

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

STATE OF NEW YORK, NEW YORK STATE
EDUCATION DEPARTMENT, COUNTY OF
MONROE INDUSTRIAL DEVELOPMENT
AGENCY, CITY OF ROCHESTER,
ROCHESTER CITY SCHOOL DISTRICT
ex. rel. MARY ELLEN BELDING,
PRESIDENT, STRUCTURAL REMEDIATION
SERVICES, INC.,

Plaintiffs,

- against -

THE PIKE COMPANY,

Defendant.

Index No. 14/7082

Filed under Seal in Camera Pursuant to
NEW YORK FALSE CLAIMS ACT,
STATE FINANCE LAW § 190(2)(b)

STIPULATION AND SETTLEMENT AGREEMENT

This Stipulation and Settlement Agreement (the Agreement) is entered into among the State of New York (the “State”), Defendant The Pike Company, and Relator Mary Ellen Belding, through their authorized representatives. The above-named parties are hereinafter collectively referred to as “the Parties.”

This Agreement contains the findings of the Office of the Attorney General of the State of New York (the “OAG”) in connection with its investigation of The Pike Company and the relief agreed to by The Pike Company.

OAG FINDINGS

1. The following conduct described in Paragraph 2 through Paragraph 22 is referred to as the “OAG Findings.”

A. The Rochester School Facilities Modernization Program

2. In 2007, the State enacted the Rochester School Facilities Modernization Program Act. *See* 2007 Laws of New York, Chapter 416, Section 5 (“RSMP Act” or the “Act”).

3. The Act created the Rochester Schools Modernization Program (“RSMP”), a three-phase program to rehabilitate deteriorating schools. In total, the RSMP is expected to cost \$1.2 billion, making it the largest public project in Rochester’s history.

4. The RSMP Act called for the establishment of the Rochester Joint Schools Construction Board (“RJSCB”) to plan and oversee the RSMP.

5. The RJSCB divided the project into three phases. The first phase of the RSMP was designed to rehabilitate 13 schools owned by the Rochester City School District. At the outset, this phase was expected to cost \$325 million, including \$278 million in State funds. The conduct at issue in this case concerns this first phase of the RSMP.

B. The RSMP’s Diversity Requirements

6. The RSMP Act established minimum diversity requirements by providing that any entity “entering into a contract for a project” was to “be deemed a state agency” under article 15-A of the Executive Law. Therefore, any entity that was awarded a contract for the RSMP was required to meet certain minimum diversity goals for the utilization of Eligible Business Enterprises (“EBEs”), including Minority Business Enterprises (“MBEs”) and Women Business Enterprises (“WBEs”). *See* RSMP Act § 9(e).

7. In addition, the RSMP Act required the RJSCB to draft a Diversity Plan. *See id.* § 5(f). The RJSCB’s Diversity Plan acknowledged the historical disadvantage experienced by MBEs and WBEs in gaining access to participate in projects and their continued underrepresentation in the industry. As a consequence, one of the principal goals of the Diversity Plan was to support workforce development and to create diversification opportunities. To that end, the RJSCB’s Diversity Plan provided: “The RJSCB recognizes the need to take action to ensure that minority-

owned business enterprises and minority and women employees are given the opportunity to participate in the performance of the contracts with the RJSCB.”

8. The Diversity Plan required prime contractors to use best efforts to sub-contract 15% of their work to MBEs and 5% of their work to WBEs. The Diversity Plan also required prime contractors to demonstrate “Good Faith Efforts” in order to seek waivers in instances in which they were unable to meet the diversity goals. Good Faith Efforts were defined as “active and aggressive” actions by a contractor, established by the Diversity Plan, to meet its goals.

9. These diversity goals, as set forth in the Diversity Plan, were incorporated by reference into each prime contractor’s contract.

10. In general, to meet these goals, prime contractors could claim credit for the full amount paid to sub-contractors for labor. Prime contractors could also claim 50% credit for purchasing supplies from a certified M/WBE supplier which “warehouses goods and materials” and provided a “commercially useful function.”

11. The Diversity Plan defined “commercially useful function” as follows (with emphasis added):

“Commercially Useful Function” shall mean the execution by an EBE that contracts with the [RJSCB], or subcontracts with another business enterprise that contracts with the [RJSCB], of a distinct element of the work of the contract by actually performing, managing, and supervising the work involved. A business enterprise that serves as a conduit for another business shall not be deemed to perform a commercially useful function. In determining whether an EBE prime or subcontractor is performing a commercially useful function, factors, including but not limited to the following, will be considered:

- a. The nature and amount of work subcontracted;
- b. Whether the EBE has the skill and expertise to perform work for which it has been certified...;
- c. Whether the EBE actually performs, manages and supervises the work;
- d. Whether the EBE intends to purchase commodities and/or services from a non-EBE and simply resell same to the general or prime

bidder for the purpose of allowing those commodities and/or services to be counted toward assessment of a benchmark or fulfillment of a goal;

e. Standard industry practices relating to the use of the second tier subcontractors. Consistent with standard industry practices, an EBE subcontractor may enter into second tier subcontracts. If an EBE subcontractor subcontracts a significantly greater portion of the work of its subcontract to a non-EBE inconsistent with standard industry practices, the EBE subcontractor shall be presumed not to be performing a Commercially Useful Function.

12. Prime and sub-contractors certified compliance with the Diversity Plan through the submissions of various forms.

13. With their bids, prime contractors were required to submit a Contractor's Utilization Plan (DDP-1 form), which included a listing of the EBE subcontractors that the prime contractor intended to engage, the work that each EBE would perform, and the dollar value of the EBEs' subcontracts. The form included a signed certification that the prime contractor discussed the submission with the proposed EBE prior to submitting the bid: "the below signed, being an authorized representative of the bidding company, hereby certifies that the above information is accurate and has been discussed with the proposed M/WBE, SBE or DBE prior to the submission of the accompanying bid proposal."

14. After a contract was awarded to a prime contractor, the prime and the EBE-subcontractors were required to jointly submit a Letter of Intent to Perform (DDP-2 form). The completed form indicated the work to be performed by the EBE and the dollar amount of the contract.

15. Prime contractors were required to submit a monthly report (DDP-3A form) summarizing the amounts paid to each EBE and the current EBE utilization percentages.

16. Prime contractors were also required to submit monthly summaries of diversity participation (DDP-3 form). These summaries indicated the actual hours worked by minority and female employees.

C. Defendant The Pike Company

17. Defendant The Pike Company is a New York corporation with a principal places of business in Rochester, New York. The Pike Company is a general (or “prime”) contractor.

18. In 2012 and 2013, The Pike Company was awarded three prime contracts by the RJSCB to perform work in connection with the RSMP. The Pike Company’s contracts, as explained above, bound it to comply with the Diversity Plan.

19. Contrary to the requirements of the Diversity Plan, and contrary to its signed certifications, The Pike Company engaged in supplies “pass-throughs,” paying mark-ups to EBEs merely to pass payments and paperwork to other entities, instead of engaging EBEs for commercially useful functions with respect to those supplies.

20. In these pass-throughs, The Pike Company dealt directly with a product’s manufacturer or supplier, negotiated a price, and received a quote for materials. Then, even though it had ordered the supplies directly from a non-EBE suppliers, it passed the orders through EBEs that were not certified as suppliers and later claimed credit for those EBEs’ “work” on the project.

21. For example, The Pike Company submitted a bid for the Charlotte contract, certifying that Scott Construction would provide \$846,000 worth of “Doors, frames, and Hardware,” in order to fulfill its EBE requirements. However, rather than retain Scott Construction to procure and provide the supplies, The Pike Company ordered \$754,786 worth of doors, frames, and hardware from Rochester Colonial, a non-EBE. The Pike Company directly sought quotes from Rochester Colonial, wrote up a purchase order, and placed the orders. A representative from Pike characterized this arrangement as creating “a [purchase order] that will be run through” Scott Construction. Further, without revealing it to the RJSCB or its ICO, Pike wrote a letter to Scott Construction, explicitly instructing Scott to subcontract \$754,786 worth of its \$846,000 contract to Rochester Colonial for all work in connection with these supplies. Nonetheless, the Pike Company certified to the RJSCB that Scott Construction was performing \$846,000 worth of work towards meeting its utilization goals under the Diversity Requirements.

22. By participating in the foregoing activities, among others, The Pike Company (and the participating sub-contractors) undermined the State's legislative goals and mis-used taxpayer money. When, for example, The Pike Company claimed EBE credit for Scott Construction's pass-through, it deprived a legitimate MBE of the opportunity to perform \$754,786 worth of work on a legitimate subcontract.

RELIEF

WHEREAS, on or about June 24, 2014, Relator filed a *qui tam* action (the "Action") captioned *State of New York et al. ex rel. Belding v. The Pike Company et al.*, pursuant to the New York False Claims Act, N.Y. State Finance Law section 187 *et seq.* ("NYFCA"), alleging that Defendant knowingly presented, or caused to be presented, false or fraudulent claims for payment or approval; and

WHEREAS, the OAG thereafter commenced an investigation in connection with the allegations of the Relator's complaint in cooperation with and with substantial assistance from the RJSCB; and

WHEREAS, as a result of that investigation, the State contends that it has certain civil claims against Defendant under the NYFCA; and

WHEREAS, the State has an interest in ensuring the effective implementation of the Diversity Plan in order to provide equal opportunities to all New Yorkers and to promote a diverse workforce on public projects; and

WHEREAS, the State also contends that it has certain civil claims against Defendant under Section 63(12) of the Executive Law, which prohibits repeated or persistent fraudulent or illegal acts in the transaction of business; and

WHEREAS, to avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, the Parties have determined and hereby agree that settlement is in each of their best interests, and the OAG has agreed to accept the terms of the Agreement and

discontinue its investigation that arose from the allegations of the complaint in the Action against Defendant; and

WHEREAS, this Agreement is made in compromise of disputed claims and is neither an admission of liability by Defendant nor a concession by the State that its claims are not well founded; and

WHEREAS, the Action remains under seal pursuant to an Order of the Supreme Court, Monroe County, dated June 25, 2014, which seal was lifted in part pursuant to an Order dated January 11, 2016, which permitted the Complaint to be revealed to Defendant such that the identity of the Relator is known to Defendant; and

WHEREAS, the seal in the Order of the Supreme Court, Monroe County, dated June 25, 2014, was partially lifted by Order dated January 10, 2017, for the limited purpose of permitting Relator to publicly disclose herself as such, remains otherwise in place;

NOW THEREFORE, in consideration of the mutual promises and obligations of the Agreement, the Parties agree fully and finally to settle this Action against Defendant and the OAG's investigation of Defendant pursuant to the Terms and Conditions below.

MONETARY RELIEF

23. Defendant will pay, in total, \$125,000 (the "Settlement Amount") in accordance with the terms of the payment set forth below to resolve the Action against Defendant and the OAG's investigation of Defendant. This amount represents all damages and penalties being recovered by the State, the Relator's share, *i.e.*, the share to which the Relator is entitled under New York State Finance Law § 190(6), as well as the State's attorneys' fees and costs.

24. On or before March 31, 2022, Defendant will pay the State a sum of \$100,000, (the "State's Share"). Defendant shall pay the State's Share by wire transfer pursuant to instructions provided by the Office of the Attorney General or by certified or bank check made out to the New

York State Department of Law and forwarded to the Office of the Attorney General, Civil Rights Bureau, 28 Liberty St, New York, New York 10005, Attention: Sandra Pullman, Senior Counsel.

25. On or before March 31, 2022, Defendant shall pay the Relator a sum of \$25,000 (the “Relator’s Share”), the share to which the Relator is entitled under New York State Finance Law § 190(6). Defendant shall pay the Relator’s Share by check or wire transfer to a trust account for Relator, through her counsel, in accordance with written instructions to be provided by her counsel.

COMPLIANCE WITH THE LAW

26. The terms, conditions, and agreements described in Paragraphs 27 to 47 are hereinafter referred to as the “Remedial Measures.”

27. Defendant agrees to comply fully with the New York False Claims Act, State Finance Law §§ 187 *et seq.*, the New York Executive Law § 63(12), and New York State Human Rights Law, N.Y. Exec. L. 296.

28. To the extent that Defendant works on the RSMP in the future:

(a) Defendant agrees to comply fully with the obligations, terms and conditions of the RSMP’s Diversity Plan in effect at the time. Further, Defendant specifically agrees to ensure that every EBE it utilizes to meet the Diversity Plan’s utilization goals performs a “commercially useful function,” as defined by the Diversity Plan.

(b) Under no circumstances shall Defendant claim credit for the utilization of an EBE that does not perform a “commercially useful function,” as defined by the Diversity Plan, where the EBE merely hires a third-party to perform labor at the job site.

(c) Under no circumstances shall Defendant claim credit for the utilization of any EBE, whether certified as a supplier or not, which is acting as a Conduit.

(d) For the purposes of this Agreement, acting as a “Conduit” shall be defined, per the Diversity Plan, as “a business that purchases goods or services that are not normally purchased or sold as part of its daily business from another business for the sole purpose of

resale to the [RJSCB] or a contractor doing business with the [RJSCB]” (unless there is a different definition in the Diversity Plan in effect at the time).

(e) Defendant agrees to use its best efforts to meet the goals of the Diversity Plan in accordance with the rules set out by the RJSCB.

(f) Defendant agrees that, if it is unable to meet the Diversity Plan goals despite its best efforts, it will seek a waiver from the RJSCB pursuant to the requirements of the Diversity Plan. Simultaneously with submitting the request for a waiver, Defendant shall inform the OAG of its failure to meet the Diversity Plan goals, identify what efforts it has taken to meet the Diversity Plan goals, and provide OAG with a full and complete copy of the application.

29. The OAG may take steps to monitor Defendant’s compliance with this Agreement, including but not limited to requiring on-site compliance visits, or using investigators to obtain information about Defendant’s compliance with EBE participation goals and requirements.

30. Defendant shall promptly report to the OAG any requests by EBEs to engage in fraud in violation of the NYFCA, New York Executive Law § 63(12) and/or the Diversity Plan including, but not limited to, offers to sub-contract labor to non-EBE businesses, to serve as Conduits for non-EBE businesses, or to otherwise attempt to meet the Diversity Plan goals without adding any “commercially useful function,” as defined in the Diversity Plan.

POLICY REVISIONS

31. Within 30 days of the Effective Date, Defendant will develop and implement a Policy, subject to the OAG’s and the RJSCB’s joint review, and the OAG’s approval, that ensures compliance with New York State EBE requirements. This Policy shall include, but not be limited to, requiring:

(a) certain actions to be completed and documented prior to submitting a DDP-1 form for the RSMP, and prior to submitting any similar form on any other project that

includes diversity (or similar compliance) requirements with the State, its agencies, divisions, political subdivisions, entities, municipalities or other local entities (collectively, “Public Projects”), including:

- (i) soliciting bids from EBEs;
 - (ii) requesting information about the work each EBE would perform; and
 - (iii) confirming the availability of EBEs;
- (b) the completion of a document prior to submitting a DDP-2 form for the RSMP, and prior to submitting any similar form on any other Public Projects, which provides a detailed description of the work to be performed by each EBE, its scope, its pricing, and the estimated dates of performance;
- (c) the completion of a document prior to submitting a DDP-3A form, providing a detailed description of the work performed by the EBE being claimed on the form;
- (d) payment to be made to every EBE sub-contractor within 10 days of Defendant’s receipt, from the RSMP, or other Public Project developer, owner, or similar, of the funds intended to pay for that portion of the EBE sub-contractor’s work; and
- (e) the retention of all underlying documents supporting the performance of the requirements in Sub-Paragraphs 31(a)-(d).

COMPLAINTS

32. On future RSMP or other Public Projects, Defendant shall make comment cards available to EBEs with which it works, from which it solicits bids, or from which it receives inquiries about participation in future RSMP or other Public Projects (“Comment Cards”).

33. The Comment Cards shall provide space for EBEs to give feedback about their work with Defendant on the future RSMP or other Public Project and ask the EBE to identify its name and contact information, if desired. The Comment Cards shall be addressable to Defendant, to the RJSCB, or to the OAG, at the EBE’s discretion.

34. Defendant shall make the Comment Card design available to the OAG and the RJSCB for review and change before finalizing and printing the Comment Cards.

35. Within five days of receiving a Comment Card, Defendant shall provide a copy, by the means described in Paragraph 74, to the person named in Paragraph 75 as a representative of the OAG's Civil Rights Bureau and to the RJSCB's Independent Compliance Officer ("ICO") or, in the absence of a duly appointed ICO, the person named in Paragraph 75 as a representative of the RJSCB.

36. If any Comment Card contains an allegation that Defendant has violated, or conspired to violate, the NYFCA, the Executive Law, the RSMP's Diversity Plan, or any other Public Project's diversity plan, Defendant will immediately notify the OAG and the RJSCB, investigate the allegation, provide a summary of its findings to the OAG and the RJSCB, and propose to the OAG and the RJSCB any remedial measures necessary to address the allegation. Once approved by the OAG, Defendant shall implement the proposed remedial measures within five days.

TRAINING

37. Within 120 days of the Effective Date, all principals, officers, and project managers of Defendant, and all of Defendant's employees and agents who participate in hiring, engaging subcontractors, and the bidding process, or are otherwise involved with compliance with the Diversity Plan, or other Public Projects' diversity requirements, shall attend a training program which covers compliance with the NYFCA, the RSMP's Diversity Plan, and Article 15-A of the Executive Law, and which is conducted by a qualified instructor, at the sole expense of Defendant. In addition, during the term of this Agreement, any new employee, principal, or agent of Defendant who participates in hiring, engaging subcontractors, and the bidding process, or are otherwise involved with compliance with the Diversity Plan shall, within 30 days after the date he or she commences an employment, principal, or agency relationship with Defendant, attend a

training program which covers compliance with the NYFCA, the RSMP's Diversity Plan, and Article 15-A of the Executive Law, and which is conducted by a qualified instructor, at the sole expense of Defendant. The selection of the instructor shall be subject to the review and approval by the OAG.

38. Defendant shall invite all EBEs with which it has worked on the RSMP, or with which it anticipates it may work in the future, to attend this training.

39. The training program shall include a review of the policies developed pursuant to Paragraphs 31 of this Agreement, as well as all the documents required to be completed and maintained thereunder.

40. Defendant shall provide to the OAG a certification from the training provider.

41. Defendant shall certify in writing to the OAG and the RJSCB that all principals, employees, and agents of Defendant who participate in hiring, engaging subcontractors, and the bidding process, or are otherwise involved with compliance with the Diversity Plan have attended the training, using the Training Acknowledgment Form, attached as Exhibit A.

RECORD KEEPING AND REPORTING

42. Defendant shall maintain the following information:

- (a) the new policy pursuant to Paragraph 31 of this Agreement, copies of all forms and documents required to be completed thereunder, and copies of all supporting documentation;
- (b) copies of all forms DDP-1, DDP-2, DDP-3, and DDP-3A, and all similar forms required by other Public Projects;
- (c) all certified payrolls of Defendant and its sub-contractors;
- (d) copies of all Comment Cards returned to Defendants;
- (e) all documents related to any investigation conducted pursuant to Paragraph 36;

- (f) the executed training provider and attendance forms, pursuant to Paragraphs 40-41; and
- (g) all correspondence with EBEs, the ICO, and the RJSCB about EBE participation in the RSMP and compliance with the Diversity Plan.

43. Defendant shall prepare reports and provide them to the OAG and the RJSCB at the close of each of the six reporting periods. The first reporting period shall begin on the Effective Date and end six months thereafter. The remaining reporting periods shall begin at the close of the prior reporting period and end six months thereafter. The reports shall contain the following information:

- (a) the names of all EBEs used during the reporting period, a description of the work that each EBE performed, and the amount paid to each EBE;
- (b) copies of the documents required to be maintained pursuant to Paragraphs 42; and
- (c) any issues raised by the ICO or reported to the ICO concerning Defendant's compliance with the Diversity Plan.

SCOPE

44. The Pike Company shall perform the Remedial Measures for a period of three years from the Effective Date, except that the OAG may, in its sole discretion, extend the term of the period in which the Remedial Measures are to be performed upon a good-faith determination that Defendant has not complied with this Agreement. Before making such a determination, the OAG will discuss any issues with Defendant and attempt to resolve them in good faith.

45. The obligations set forth in the Remedial Measures shall apply to all future phases of the RSMP. All references to the Diversity Plan shall be construed to include any diversity plan adopted by the RJSCB for any future phase of the RSMP.

46. The obligation to perform the Remedial Measures binds Defendant and any other business entities that its principals may hereafter form or control in the future.

47. To the extent not already provided under this Agreement, Defendant agrees to, upon request by the OAG, provide all documentation and information necessary for the OAG to verify compliance with this Agreement.

DISMISSAL AND RELEASES

48. Subject to the exceptions set forth in this Agreement, and in consideration of the obligations of Defendant as set forth in this Agreement, Relator and the State, within 30 days after the Effective Date, shall file, pursuant to CPLR 3217(a), a Notice of Discontinuance of the *qui tam* action with respect to Defendant.

49. Subject to the exceptions in the next Paragraph, in consideration of the obligations of Defendant set forth in this Agreement, conditioned upon the full payment by Defendant of the Settlement Amount and subject to Paragraphs 55 to 57 herein (concerning, among other things, bankruptcy proceedings commenced within 91 days of the Effective Date of this Agreement or any payment to the State under the Agreement, whichever is later), the State releases Defendant from any civil or administrative monetary claim the State has or may have for the OAG Findings under the New York False Claims Act, N.Y. State Fin. Law §§ 187, *et seq.* and Section 63(12) of the Executive Law.

50. In consideration of the obligations of Defendant in this Agreement, conditioned upon the full payment by Defendant of the Settlement Amount and the Relator's Share, and subject to Paragraphs 55 to 57 herein (concerning, among other things, bankruptcy proceedings commenced within 91 days of the Effective Date of this Agreement or any payment to the State under the Agreement, whichever is later), Relator, for herself, and for her heirs, personal representatives, legal representatives, successors, attorneys, agents, and assigns, releases Defendant from any claim that Relator may have against Defendant for the OAG Findings under the New York False Claims Act, N.Y. State Fin. Law §§ 187, *et seq.*, and any claims that Relator asserted or may properly have asserted in the complaint which Relator filed in the Action.

51. Defendant fully and finally releases the State, its agencies, divisions, political subdivisions, entities, officials, officers, employees, servants, attorneys, representatives, and agents from any rights, claims, remedies, expenses, debts, liabilities, demands, obligations, costs, damages, injuries, actions, and causes of action of any nature (including, but not limited to, claims for attorney's fees, costs, and expenses of every kind and however denominated) that Defendant has asserted, could have asserted, or may assert in the future against the State, its agencies, divisions, political subdivisions, entities, officials, employees, servants, attorneys, representatives, agents, and/or employees, related to the OAG Findings and the State's investigation and prosecution thereof.

52. Upon the filing of the Notice of Discontinuance of the *qui tam* action with respect to Defendant, Defendant fully and finally releases, waives, and discharges Relator, her heirs, personal representatives, legal representatives, successors, attorneys, agents, and assigns from any rights, claims, remedies, expenses, debts, liabilities, demands, obligations, costs, damages, injuries, actions, and causes of action of any nature (including, but not limited to, claims for attorney's fees, costs, and expenses of every kind and however denominated) that Defendant has asserted, could have asserted, or may assert in the future against the Relator, her heirs, personal representatives, legal representatives, successors, attorneys, agents, and assigns, related to the OAG Findings and Relator's and the State's investigations and prosecution concerning the Action.

53. Relator, and each of her heirs, personal representatives, legal representatives, successors, attorneys, agents, and assigns, will not object to this Agreement and agrees and confirms that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to New York State Finance Law § 190(5)(b)(ii). Conditioned upon receipt of the full Relator's Share as provided in Paragraph 25 pertaining to the Relator's share, the Relator, individually, and for Relator's heirs, personal representatives, legal representatives, successors, attorneys, agents, and assigns, fully and finally releases, waives, and forever discharges the State and its agencies, divisions, political subdivisions, entities, officials, officers, employees, attorneys, representatives, and agents

from any and all rights, claims, remedies, expenses, debts, liabilities, demands, obligations, costs, damages, injuries, actions, and causes of action of any nature, that Relator has asserted, could have asserted, or may assert in the future against the State, arising out of the filing of the Action or from any other claim for a share of the settlement proceeds related to Defendant. Relator accepts the payment described in Paragraph 25 in full settlement of any claims Relator may have against the State under this Agreement or as a result of the Action with respect to Defendant. This Agreement does not resolve or in any manner affect any claims the State has or may have against Relator arising under state tax laws, or any claims arising under this Agreement.

54. Upon the filing of the Notice of Discontinuance of the *qui tam* action with respect to Defendant, the State fully and finally releases, waives, and forever discharges Relator, her heirs, personal representatives, legal representatives, successors, attorneys, agents, and assigns from any claims related to the Action with respect to Defendant.

BANKRUPTCY

55. If within 91 days of the Effective Date of this Agreement or of any payment made under this Agreement, Defendant, a representative of Defendant, or a third party commences any case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors (a) seeking to have any order for relief of its or their debts, or seeking to adjudicate Defendant as bankrupt or insolvent; or (b) seeking appointment of a receiver, trustee, custodian, or other similar official for Defendant or for all or any substantial part of its assets, Defendant agrees as follows:

- (a) Defendant's obligations under this Agreement may not be avoided pursuant to 11 U.S.C. § 547 or other law, and Defendant shall not argue, allege any defense, or otherwise take the position in any such case, proceeding, or action that: (i) its obligations under this Agreement may be avoided under 11 U.S.C. § 547; (ii) it was insolvent at the time this Agreement was entered into, or became insolvent as a result

of the payment of the Settlement Amount; or (iii) the mutual promises, covenants, and obligations set forth in this Agreement do not constitute a contemporaneous exchange for new value given to Defendant.

- (b) If Defendant's obligations under this Agreement are avoided for any reason, or payments made are recouped, clawed back, or otherwise required to be repaid in any proceeding, including, but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, the State or Relator, as the case may be, at its sole option, may rescind the releases, waivers and discharges in this Agreement given by the State or Relator, as the case may be, to Defendant, and bring any civil and/or administrative claim, action, or proceeding against Defendant for the claims that would otherwise be covered by such releases provided above, and Defendant agrees that (i) any such claims, actions, or proceedings brought by the State or the Relator, as the case may be, are not subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the action, case, or proceedings described in the first clause of this Paragraph, and Defendant shall not argue or otherwise contend that the State's or Relator's claims, actions, or proceedings are subject to an automatic stay; (ii) it shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claims, actions, or proceedings that are brought by the State or the Relator, as the case may be, within 60 calendar days of written notification to Defendant that such releases have been rescinded pursuant to this Paragraph, except to the extent such defenses were available on the Effective Date of the Agreement; and (iii) the State or the Relator, as the case may be, has a valid claim against Defendant in the amount of treble damages plus penalties under the New York False Claims Act, and may pursue its claim in the case, action, or

proceeding referenced in the first clause of this Paragraph, as well as in any other case, action, or proceeding.

- (c) Defendant acknowledges that its agreements in this Paragraph are provided in exchange for valuable consideration provided in this Agreement.

NON-PAYMENT

56. In the event of the failure by Defendant to make any or all of the payments of the Settlement Amount when due, the State may provide written notice of the non-payment to Defendant. Such notice shall be given to the person and address designated in Paragraph 76 by the means described in Paragraph 75. Notice so given shall be effective upon (i) receipt, or (ii) on the fifth day following mailing, whichever occurs first. Defendant shall have an opportunity to pay the unpaid balance within five calendar days from the date of notice. If Defendant fails to pay the overdue unpaid balance of its payment obligations under this Agreement within five calendar days from the date of notice of non-payment (“Default”), the State, in its sole discretion, may declare or do any or all of the following:

- (a) The State may declare the entire Settlement Amount, less any payments already made, immediately due and payable, with unpaid amounts bearing the Default rate of interest at the interest rate set forth in New York Civil Practice Law and Rules § 5004 beginning as of the date of Default until payment of the remaining Settlement Amount is made in full; and/or
- (b) rescind its agreement to this Agreement as to Defendant and pursue all available remedies against Defendant; and/or
- (c) without further notice, enter judgment pursuant to C.P.L.R. § 3215(i) for the entire Settlement Amount, plus interest accrued at the rate of 9 percent from the date of this Agreement, less any payments made based on the failure to comply with this Agreement; and/or

(d) reinstitute an action or actions against Defendant in this Court.

In the event of a Default as described above, Defendant agrees not to contest any action to enforce this Agreement or any other collection action undertaken by the State pursuant to this Paragraph, and Defendant agrees to pay the State all reasonable costs of collection and enforcement of this Agreement, including attorney's fees and expenses. In the event the State reinstutes this action, Defendant: (1) expressly agrees not to plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel or similar theories, to any civil or administrative claims which (i) are filed by the State after the written notification to Defendant that this Agreement has been rescinded, and (ii) relate to the OAG Findings, and (2) further waive and will not assert any defenses they may have to any civil or administrative action relating to the OAG Findings.

57. In the event of the failure by Defendant to make any or all of the payments of the Relator's Share when due, the Relator may provide written notice of the non-payment to Defendant. Such notice shall be given to the person and address designated in Paragraph 76 by the means described in Paragraph 75. Notice so given shall be effective upon (i) receipt, or (ii) on the fifth day following mailing, whichever occurs first. Defendant shall have an opportunity to pay the unpaid balance within five calendar days from the date of notice. If Defendant fails to pay the overdue unpaid balance of its payment obligations for the Relator's Share under this Agreement within five calendar days from the date of notice of non-payment ("Relator's Share Default"), Relator, in her sole discretion, may declare or do any or all of the following:

- (a) declare the entire Relator's Share, less any payments already made, immediately due and payable, with unpaid amounts bearing the Default rate of interest set forth in New York Civil Practice Law and Rules § 5004 beginning as of the date of Relator's Share Default until payment of the remaining Relator's Share is made in full;
- (b) rescind her agreement to this Agreement as to Defendant and pursue all available remedies; and/or

- (c) without further notice, enter judgment pursuant to C.P.L.R. § 3215(i) for the entire Relator's Share, plus interest accrued at the rate of 9 percent from the date of this Agreement, less any payments made based on the failure to comply with this Agreement; and/or
- (d) institute an action or actions against Defendant in this Court to collect the unpaid amounts of the Relator's Share plus applicable interest.

In the event of a Default as described above, Defendant agrees not to contest any action to enforce this Agreement with respect to the Relator's Share or any other collection action undertaken by Relator pursuant to this Paragraph, and Defendant agrees to pay Relator all reasonable costs of collection and enforcement of this Agreement, including, without limitation, reasonable attorneys' fees, expenses associated therewith, and court costs.

ADDITIONAL TERMS

58. The State has agreed to the terms of this Settlement Agreement based on, among other things, the representations made to the OAG by Defendant and its counsel. To the extent that any material representations are later found to be inaccurate or misleading, this Agreement is voidable by the OAG in its sole discretion. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Agreement has been made to or relied upon by Defendant in agreeing to this Agreement. Defendant represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion.

59. Defendant represents and warrants, through the signatures below, that the terms and conditions of this Agreement are duly approved, and that execution of this Agreement is duly authorized. The undersigned counsel and any other signatories represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

60. Except as provided for specifically in each Paragraph, this Agreement is intended to be for the benefit of the Parties only. This Agreement is not intended for use by any third party in

any other action or proceeding and is not intended, and should not be construed, as an admission of liability by Defendant.

61. For purposes of construction, this Agreement (except for the OAG findings) shall be deemed to have been drafted by all Parties to this Agreement and therefore shall not be construed against any Party for that reason in any subsequent dispute.

62. Each Party shall bear its own legal and other costs incurred in connection with this matter.

63. Defendant agrees to the following:

(a) Unallowable Costs Defined: All costs incurred by or on behalf of Defendant, and its present or former officers, directors, employees, shareholders, and agents in connection with:

- (i) the matters covered by this Agreement;
- (ii) the State's audits and civil investigations of the matters covered by this Agreement;
- (iii) Defendant's investigation, defense, and corrective actions undertaken in response to the State's audits and civil investigations in connection with the matters covered by this Agreement (including attorney's fees incurred by Defendant);
- (iv) the negotiation and performance of this Agreement; or
- (v) the payments Defendant makes to the State and Relator pursuant to this Agreement (including Relator's Attorney's Fees)

are unallowable costs for government contracting purposes (hereinafter referred to as "Unallowable Costs").

(b) Future Treatment of Unallowable Costs: Defendant shall not charge such Unallowable Costs directly or indirectly to any contract with the State, its agencies, divisions, political subdivisions, entities, municipalities or other local entities

(collectively, “New York State or a Local Government”), and shall not cite such Unallowable Costs as the basis for any request for a price increase under any contract with New York State or a Local Government or in which a New York State or a Local Government participates.

64. This Agreement, including its Exhibit, constitutes the complete agreement between the Parties, and may not be amended except by an instrument in writing signed on behalf of all the Parties to this Agreement.

65. This Agreement, including the Remedial Measures and its Exhibit, shall be binding on and inure to the benefit of the Parties to this Agreement and their respective successors and assigns, and on all companies that Defendant owns and/or operates, their principals, directors, beneficial owners, officers, shareholders, successors, assigns, and “d/b/a” companies. No party, other than the OAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this agreement without the prior written consent of the OAG.

66. This Agreement is binding on Relator’s successors, transferees, heirs, and assigns.

67. In the event that any one or more of the provisions contained in this Agreement, other than provisions concerning payment and release, shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision of this Agreement.

68. Any failure by the State to insist upon the strict performance by Defendant and/or Relator of any of the provisions of this Agreement shall not be deemed a waiver of any of the provisions hereof, and the State, notwithstanding the failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Agreement to be performed by any or all of the Parties.

69. Pursuant to New York State Executive Law § 63(15), evidence of a violation of this Agreement shall constitute *prima facie* proof of violation of the applicable law in any action or proceeding thereafter commenced by the OAG.

70. If a court of competent jurisdiction determines that Defendant has breached this Agreement, Defendant shall pay to the OAG the costs, if any, of obtaining such determination and of enforcing this Agreement, including, without limitation, legal fees, expenses, and court costs.

71. This Agreement shall be governed by the laws of the State of New York without regard to any conflict of laws principles. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Agreement will be the Supreme Court of the State of New York, Monroe County.

72. The OAG finds the relief and agreements contained in this Agreement to be appropriate and in the public interest.

73. This Agreement shall not be deemed to be an approval by the OAG of any of the practices or procedures referenced in the OAG Findings, and Defendant shall make no representation to the contrary.

NOTICES & EXECUTION

74. All communications from any Party to another Party concerning this Agreement shall be sent by United States mail with return receipt requested or overnight delivery service with signature required to the signatory counsel for each Party, unless such communications are sent by email and a reply is written without objection to the electronic means of communication.

75. All communications from any party concerning the subject matter of this Agreement shall be addressed as follows:

If to the State of New York:

Sandra E. Pullman
Senior Counsel
Office of the New York Attorney General
Civil Rights Bureau
28 Liberty St., 20th floor
New York, NY 10271
(212) 416-8623

and

Maureen A. Fitzgerald
Assistant Attorney General
Office of the New York Attorney General
Taxpayer Protection Bureau
28 Liberty St., 21st Floor
New York, NY 10005
(212) 416-6012

If to Relator:

Steven V. Modica, Esq.
Modica & Associates, Attorneys, PLLC
2430 Ridgeway Avenue
Rochester, NY 14626
(585) 368-1111

If to the Rochester Joint Schools Construction Board:

Brian M. Feldman, Esq.
Harter Secrest & Emery LLP
1600 Bausch & Lomb Place
Rochester, NY 14604
(585) 232-6500

If to Defendant:

Alan J. Bozer, Esq.
Phillips Lytle LLP
One Canalside
125 Main Street
Buffalo, NY 14203-2887
716 504 5700

and

Ryan A. Lema, Esq.
Phillips Lytle LLP
One Canalside
125 Main Street
Buffalo, NY 14203-2887
716 504 5790

76. This Agreement is effective on the date of signature of the last signatory of the Agreement (the "Effective Date").

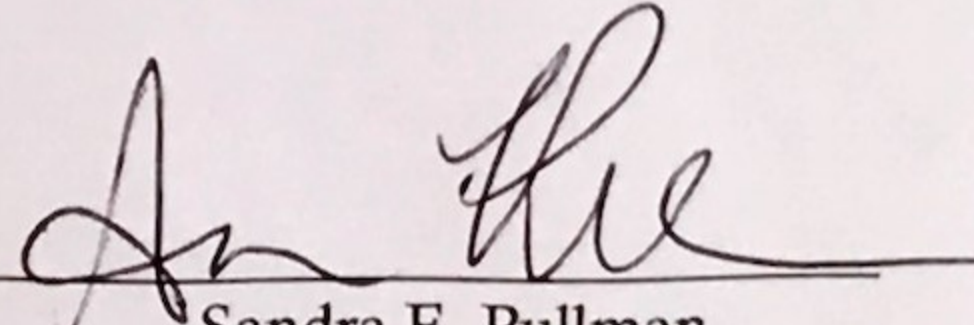
77. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitutes one and the same agreement. Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

IN WITNESS WHEREOF, the Agreement is executed by the Parties hereto.

THE STATE OF NEW YORK

Dated: 3/28/22

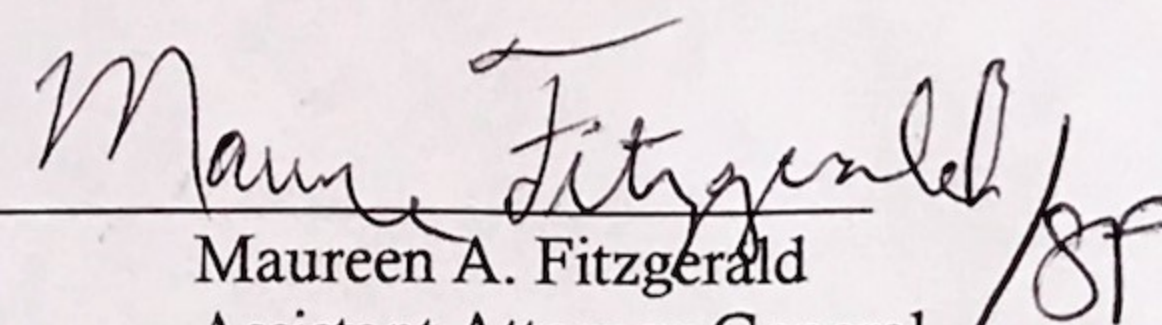
LETITIA JAMES
New York State Attorney General

BY: 
Sandra E. Pullman
Senior Counsel

Office of the New York Attorney General
Civil Rights Bureau
28 Liberty St., 20th Floor
New York, NY 10271
(212) 416-8623

Dated: 3/28/22

LETITIA JAMES
New York State Attorney General

BY: 
Maureen A. Fitzgerald
Assistant Attorney General

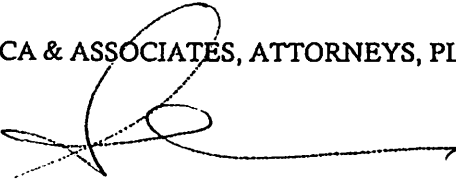
Office of the New York Attorney General
Taxpayer Protection Bureau
28 Liberty St., 21st Floor
New York, NY 10005

(212) 416-6012

RELATOR

Dated: 3/25/2022

MODICA & ASSOCIATES, ATTORNEYS, PLLC

By: 
Steven V. Modica, Esq.

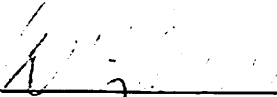
2430 Ridgeway Avenue
Rochester, NY 14626
(585) 368-1111

Attorneys for Relator

DEFENDANT

Dated: 3/25/2022

THE PIKE COMPANY

By: 
William Tehan, President

Dated: 3/25/2022

By: 
Alan Bozer

Alan Bozer, Esq.
Phillips Lytle LLP
One Canalside
125 Main Street
Buffalo, NY 14203-2887
716 504 5700

Attorneys for Defendant

EXHIBIT A

Training Acknowledgment Form

I, _____, have attended the training provided by _____
on _____, 20__ that covered the Rochester Schools Modernization Program's Diversity
Plan and the New York False Claims Act, N.Y. State Finance Law section 187 *et seq.*

I understand that I will be subject to discipline, including possible termination of employment, for
failure to comply with these laws and regulations.

Name

Signature

Date