	100	0				
02815	Fountain Allowance	336,300	-336,300	0	0	0	0	0	0	0				
02833	Retaining Wall	339,000	6,000	345,000	345,000	0	0	345,000	100	0				
02900	Landscaping	135,400	85,203	220,603	210,950	9,653	0	220,603	100	0				
03330	CIP Concrete	3,540,656	2,451,388	5,992,044	5,256,728	735,315	0	5,992,044	100	0				
04210	Masonry	859,200	54,844	914,044	914,044	0	0	914,044	100	0				
05100	Structural Steel	616,500	29,438	845,938	845,938	0	0	845,938	100	0				
05700	Railings	677,665	-677,665	0	0	0	0	0	0	0				
06199	Rough Carpentry	159,565	-159,565	0	0	0	0	0	0	0				
06299	Finish Carpentry	37,037	-30,528	6,509	6,509	0	0	6,509	100	0				
07100	Waterproofing	74,384	214,911	289,295	227,683	61,612	0	289,295	100	0				
07410	Roofing	181,000	153,599	334,599	318,736	15,863	0	334,599	100	0				
074104	Metal Wall Panels	215,148	-60,188	154,960	154,960	0	0	154,960	100	0				
07460	Siding	27,096	-27,096	0	0	0	0	0	0	0				
07900	Joint Sealants	19,051	-19,051	0	0	0	0	0	0	0				
08110	Doors & Hardware	115,922	-10,322	105,600	105,600	0	0	105,600	100	0				
08330	Coiling Doors	25,718	-8,710	17,008	17,008	0	0	17,008	100	0				
08400	Glazing	135,180	52,090	187,270	184,570	2,700	0	187,270	100	0				
09250	Framing & Drywall	96,421	83,853	180,274	180,274	0	0	180,274	100	0				
09300	Flooring	83,180	-52,499	30,681	30,681	-1	0	30,681	100	0				
09900	Painting	98,705	-38,774	59,931	59,525	406	0	59,931	100	0				
10199	Specialties	27,636	62,762	90,398	90,398	0	0	90,398	100	0				

J.E. Dunn Construction Company

CONTINUATION SHEET

AIA DOCUMENT G703

AIA DOCUMENT G702, APPLICATION AND CERTIFICATE FOR PAYMENT, containing  
Contractor's signed Certification is attached.  
In tabulation below, amounts are stated to the nearest dollar.  
Use Column 1 on Contracts where variable retainage for line items may apply.

Page: 3

APPLICATION NUMBER: 19

APPLICATION DATE: 08-27-2024

INVOICE NO.:

PERIOD TO: 08-30-2024

21046300019

PROJECT NO: 21046300

A ITEM NO.	B DESCRIPTION OF WORK	C SCHEDULED VALUE			D E WORK COMPLETED (D+E)		F MATERIAL PRESENTLY STORED	G TOTAL COMPLETED AND STORED TO DATE	H BALANCE TO FINISH	I PER- %(G/C)
		ORIGINAL	CHANGE ORDERS	CURRENT	FROM PREVIOUS APPLICATION	THIS PERIOD				
10800	Site Furnishings	447,280	-144,387	302,893	286,517	16,376	0	302,893	100	0
11600	Food Service Equipment	504,142	-88,825	415,317	423,237	-7,920	0	415,317	100	0
12510	Boardwalk	390,947	-390,947	0	0	0	0	0	0	0
15400	Plumbing & HVAC	1,228,350	498,704	1,727,054	1,716,269	10,785	0	1,727,054	100	0
16000	Electrical	1,549,371	344,414	1,893,785	1,881,129	12,656	0	1,893,785	100	0
35000	Escalation Allowance	192,065	-192,065	0	0	0	0	0	0	0
	DIRECT COSTS Total:	13,287,490	2,320,176	15,607,666	14,822,402	785,263	0	15,607,666	100	0
05	CONTINGENCY	447,515	-482,242	-34,727	18,838	-53,565	0	-34,727	100	0
	CONTINGENCY Total:	447,515	-482,242	-34,727	18,838	-53,565	0	-34,727	100	0
06	FEE	389,566	45,364	434,930	404,672	30,258	0	434,930	100	0
	FEE Total:	389,566	45,364	434,930	404,672	30,258	0	434,930	100	0
	Total:	15,955,803	1,435,971	17,391,774	16,591,565	800,209	0	17,391,774	100	0
	Project Total:	15,955,803	1,435,971	17,391,774	16,591,565	800,209	0	17,391,774	100	0

AIA DOCUMENT G703 - APPLICATION AND CERTIFICATE FOR PAYMENT

THE AMERICAN INSTITUTE OF ARCHITECTS 1735 NEW YORK AVENUE NW WASHINGTON DC 20006