

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release (“Agreement”) is made as of _____, 2019 (“Effective Date”) between the City of Albuquerque (the “City”) and BYD Motors LLC (“BYD”). As used herein, “Party” refers to either the City or BYD, and “Parties” refers to the City and BYD collectively.

WHEREAS, on January 26, 2017, the City and BYD Motors, Inc. entered into an agreement (the “Contract”) pursuant to which the City committed to purchase and BYD Motors, Inc. committed to provide eighteen K11 sixty-foot, five-door battery-electric buses;

WHEREAS, BYD is the successor to BYD Motors, Inc. as a result of a merger between the two companies;

WHEREAS, the Contract also provided that BYD would supply two additional K11 sixty-foot, five-door battery-electric buses with the initial order of eighteen units;

WHEREAS, on November 13, 2018, the City gave BYD notice that it was not accepting the buses;

WHEREAS, on November 28, 2018, BYD took possession of the buses;

WHEREAS, on December 7, 2018, the City commenced an action against BYD in the Second Judicial District, County of Bernalillo, New Mexico in *City of Albuquerque v. BYD Motors, Inc.*, Case No. D-202-CV-2018-8955 (the “state-court action”) asserting certain claims related to BYD’s alleged performance under the Contract;

WHEREAS, on January 8, 2019, BYD removed the state-court action to the U.S. District Court for the District of New Mexico in *City of Albuquerque v. BYD Motors, Inc.*, Case No. 1:19-cv-00012-RB-JHR (the “Action”);

WHEREAS, BYD could assert breach of contract and other claims against the City and its officials, employees and other representatives in the Action;

WHEREAS, in order to avoid the uncertainty, inconvenience, burden, and expense of litigation, the Parties wish to settle the City’s claims as asserted in the Action and any claims that BYD could have asserted in the Action. The Parties also desire to enter into this Agreement to terminate their respective obligations under the Contract in accordance with the terms of this Agreement. This Agreement does not constitute a Termination for Convenience or a Termination for Cause as defined by the Contract.

NOW, THEREFORE, in consideration of the above premises and the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties, for themselves, their successors and assigns, intending to be legally bound, agree as follows:

1.0 RELEASES

1.1 Upon the Effective Date, each Party, on behalf of itself and all of its agents, attorneys, beneficiaries, shareholders, investors, creditors, insurers, directors, officers, employees, consultants, representatives, heirs, successors, grantees, trustees, devisees, licensors, licensees, and assigns, hereby fully, forever, and irrevocably releases and discharges each other Party, and each other Party's officials (including all City elected and appointed officials), agents, attorneys, beneficiaries, shareholders, investors, creditors, insurers, directors, officers, employees, consultants, representatives, heirs, successors, grantees, trustees, devisees, licensors, licensees, and assigns (collectively, the "Released Parties") from any and all Claims (as defined in Section 1.2), that each Party and all of his, her, or its agents, attorneys, beneficiaries, shareholders, investors, creditors, insurers, directors, officers, employees, consultants, representatives, heirs, successors, grantees, trustees, devisees, licensors, licensees, and assigns have had, now have, or hereafter can or shall have against any Released Party.

1.2 The term "Claims" shall mean any and all actions, claims, demands, rights, complaints, controversies, suits, or causes of action of whatever kind or nature, including, but not limited to, defamation, libel, slander, interference with economic relations or advantage and all other torts and statutory claims against any Released Party arising from, in connection with, or as a result of the Contract or the alleged breach of Contract, including all liabilities, damages, costs, expenses, penalties, and attorneys' fees, known or unknown, suspected or unsuspected, fixed or contingent, in law or equity, that arise from or relate to any Claim.

1.3 In addition, the Parties specifically agree that Atlantic Surety Bond No. 800016723 is released from all past, present, and future liability arising from this matter.

1.4 The Parties acknowledge that no money is being exchanged as part of the consideration for this Settlement and Mutual Release.

2.0 TERMINATION OF CONTRACT

2.1 Consistent with Section 1.0 (Releases), each Party agrees that the Contract is terminated and that it will forego any action in law or equity it may have against the other Party or any other Released Party to enforce any obligations arising from, in connection with, or as a result of the Contract including, but not limited to, any demand for damages or compensation for activities undertaken by the other Party or any other Released Party prior to the execution of, during the term of, or after the termination of the Contract.

3.0 DISMISSAL OF ACTION

3.1 The Parties agree to take no other or further action to prosecute or defend the Action.

3.2 The City agrees to take all actions necessary to dismiss the entire Action, with prejudice, within five (5) business days of the Effective Date, including, but not limited to, executing and filing a notice of dismissal of the Action with prejudice with the U.S. District Court for the District of New Mexico.

4.0 WARRANTIES

4.1 The Parties warrant and represent that they are validly existing businesses or entities and in good standing under the laws of the respective jurisdictions in which they have activities, and have the full power and authority to enter into, execute, deliver, and perform this Agreement and to consummate the transactions contemplated herein.

4.2 Each Party warrants and represents that this Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with the Agreement's terms, subject to any equitable defenses.

5.0 TERM AND TERMINATION

5.1 This Agreement shall not be binding on the Parties until it has been signed below by all Parties, at which time it shall be deemed effective as of the date that the second of them signs this Agreement.

6.0 ASSIGNABILITY

6.1 This Agreement shall inure to the benefit of and be binding upon the Parties hereto and their respective valid successors and assigns.

7.0 CONFIDENTIALITY

7.1 The Parties agree that this Agreement is subject to the confidentiality and disclosure requirements of City of Albuquerque Code of Ordinances, Section 2-8-2-11. The Parties understand that this document is subject to production under the New Mexico Inspection of Public Records Act ("IPRA") should a request be made.

7.2 Neither Party, including its officials, representatives and counsel, shall issue a press release regarding this Agreement or the settlement and dismissal of the Action except as agreed by the Parties in writing.

7.3 The Parties agree to issue the following joint press statement:

BYD and the City have reached a settlement that resolves litigation, allowing the parties to move forward at no additional cost. Since the contract was terminated, both BYD and the City have engaged in good faith dialogue to reach this resolution. Although the parties made public statements in defense of their respective positions during the dispute, they are now committed to moving forward and wish each other success.

The City supports BYD's pursuit of its mission to expand zero-emission public transportation with the next generation of high-quality electric buses. BYD supports the City's commitment to the Albuquerque Rapid Transit project and wishes the City best of luck on its completion and successful operation.

8.0 NOTICES

8.1 All notices required or permitted to be given hereunder shall be in writing and shall be deemed delivered (i) upon receipt if delivered by hand; (ii) the next business day after being sent by prepaid, nationally-recognized, overnight air courier; (iii) five (5) business days after being sent by registered or certified first class mail, return receipt required, postage prepaid; or (iv) upon transmittal when transmitted by confirmed e-mail (provided that such notice is followed notice pursuant to any of (i) – (iii) above).

8.2 All notices shall be addressed as follows:

For the City:

Albuquerque City Attorney
P.O. Box 2248
Albuquerque, NM 87103
Attn: Esteban A. Aguilar, Jr.
Phone: (505) 768-4500
Facsimile: (505) 768-4525
Email: eaj@cabq.gov

And with a copy to:

Sanchez, Mowrer & Desiderio, P.C.
P.O. Box 1966
Albuquerque, NM 87102
Attn: Robert J. Desiderio
Phone: (505) 247-4321
Facsimile: (505) 247-4441
Email: rdesiderio@smdlegal.com

For BYD:

BYD Motors LLC
1800 S. Figueroa St.
Los Angeles, CA 90015
Attn: US Legal Counsel
Phone: (213) 748-3980
Facsimile: (213) 748-3945
Email: john.zhuang@byd.com

And with a copy to:

O'Melveny & Myers LLP
400 S. Hope St.
Los Angeles, CA 90071
Attn: Steven J. Olson
Phone: (213) 430-6000
Facsimile: (213) 430-6407
Email: solson@omm.com

9.0 GOVERNING LAW

This Agreement shall be construed, and the relationship between the Parties determined, in accordance with the laws of the State of New Mexico, without giving effect to that state's choice of law rules.

10.0 ENFORCEMENT

Should a dispute arise regarding the enforcement, scope, meaning, interpretation, validity, and/or performance or nonperformance of or under this Agreement, the Parties shall meet and confer in good faith to resolve such dispute. If the Parties cannot informally resolve the dispute, they shall mediate the dispute by mediation before a mutually agreed mediator in a mutually agreed neutral location. If the Parties cannot resolve such dispute after mediation, and unless otherwise agreed in writing by the Parties, the dispute shall be submitted to the United States District Court District of New Mexico. The Parties agree to waive their rights to a jury trial for any litigation that may arise from this Agreement. The Parties further agree that the venue for any litigation that may arise from this Agreement is the United States District Court District of New Mexico, located in Albuquerque, New Mexico.

11.0 ADDITIONAL TERMS

11.1 By executing this Agreement, neither Party admits to fault in the implementation of its obligations under the Contract. Each Party acknowledges and agrees that this Agreement is not in any respect, nor for any purpose, to be deemed or construed to be or used as evidence of, an admission of any fact, legal conclusion, proposition, or liability whatsoever on the part of any person or entity.

11.2 Nothing in this Agreement is intended or shall be deemed to constitute a partnership, agency, employer-employee, or joint venture relationship between the Parties. Neither Party shall incur any debts or make any commitments for the other. There is no fiduciary duty or special relationship of any kind between the Parties to this Agreement. Each Party expressly disclaims any reliance on any act, word, or deed of the other Party in entering into this Agreement.

11.3 This Agreement may be pleaded as a full and complete defense and may be used as the basis for an injunction against any action, suit, or proceeding that may be prosecuted, instituted, or attempted by any Party in breach thereof.

11.4 If any portion of this Agreement is found to be invalid, illegal, or unenforceable for any reason, the remainder of the Agreement shall continue in force and, if needed, the Parties or a court of competent jurisdiction shall substitute suitable provisions having like economic effect and intent.

11.5 This Agreement cannot be modified, terminated, or amended in any respect either orally or by conduct of the Parties. Any termination, modification, or amendment may be made only by a writing signed by all Parties. No waiver of any provision shall be binding in any event unless executed in writing by the Party making the waiver.

11.6 This Agreement may be executed in several counterparts, each of which is deemed to be an original but all of which constitute one and the same instrument.

11.7 Each Party and its counsel have participated in the drafting of this Agreement, and accordingly any presumption or rule of construction permitting ambiguities to be resolved against the drafting party shall not be employed in the interpretation or application of this Agreement.

11.8 The headings inserted in this Agreement are for reference only and are not intended to form any part of the operative portion of this Agreement, and they shall not be employed in the interpretation or application of this Agreement.

11.9 This Agreement sets forth the entire understanding of the Parties with respect to the settlement and dismissal of the Action and release of the Claims, and replaces any prior oral or written communications, discussions, or agreements between them.

11.10 The Parties agree that they shall not communicate any disparaging, misleading or false remarks about any of the Released Parties, nor will the Parties encourage others to make any such communications about any of the Released Parties or their respective employees, officers, or agents. The Parties acknowledge and agree that the City may not limit the ability of City employees, in their individual capacities, to exercise freedom of speech. Furthermore, City employees in their individual and official capacities are required to comply with court orders or subpoenas to testify or produce documents, and such conduct by City employees will not violate this Agreement.

11.11 The Parties agree that irreparable harm would occur in the event that any of the specific provisions of this Agreement were breached. Accordingly, the Parties, or any Released Party, will be entitled to an injunction to prevent or stop breaches of this Agreement and to enforce specifically the terms and provisions of this Agreement, in addition to any other remedies.

11.12 Each of the Parties acknowledges that this Agreement constitutes a complete settlement of Claims as set forth in Section 1.0 of this Agreement. Nothing herein shall constitute or be deemed to constitute any admission of liability by the City, BYD or any Released Party.

11.13 EXCEPT AS PROVIDED EXPLICITLY HEREIN, IN NO EVENT SHALL ANY PARTY BE LIABLE TO ANY OTHER PARTY, ANY RELEASED PARTY, OR ANY OTHER PERSON OR ENTITY (UNDER CONTRACT, STRICT LIABILITY, NEGLIGENCE, OR OTHER THEORY) FOR SPECIAL, INDIRECT, EXEMPLARY, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, INCLUDING LOST PROFITS, OPPORTUNITIES OR SAVINGS, ARISING OUT OF OR RELATED TO THE SUBJECT MATTER OF THIS AGREEMENT.

IN WITNESS WHEREOF, this Agreement has been duly executed by the Parties to be effective as of the Effective Date.

CITY OF ALBUQUERQUE

By: SMJ

Name: Sarita Nair

Its: Chief Administrative Officer

Dated: 5/19/19

BYD MOTORS LLC

By: John Zhuang

Name: JOHN ZHUANG, ESG.

Its: LEGAL COUNSEL

Dated: MAY 13, 2019