



State of North Carolina

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September 17, 2009

North Carolina Senate President Pro Tempore Marc Basnight
North Carolina House of Representatives Speaker Joe Hackney
Co-Chairs, Joint Legislative Commission on Governmental Operations

Senator John Snow
Senator Eleanor Kinnaird
Representative Alice Bordsen
Representative Jimmy Love
Co-Chairs, Appropriations Subcommittees on Justice and Public Safety

North Carolina General Assembly
Raleigh, North Carolina 27601-1096

RE: G.S. §114-2.5; Report on Settlement Agreement between Appalachian
State University, American Home Assurance Company and Crossley
Construction Corporation

Dear Members:

G.S. § 114-2.5 requires the Attorney General to report to the Joint Legislative Commission on Governmental Operations and the Chairs of the Appropriations Subcommittees on Justice and Public Safety regarding all settlements and court orders which result in more than \$75,000.00 being paid to the State. Pursuant to that statute, I am writing regarding the settlement of Appalachian State University's ("ASU") claims against Crossley Construction Corporation ("Crossley") and its surety, American Home Assurance Corporation ("AHAC"), to recover the excess cost of completing two ASU construction projects after ASU declared Crossley in default, terminated Crossley's contract and made demand of AHAC to complete the projects.

By way of background, ASU issued an invitation for bids in 2001 for the renovation and expansion of its bookstore (the "Bookstore Project") and the construction of a solarium to ASU's Student Union center (the "Solarium Project"). ASU chose a dual bidding delivery method for these Projects (i.e., multiple prime contracts) and Crossley was the lowest responsible bidder for the general construction contract. Crossley was a Tennessee corporation that provided general construction contracting services. Crossley obtained payment and performance bonds for the Projects from AHAC, which is a wholly owned subsidiary of the American Insurance Group, Inc. ("AIG").

ASU issued notices to proceed for both Projects in December 2001. The original completion date of the Solarium Project was December 16, 2002. The original completion date of the Bookstore Project was June 9, 2003, which was extended by change order to August 20, 2003. Crossley failed to complete the Projects by the completion dates. The State Construction Office ("SCO") recommended to ASU that Crossley's contracts be terminated in June 2003. Contrary to SCO's recommendation, ASU issued a notice of default to Crossley on June 9, 2004. Crossley failed to cure the deficiencies in its performance within the fifteen days, as required, and the contracts were terminated. In July 2004, ASU made demand of AHAC to complete the Projects pursuant to the performance bond. After a brief investigation, AHAC denied ASU's performance bond claim. ASU hired a completion contractor for the Solarium Project for Crossley's scope of work and competitively bid the completion contract for Crossley's scope of work on the Bookstore Project. The Solarium Project was completed in September 2004 (a year and nine months late) and the Bookstore Project was completed in July 2006 (three years late). It cost ASU \$795,975.83 more to complete the Bookstore Project over the agreed upon contract price with approved change orders. ASU completed the Solarium Project for \$82,166.17 less than the remaining contract balance due under Crossley's contract and this amount was set off against the amount Crossley owed ASU for completing the Bookstore Project.

On or about August 19, 2004, Crossley filed a verified claim with the SCO seeking \$1,598,795.17 for wrongful termination of its contract or, in the alternative, \$1,677,688.65 for nonpayment of the services and materials Crossley alleged furnished ASU under the contract. The director of SCO denied Crossley's verified claim finding that the default and termination were proper. In 2007, Crossley commenced a civil action in Wake County Superior Court against the State (through ASU), entitled Crossley Construction Corp. v. North Carolina, Docket No. 07-CVS-004968, seeking to recover damages for wrongful termination or nonpayment as described above. ASU filed a counterclaim in that action against Crossley seeking to recover the \$795,975.83 to complete the Projects, liquidated damages or the Bookstore's lost net profits, and interest. The case was scheduled for trial in May 2009.

ASU's estimated litigation costs (expert fees and additional fees from the Projects' architect, engineers and/or scheduling consultant) was between \$250,000 to \$500,000, and ASU would incur additional costs in litigating its claims against AHAC.¹ Based on the estimated costs of litigation, changing economic and budgetary conditions, the financial stability of AHAC's parent corporation — AIG, issues regarding ASU's termination of Crossley on the Solarium Project, and the risks associated with litigation, ASU agreed to accept AHAC's settlement offer based on the condition that all litigation between ASU, Crossley and AHAC would end and all potential claims between

¹ Crossley had tried a similar case against Western Carolina University ("WCU") in November 2007, and WCU spent almost \$250,000 for expert witnesses and additional fees charged by WCU's architect and engineer. Crossley lost this case and judgment was entered in favor of WCU for \$317,950 plus interest. It was this judgment that assisted the State in obtaining a favorable resolution in Crossley's case against ASU. WCU's judgment was not collectible because Crossley had no assets, the judgment was setoff against another claim Crossley had pending against WCU, and Crossley's surety on the WCU's projects had an \$8 million interest against Crossley's assets because that surety completed one of the WCU projects for Crossley.

these three parties would be released.² The settlement ends this litigation and also resolves ASU claims against AHAC arising from AHAC's denial of ASU's performance bond claim. The University of North Carolina's Board of Governors has approved the settlement.

Under the terms of the settlement, ASU will recover \$250,000, which will be used to reimburse ASU for \$15,000 in litigation costs (document copying) and the balance to be used to partially reimburse ASU for the additional \$795,975.83 it spent to complete the Bookstore Project.

We will be happy to respond to any questions you may have regarding this report.

Very truly yours,


Kristi Hyman
Chief of Staff

cc: Jean Sandaire, NCGA Fiscal Research Division
Greg McLeod, NCDOJ, Legislative Counsel
Nels Roseland, NCDOJ, Deputy Chief of Staff

² ASU's acceptance of AHAC's settlement offer is \$550,000 from ASU's offer to pay Crossley \$300,000 to settle this case in October 2007 as part of a global settlement of the three cases Crossley had pending against the State (one against ASU and two against WCU), and \$250,000 from ASU's offer to Crossley in February 2008 to walk away from its counterclaim for \$0.00, if Crossley agreed to walk from its claims against ASU for \$0.00.