

1                                   **SETTLEMENT AND RELEASE AGREEMENT**

2   **BETWEEN**

3   **CITY OF FULLERTON**

4   **AND**

5   **FLATIRON WEST, INC.**

6  
7       This **SETTLEMENT AND RELEASE AGREEMENT** ("Release") is entered into by and between the City  
8       of Fullerton ("City") of 303 W. Commonwealth Avenue, Fullerton, CA 92832, and Flatiron West, Inc.  
9       (Flatiron) of 1771 La Costa Meadows Drive, San Marcos, CA 92078 (collectively the "Parties," and  
10      individually a "Party").

11               **WHEREAS**, the Parties entered into Agreement No. P-45890 (the "Agreement") under which  
12      Flatiron agreed to provide construction services (hereinafter, "Services") for City for the Raymond Avenue  
13      Grade Separation Project ("Project"), which is part of the Orange County Transportation Authority's OC  
14      Bridges program, with construction overseen by both OCTA and the City; and

15               **WHEREAS**, Flatiron has submitted Change Request 45 / Claim 19 Directional Boring Impacts to  
16      City alleging City was responsible for additional costs under the Agreement; and

17               **WHEREAS**, Flatiron has submitted Change Request 45 and 49 Acacia Avenue Unsuitable  
18      Material to City alleging City was responsible for additional costs under the Agreement; and

19               **WHEREAS**, Flatiron has submitted Change Request 122 BNSF Shoofly Unsuitable Material to  
20      City alleging City was responsible for additional costs under the Agreement; and

21               **WHEREAS**, Flatiron has submitted Change Request 435 Additional Construction Engineering  
22      Services to City alleging City was responsible for additional costs under the Agreement; and

23               **WHEREAS**, Flatiron has submitted Change Request 439 Night Shift Differential to City alleging  
24      City was responsible for additional costs under the Agreement; and

25               **WHEREAS**, Flatiron has submitted Change Request for Time Related Overhead for schedule  
26      impacts to City alleging City was responsible for additional costs under the Agreement; and

1           **WHEREAS**, Flatiron has submitted Change Request 441 Change in Character Work for  
2 Waterlines to City alleging City was responsible for additional costs under the Agreement; and

3           **WHEREAS**, Flatiron has submitted Change Request 444 Additional Quality Control Services to  
4 City alleging City was responsible for additional costs under the Agreement; and

5           **WHEREAS**, City has alleged Flatiron did not meet all contract requirements to support alleged  
6 additional costs; and

7           **WHEREAS**, the Parties have reached an agreement to compromise, settle, and resolve all  
8 issues, claims, change requests, demands, and disputes between the Parties arising out of or related to  
9 the amount of the final payment due to Flatiron for work under the Agreement and change orders  
10 (hereinafter the "Released Matters").

11           **NOW, THEREFORE**, in consideration of the foregoing, the mutual promises set forth herein and  
12 other good and valuable consideration, the receipt and sufficiency of which the Parties acknowledge, the  
13 Parties agree as follows:

14           **CITY's Obligations and Remedies**

15           1. City agrees, for the consideration, promises and covenants set forth herein that it shall:

16           A. Within 30 days of full execution of this Release execute Contract Change Orders (CCO)  
17 to reflect the agreed final Agreement amount of \$54,000,000.00, which includes additional CCOs  
18 that are not disputed, and shall be the amount, without any offsets, assessments or deduction  
19 that City shall pay to Flatiron for work on the Project, save for City's statutory obligations to  
20 withhold for future timely stop notices received before the release of funds pursuant to this  
21 Release.

22           B. The final Agreement amount, less payments already made to Flatiron, shall be paid to  
23 Flatiron by City no later than June 15, 2019.

24           **FLATIRON's Obligations**

25           2. FLATIRON agrees to release all present, future, known and unknown change requests and  
26 claims against City which relate to or arise from the Released Matters. Accordingly, it is the intent of

1 this Release that any and all present, future, known or unknown rights, claims, change requests,  
2 warranties, demands, debts, obligations, liabilities, actions, damages, costs, expenses or other claims  
3 on the part of Flatiron against City which relate to the final payment due to Flatiron for work under the  
4 Agreement are fully, finally and forever resolved.

5 Therefore, Flatiron does hereby release, acquit, and forever discharge the City, and their  
6 respective heirs, executors, administrators, successors, assigns, partners, officers, elected officials,  
7 appointed officials, agents, servants, shareholders, officers, employees and attorneys from any and  
8 all rights, claims, warranties, demands, debts, obligations, liabilities, actions, damages, costs,  
9 expenses and other claims whatsoever which it has or might have asserted against City by reason of  
10 any matter or thing occurring, done, created or happening, arising out of, or connected with the final  
11 payment due to Flatiron for work under the Agreement. Notwithstanding the foregoing, Flatiron reserves  
12 all defense, rights, and claims as to any future claim by the City or OCTA unrelated to the Released  
13 Matters.

14 Except for those obligations, and agreements identified in this Release as excluded from the  
15 Released Matters, and regarding the Released Matters only, Flatiron hereby waives and relinquishes any  
16 and all rights and benefits which it may have under, and which may be conferred upon it by, the provisions  
17 of Section 1542 of the California Civil Code, which provides as follows:

18 **“A general release does not extend to claims that the creditor or**  
19 **releasing party does not know or suspect to exist in his or her favor**  
20 **at the time of executing the release, that if known by him or her**  
21 **would have materially affected his or her settlement with the debtor**  
22 **or released party.”**

23 In connection with such waiver and relinquishment, Flatiron hereby acknowledges that it  
24 understands the full nature, extent and import of Section 1542 of the California Civil Code and has been  
25 so advised by its attorneys. Flatiron acknowledges that it is aware of and/or may hereafter discover  
26 claims or facts in addition to or different from those which it now knows and/or believes to exist with

1 respect to the Released Matters in this Agreement, but that it hereto intends to and hereby does fully,  
2 finally, and forever settle and release all of the disputes and differences it may have with City, whether  
3 known or unknown, suspected or unsuspected, matured or contingent which concern, arise out of, or are  
4 in any way connected with the Released Matters. In furtherance of such intentions, the waivers and  
5 releases herein given shall be and remain in effect as full and complete releases, notwithstanding the  
6 discovery or existence of any such additional different facts or claims.

7 Pursuant to this Release Flatiron shall provide any other documents necessary to effectuate the  
8 intent of this Release and agrees to cooperate fully with City.

9 Nothing in this Release is intended to release or alter the rights, claims and/or defenses of the  
10 Parties from their respective continuing contractual obligations under the Agreement, in related to the  
11 Released Matters including but not limited to, any obligations arising out of any warranty claims,  
12 deficiencies as defined in California Code of Civil Procedure, Sections 337.1 and 337.15, and indemnity  
13 and hold harmless provisions, or Flatiron's rights to collect the amount due to Flatiron from City under the  
14 Agreement and this Release.

15 **Mutual Obligations**

16 3. The Parties mutually agree as follows:

17 A. Each Party represents and warrants that they are the sole owner of all rights, title, and  
18 interests in and to all of the Released Matters settled under this Release, and that they have not  
19 heretofore assigned, transferred, or purported to assign and/or transfer to any person any matters, or  
20 portions thereof, settled and released under this Release.

21 B. The settlement, releases and other matters set forth herein are a compromise and  
22 settlement of disputed and contested claims between the Parties, and nothing contained herein shall  
23 be construed as an admission by any Party of any obligation and/or liability of any kind to any other  
24 Party.

25 C. This Release contains and embodies the entire agreement of the Parties with regard  
26 to the obligations under this Release and to the Released Matters covered in this Release, and no

1 representations, inducements, or other agreements, oral or otherwise, not embodied herein, exist nor  
2 shall they be of any force or effect. This Release supersedes all prior agreements between the Parties  
3 and controls all rights and obligations between the Parties regarding the Released Matters. This  
4 Release can only be modified or amended by a subsequent written agreement signed by the Parties  
5 hereto.

6 D. This Release is binding upon and shall inure to the benefit of the Parties, their  
7 respective agents, employees, representatives, shareholders, officers, directors, partners, divisions,  
8 corporations, subsidiaries, parents, affiliates, assigns, heirs, predecessors, and successors, past,  
9 present, and future, and all of their insurers, guarantors, sureties and reinsurers.

10 E. The Parties to this Release shall each be deemed to have drafted this Release, such  
11 that no ambiguity in this Release, if any, shall be construed against any Party.

12 F. The Parties shall each bear their own costs, expenses and fees, of all kind, including  
13 attorneys and experts, up through the effective date of this Release regarding the Released Matters.

14 G. The Parties agree to execute all such other documents and perform such other acts as  
15 are necessary to give effect to the intent and purposes of this Release.

16 H. This Release is entered into and shall be subject to the laws of the State of California.  
17 The Parties consent to personal jurisdiction of the Superior Court for the County of Orange for the  
18 resolution of any disputes arising out of or relating to this Settlement Agreement and Release.

19 I. The date that all parties have executed this Release shall constitute the "effective date"  
20 of this Release.

21 J. Each Party hereto represents, warrants, and acknowledges that it is represented by  
22 legal counsel, that it fully understands this Release, and that it has knowingly and voluntarily entered  
23 into it. And that it is authorized to sign this Release and bind the respective Party hereby and that all  
24 acts necessary to confer such authority have been duly, properly and legally taken.

25 K. In the event that one or more of the provisions, or portions thereof, of this Release is  
26 determined to be illegal or unenforceable, the remainder of this Release shall not be affected thereby,

1 and all remaining portions of this Release shall continue to be valid, effective and enforceable to the  
2 fullest extent provided by law. As to any provision or portion of any provision of this Release that is  
3 determined to be illegal or unenforceable, that provision shall be deemed amended and revised, to  
4 the extent possible, in such manner as to implement the intent of such provision or portion thereof to  
5 the greatest extent legal and enforceable.

6 L. This Release may be executed in two or more counterparts, each of which will be  
7 deemed to be an original, and all of which together may be deemed to be one and the same Release.  
8 Signatures transmitted electronically or by facsimile shall be deemed original signatures.

9 M. All communications referenced in or made pursuant to this Release shall be in writing,  
10 whether specified as such or not, and shall be delivered by courier or by hand or other means providing  
11 verification or receipt, to the address set forth below, and notice shall be deemed given on the date of  
12 receipt:

13 **IF TO FLATIRON:**

14 Flatiron West, Inc.

15 1770 La Costa Meadows Drive

16 San Marcos, CA 92078

**IF TO CITY:**

City of Fullerton

303 W. Commonwealth Avenue

Fullerton, CA 92832

17  
18 ATTENTION: \_\_\_\_\_  
19 \_\_\_\_\_

ATTENTION: \_\_\_\_\_  
\_\_\_\_\_.

20  
21 **Remainder of This Page Intentionally Left Blank**  
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26

1 **IN WITNESS WHEREOF**, each of the Parties hereto and the persons and entities listed below has duly  
2 executed this Settlement Agreement and Release as of the last date written below:  
3

4 **Flatiron West, Inc.**

**City of Fullerton**

5  
6 By: \_\_\_\_\_

By: \_\_\_\_\_

7 Name: \_\_\_\_\_

Name: \_\_\_\_\_

8 Title: \_\_\_\_\_

Title: \_\_\_\_\_

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

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

10  
11 Attest:

12 \_\_\_\_\_

13 City Clerk

14  
15 Approved As to Form:

16 By: \_\_\_\_\_  
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