

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into among the United States of America, acting through the United States Department of Justice and on behalf of the United States Department of Transportation (“USDOT”) (collectively the “United States”) and McClain & Company, Inc. (“McClain”) (hereafter collectively referred to as “the Parties”), through their authorized representatives.

RECITALS

A. McClain & Company, Inc. is a corporation organized and operating under the laws of the Commonwealth of Virginia. McClain rents and leases bridge access equipment to engineering companies and government agencies for use on bridge inspection and bridge maintenance projects.

B. The United States contends that it has certain civil claims against McClain arising from the conduct alleged in Paragraphs C through F during the period from January 5, 2012 through January 27, 2015. That conduct is referred to below as the Covered Conduct.

C. As part of its business, McClain provided Underbridge Inspection (“UBI”) Vehicles and operators to various state departments of transportation and bridge inspection engineering firms under federal aid contracts funded in part by USDOT, including multiple contracts with the Connecticut Department of Transportation.

D. The United States contends that, from on or about January 5, 2012 and continuing through on or about January 27, 2015, McClain paid a third party \$76,400 to create 123 certificates of inspection falsely certifying that this neutral third party had inspected the UBI Vehicles in McClain’s fleet and that each UBI Vehicle met the requirements of American

National Standards Institute (“ANSI”) Standard 92.8 and 29 C.F.R. §§ 1910 and 1926 when, in fact, McClain knew the UBI Vehicles had not been inspected by a neutral third party.

E. On or about August 26, 2015, the Occupational Safety and Health Administration opened a workplace fatality investigation into the death of one of McClain’s employees who had been operating a McClain UBI Vehicle in Connecticut.

F. The United States contends that, between August 31, 2015 and October 26, 2015, in response to requests by OSHA relating to the workplace fatality investigation, McClain sent OSHA false certificates of inspection for the UBI Vehicle that had been involved in the workplace fatality.

G. This Settlement Agreement is neither an admission of liability by McClain nor a concession by the United States that its claims are not well founded. McClain denies the United States’ allegations of the Covered Conduct, except to the extent admitted in McClain’s guilty plea.

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. McClain shall pay to the United States One Hundred Thirty-Seven Thousand Five Hundred Dollars (\$137,500.00) (“Settlement Amount”), all of which is restitution, by electronic funds transfer pursuant to written instructions to be provided by the Office of the United States Attorney for the District of Connecticut, no later than seven (7) days after the Effective Date of this Agreement.

2. Subject to the exceptions in Paragraph 3 (concerning reserved claims) below and subject to Paragraph 4 (concerning disclosure of assets) and Paragraph 8 (concerning bankruptcy) below, and conditioned upon the United States' receipt of the Settlement Amount, the United States releases McClain from any civil or administrative monetary claim the United States has for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; or the common law theories of breach of contract, payment by mistake, unjust enrichment, and fraud.

3. Notwithstanding the release given in Paragraph 2 of this Agreement, or any other term of this Agreement, the following claims and rights of the United States are specifically reserved and are not released:

- a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);
- b. Any criminal liability;
- c. Except as explicitly stated in this Agreement, any administrative liability or enforcement right, or any administrative remedy, including the suspension and debarment rights of any federal agency;
- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- e. Any liability based upon obligations created by this Agreement;
- f. Any liability of individuals;
- g. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- h. Any liability for failure to deliver goods or services due; and

- i. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

4. McClain has provided sworn financial disclosures and supporting documents (“Financial Disclosures”) to the United States and the United States has relied on the accuracy and completeness of those Financial Disclosures in reaching this Agreement. McClain warrants that the Financial Disclosures are complete, accurate, and current as of the Effective Date of this Agreement. If the United States learns of asset(s) in which McClain had an interest of any kind as of the Effective Date of this Agreement (including, but not limited to, promises by insurers or other third parties to satisfy McClain’s obligations under this Agreement) that were not disclosed in the Financial Disclosures, or if the United States learns of any false statement or misrepresentation by McClain on, or in connection with, the Financial Disclosures, and if such nondisclosure, false statement, or misrepresentation changes the estimated net worth set forth in the Financial Disclosures by \$25,000 or more, the United States may at its option: (a) rescind this Agreement and file suit based on the Covered Conduct or (b) collect the full Settlement Amount in accordance with the Agreement plus one hundred percent (100%) of the net value of McClain’s previously undisclosed assets. McClain agrees not to contest any collection action undertaken by the United States pursuant to this provision, and agrees that it will immediately pay the United States the greater of (i) a ten-percent (10%) surcharge of the amount collected in the collection action, as allowed by 28 U.S.C. § 3011(a), or (ii) the United States’ reasonable attorneys’ fees and expenses incurred in such an action. In the event that the United States, pursuant to this paragraph rescinds this Agreement, McClain waives and 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 that (a) are filed by the United

States within 120 calendar days of written notification to McClain that this Agreement has been rescinded, and (b) relate to the Covered Conduct, except to the extent these defenses were available on April 15, 2019.

5. McClain waives and shall not assert any defenses McClain may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action.

6. McClain fully and finally releases the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that McClain has asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, agents, employees, and servants, related to the Covered Conduct and the United States' investigation and prosecution thereof.

7. a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47) incurred by or on behalf of McClain, and its present or former officers, directors, employees, shareholders, and agents in connection with:

- (1) the matters covered by this Agreement and any related plea agreement;
- (2) the United States' audit(s) and civil and any criminal investigation(s) of the matters covered by this Agreement;

- (3) McClain's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil and any criminal investigation(s) in connection with the matters covered by this Agreement (including attorneys' fees);
- (4) the negotiation and performance of this Agreement and any plea agreement;
- (5) the payment McClain makes to the United States pursuant to this Agreement,

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

b. Future Treatment of Unallowable Costs: Unallowable Costs will be separately determined and accounted for by McClain, and McClain shall not charge such Unallowable Costs directly or indirectly to any contract with the United States.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 days of the Effective Date of this Agreement, McClain shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by McClain or any of its subsidiaries or affiliates from the United States. McClain agrees that the United States, at a minimum, shall be entitled to recoup from McClain any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine McClain's books and records and to disagree with any calculations submitted by McClain or any of its subsidiaries or affiliates regarding any Unallowable Costs

included in payments previously sought by McClain, or the effect of any such Unallowable Costs on the amount of such payments.

8. In exchange for valuable consideration provided in this Agreement, McClain acknowledges the following:

a. McClain has reviewed its financial situation and warrants that it is solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I) and shall remain solvent following payment to the United States of the Settlement Amount.

b. In evaluating whether to execute this Agreement, the Parties intend that the mutual promises, covenants, and obligations set forth herein constitute a contemporaneous exchange for new value given to McClain, within the meaning of 11 U.S.C. § 547(c)(1), and the Parties conclude that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange.

c. The mutual promises, covenants, and obligations set forth herein are intended by the Parties to, and do in fact, constitute a reasonably equivalent exchange of value.

d. The Parties do not intend to hinder, delay, or defraud any entity to which McClain was or became indebted to on or after the date of any transfer contemplated in this Agreement, within the meaning of 11 U.S.C. § 548(a)(1).

e. If McClain's obligations under this Agreement are avoided for any reason (including but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code) or if, before the Settlement Amount is paid in full, McClain or a third party commences a case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors seeking any order for relief of McClain's debts, or to adjudicate McClain as bankrupt or insolvent; or seeking appointment of a receiver, trustee,

custodian, or other similar official for McClain or for all or any substantial part of McClain's assets:

(i) the United States may rescind the releases in this Agreement and bring any civil and/or administrative claim, action, or proceeding against McClain for the claims that would otherwise be covered by the releases provided in Paragraph 2 above; and

(ii) the United States has an undisputed, noncontingent, and liquidated allowed claim against McClain in the amount of \$4,607,040.00, less any payments received pursuant to Paragraph 1 of this Agreement, provided, however, that such payments are not otherwise avoided and recovered from the United States by a receiver, trustee, creditor, custodian, or similar official.

f. McClain agrees that any civil and/or administrative claim, action, or proceeding brought by the United States under Paragraph 8.e is not subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) because it would be an exercise of the United States' police and regulatory power. McClain shall not argue or otherwise contend that the United States' claim, action, or proceeding is subject to an automatic stay and, to the extent necessary, consents to relief from the automatic stay for cause under 11 U.S.C. § 362(d)(1). McClain waives and 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 claim, action, or proceeding brought by the United States within 120 days of written notification to McClain that the releases have been rescinded pursuant to this paragraph, except to the extent such defenses were available on April 15, 2019.

9. This Agreement is intended to be for the benefit of the Parties only.

10. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

11. Each Party and signatory to this Agreement represents that it freely and voluntarily enters into this Agreement without any degree of duress or compulsion.

12. This Agreement is governed by the laws of the United States. The exclusive venue for any dispute relating to this Agreement is the United States District Court for the District of Connecticut. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

13. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

14. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

15. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

16. This Agreement is binding on McClain's successors, transferees, heirs, and assigns.

17. All Parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public.

18. This Agreement is effective on the date of signature of the last signatory to the Agreement ("Effective Date of this Agreement"). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

THE UNITED STATES OF AMERICA

DATED: 7/7/22

BY: Michelle L. McConaghy
MICHELLE L. McCONAGHY
Assistant United States Attorney
Chief, Civil Division
District of Connecticut

DATED: _____

BY: _____
SARAH GRUBER
Assistant United States Attorney
District of Connecticut

McCLAIN & COMPANY, INC.

DATED: 7/6/22

BY: Daniel McClain
Daniel McClain
President
On behalf of McClain & Co., Inc.

DATED: 7/6/22

BY: Dan E. LaBelle by JKF
Dan E. LaBelle, Esq.
Counsel for McClain & Co., Inc.