



**U.S. Department of Justice**

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Eastern District of Wisconsin*

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February 14, 2014

Mr. Stephen Hurley  
Hurley, Burish & Stanton, S.C.  
P.O. Box 1528  
Madison, Wisconsin 53701-1528

Mr. Franklyn Gimbel  
Gimbel, Reilly, Guerin & Brown  
330 East Kilbourn Avenue, Ste. 1170  
Milwaukee, Wisconsin 53202

Mr. Stephen J. Meyer  
10 East Doty Street, Ste. 617  
Madison, Wisconsin 53703

Re: Miron, et al. Non-Prosecution Agreement

Dear Messrs. Hurley, Meyer and Gimbel:

MIRON CONSTRUCTION COMPANY, INC. ("MIRON"), a Wisconsin corporation, by and through its attorney Stephen P. Hurley; David G. Voss, Jr. ("VOSS") by and through his attorney Franklyn M. Gimbel; and Dean J. Basten, ("BASTEN") by and through his attorney Stephen J. Meyer, hereinafter, "Parties"; and the United States of America, by its attorneys James L. Santelle, United States Attorney for the Eastern District of Wisconsin, and Carol L. Kraft and Joseph R. Wall, Assistant United States Attorneys (the "Office"), hereby enter into this Non-Prosecution Agreement (the "Agreement"). A Statement of Facts is attached hereto and incorporated by reference herein. MIRON does not admit or deny the Statement of Facts. However, in the event that MIRON, VOSS, or BASTEN ("Miron Party or Parties") breaches this Agreement, they agree that the Statement of Facts shall be admissible in evidence in any action commenced by the Office, in any forum, against MIRON, VOSS and BASTEN, or any individual one of them, and may be accepted by a trier of fact as true.

**Monetary Payment**

1. MIRON agrees that it will pay the amount of \$4,000,000 as part of this Agreement within ninety days of the signing of this Agreement. The payments will be

made by wire transferring that sum as directed by the Office which solely retains, in its discretion, the right to determine the appropriate disbursement of the funds to the five school districts named in the attached Statement of Facts.

### **Permanent Revision of Contracting and Accounting Practices**

2. MIRON agrees to continue the contract and accounting practices implemented of its own accord beginning in 2008 and to implement the following revisions of its practices:

- a. In future cost-plus contracts, when MIRON charges a customer for labor in an amount greater than wages paid plus attendant burden, it shall include in the "Cost Of The Work" section of the contract the following disclosure: "Labor will be billed as set forth in the attached 'Labor Rates' schedule which in addition to wages paid and attendant burden includes charges for overhead and/or profit in addition to the fee."
- b. MIRON will maintain financial statements with accurate supplemental schedules that do not rely on "cost smoothing" as that term is described in the attached Statement of Facts.
- c. No later than April 15, 2014, MIRON will employ a new accounting firm to conduct the company's yearly audit and its preparation of MIRON's financial statements.
- d. MIRON will adhere to a "Document Retention Policy" which the Office has reviewed and that will be fully implemented not later than June 1, 2014.
- e. MIRON will employ any other reasonable business practice recommended by the Monitor to ensure continued ethical contracting and accounting practices.

### **Corporate Responsibility Program**

3. In addition to the remedial actions that MIRON has put in place to date, MIRON will implement and maintain an effective Corporate Responsibility Program that fully comports with the following: MIRON shall designate a training and compliance officer and develop and maintain a permanent educational and training program relating to the laws and ethics governing the work of MIRON's owners, officers, and employees. MIRON agrees that all MIRON professionals and employees shall receive appropriate training pursuant to the Corporate Responsibility Program within one year of this Agreement, and shall be given such training on a regular basis but in any event no less than annually. In addition, as part of the Corporate

Responsibility Program, MIRON shall (1) ensure that an effective program be maintained to discipline violators of laws, policies, and standards, and reward those who report such violators; (2) ensure that no owner, officer, or employee of MIRON is penalized in any way for providing information relating to MIRON's compliance or noncompliance with laws, policies, and standards to any MIRON official, government agency, compliance officers, or the Monitor appointed pursuant to paragraph 5; (3) ensure that no owner, officer, or employee of MIRON is penalized in any way for providing information relating to MIRON's compliance or noncompliance with laws, policies, and standards to any MIRON official or government agency prior to the signing of this agreement; and (4) ensure that all MIRON owners, officers, and employees have access to a means to provide information to MIRON's compliance officer relating to MIRON's compliance or noncompliance with the laws, policies, and standards. MIRON shall take steps to audit the Corporate Responsibility Program to ensure that it is carrying out the duties and responsibilities set out in this Agreement. The Corporate Responsibility Program shall be implemented in a manner consistent with MIRON's obligations under union contracts.

4. MIRON shall take additional personnel actions for wrongdoing as are warranted.

#### **Independent Monitor**

5. MIRON agrees to oversight and monitoring by an independent monitor appointed by mutual agreement between MIRON and the Office as described below (hereinafter the "Monitor"), whose powers, rights and responsibilities shall be set forth below.

- a. Jurisdiction, Powers, and Oversight Authority: The Monitor shall:
  - i. Review and monitor MIRON's compliance with this Agreement and make such recommendations to MIRON as the Monitor believes are necessary to maintain compliance;
  - ii. Review and monitor MIRON's maintenance and execution of the Corporate Responsibility Program and recommend such changes as are necessary to ensure conformity with this Agreement, and that are necessary to ensure that the Program is effective;
  - iii. Review and monitor the implementation and execution of personnel decisions regarding individuals who engaged in or were responsible (either by act or omission) for the conduct described in this Agreement and may require any personnel action regarding any such individuals; and

- iv. Review and monitor MIRON's compliance with the Corporate Responsibility Program and paragraph 2.e. above.
- b. Access to Information. The Monitor shall have the authority to take such reasonable steps, in the Monitor's view, as necessary to be fully informed about those operations of MIRON within or relating to his or her jurisdiction. To that end:
  - i. The Monitor will have access to, and the right to make copies of, any and all books, records, accounts, correspondence, files, and any and all other documents or electronic records, including e-mails, of MIRON, its owners, officers, and employees, within or relating to his or her jurisdiction;
  - ii. The Monitor will have the right to interview any owner, officer, or employee of MIRON and to participate in any meeting concerning any matter relating to his or her jurisdiction;
  - iii. The Monitor shall take appropriate steps to maintain the confidentiality of any non-public information entrusted to him/her and shall share such information for *in camera* review only with the Office to the extent that it is necessary to enforce this Agreement; and
  - iv. All documents that MIRON provides to the Monitor shall remain the confidential and exclusive property of MIRON and shall be returned to MIRON at the successful completion of this Agreement.
- c. Hiring Authority. The Monitor shall have the authority to employ any other personnel reasonably necessary to assist in the proper discharge of the Monitor's duties. Any dispute regarding the necessity of additional personnel shall be settled by agreement between the Monitor, MIRON, and the Office.
- d. Implementing Authority. The Monitor shall have the authority to take any other actions that are necessary to effectuate his or her oversight and monitoring responsibilities.

e. Miscellaneous Provisions.

- i. Term. The Monitor's authority set forth herein shall extend for a period of three years from the Monitor's entry on duty, except that in the event the Office determines during the period of monitoring (or any extension thereof) that MIRON has violated any provision of this Agreement, a one-year extension of the period of monitoring may be imposed in the sole discretion of the Office, and in the event of additional violations, an additional one-year extension, but in no event shall the total term of monitoring exceed five years.
- ii. Selection of Monitor. The Office shall consult with MIRON, and shall use its best efforts to select and appoint a mutually acceptable Monitor (and any replacement Monitor, if required) as promptly as possible. However, the Office shall have sole authority to choose a Monitor.
- iii. Notice regarding the Monitor, Monitor's Authority to Act on Information received from Employees, No Penalty for Reporting. Within 10 days of the commencement of the Monitor's duties, MIRON shall advise each of its owners, officers, and employees in writing of the appointment of the Monitor, the Monitor's powers and duties as set forth in the Agreement, and the telephone number, email and mail address designated by the Monitor. Such notice shall inform owners, officers, and employees that they may communicate with the Monitor anonymously or otherwise and that no owner, officer, or employee shall be penalized in any way for providing information to the Monitor. In addition, such notice shall direct that if an owner, officer, or employee is aware of any violation of any law or any unethical conduct that has not been reported to an appropriate federal, state or municipal agency, the owner, officer, or employee is obligated to report such violation or conduct to MIRON's compliance officer or the Monitor.
- iv. Reports to the Office. The Monitor shall keep records of his or her activities, including copies of all correspondence and telephone logs, as well as records relating to actions taken in response to correspondence and telephone calls. If potentially illegal or unethical conduct is reported to the Monitor, the Monitor may, at his or her option, conduct an investigation and/or refer the matter to MIRON's compliance officer, the Office, or designated federal agency. The Monitor may report to the Office whenever the

Monitor deems fit, but in any event, shall file a written report not less often than every six months regarding: the Monitor's activities; whether MIRON is in compliance with the terms of the Agreement, and any changes necessary to foster MIRON's compliance with any applicable laws or standards. Such periodic written reports are to be provided to MIRON and the Office. The Office may, in its sole discretion, provide all or part of any such periodic written report or other information provided to the Office by the Monitor to any designated federal agency. It is understood that such reports shall be reviewed *in camera* by the Office or by its designated federal agency. Should the Monitor determine that MIRON appears to have violated any law or any provision of this Agreement, or has engaged in any conduct that could warrant the modification of his or her jurisdiction, the Monitor shall promptly notify the Office and MIRON.

- v. Cooperation with the Monitor. MIRON and all its owners, officers, and employees shall agree to affirmatively cooperate with and assist the Monitor in the execution of his or her duties and shall inform the Monitor of any information that may relate to the Monitor's duties or lead to information that relates to his or her duties. Failure of any MIRON owner, officer or employee to cooperate with the Monitor may, in the sole discretion of the Monitor, serve as the basis for the Monitor to recommend dismissal or other disciplinary action.
- vi. Compensation and Expenses. The compensation and expenses of the Monitor and persons hired under his or her authority shall be paid by MIRON. The Monitor and any persons hired by the Monitor shall be compensated in accordance with their respective, typical hourly rates. MIRON shall pay billings for compensation and expenses promptly and in any event, within 30 days.
- vii. Indemnification. MIRON shall provide an appropriate indemnification agreement to the Monitor with respect to any claims arising out of the performance of the Monitor's duties.
- viii. No Affiliation. The Monitor is not, and shall not be treated for any purpose as an officer, employee, agent or affiliate of MIRON. MIRON agrees that it will not employ the Monitor for any purpose within one year of the termination of this Agreement.

## Cooperation

6. MIRON, its owners, and officers acknowledge and understand that their cooperation with the government's investigation is an important and material factor underlying the Office's decision to enter into this Agreement, and therefore, they agree to cooperate fully and actively with the Office and any other agency of the government designated by the Office ("Designated Agencies") regarding any matter relating to the Office's investigation about which they have knowledge or information.

7. The Office agrees that, if the Miron Parties are in compliance with all of their obligations under this Agreement, the Office will bring no charges against the Miron Parties relating to the conduct described in the Statement of Facts or flowing directly therefrom or of which the government now has knowledge.

8. It is further understood that should the Office, in its sole discretion, determine that MIRON, VOSS or BASTEN, after the date of execution of this Agreement has (a) given false, incomplete or misleading information, (b) committed any crime other than a minor state or municipal violation, or (c) otherwise violated any provision of this Agreement, that party shall, in this Office's sole discretion, thereafter be subject to prosecution for any federal criminal violation of which this Office presently has knowledge. Any such prosecution may be premised on any information provided by or on behalf of MIRON and the individual parties to the Office at any time except for that protected by Rule 11(f), F.R.Cr.P. or Rules 408 and 410 of the Federal Rules of Evidence. Any such prosecutions that are not time-barred by the applicable statute of limitations or previous waiver of same as of the date of this Agreement may be commenced against the parties. In addition, the parties agree to toll and exclude from any calculation of time, the running of the criminal statute of limitations for a period of three years, plus any extensions as described in paragraph 10, from the date of the execution of this Agreement on any offense not time barred by the applicable statute of limitation, or previous waiver of the same, on the date of this Agreement. By this Agreement, the parties expressly intend to and hereby do waive their rights in the foregoing respects, including any right to make a claim premised on the statute of limitations as well as any constitutional, statutory, or other claim concerning pre-indictment delay. Such waivers are knowing, voluntary and in express reliance on the advice of their counsel.

9. It is further agreed that in the event that this Office, in its sole discretion, determines that any of the parties have violated any provision of this Agreement, including failure to meet their obligations under this Agreement, such a breach by MIRON or one individual will not automatically result in a finding of breach by all parties, or by any other party.

10. The parties agree that in the event that the Office determines during the period of this Agreement, or any extensions thereof, that any Miron Party has violated any provision of this Agreement, a one-year extension of the period of the Agreement may be imposed in the sole discretion of the Office, and in the event of additional violations, such additional one-year extensions as appropriate, but in no event shall the total term of the Agreement exceed five years.

11. The parties agree that it is within the sole discretion of the Office to choose, in the event of a violation, whether the remedy should be an extension of the Agreement or a termination and the commencement of other proceedings. The parties understand and agree that the exercise of discretion by the Office under the terms of this Agreement is not reviewable by any court. Should the Office determine that a party has violated this Agreement, the Office shall provide notice to the parties of that determination and give the parties an opportunity to make a presentation to the Office to demonstrate that no violation occurred or to the extent applicable that the violation should not result in the exercise of remedies under this Agreement or in an extension of the period of monitoring.

12. The parties agree that they shall not, through their attorneys, agents, owners, officers, or employees make any statement contradicting the attached Statement of Facts.

#### **Limit of the Agreement**

13. It is understood that this Agreement is binding on the Office and the Department of Justice specifically, but does not bind any other federal agencies, any state or local law enforcement agencies, any licensing authorities or any regulatory authorities. However, if requested by a party or a party's attorney, the Office will bring to the attention of such agencies, the Agreement, the cooperation of the parties and their compliance with their obligations under this Agreement.

#### **Agreement to be Made Public**

14. The parties agree that the Office will make public this Agreement and the accompanying Statement of Facts.

#### **Integration Clause**

15. This Agreement sets forth all of the terms agreed to by the parties.

Very truly yours,

JAMES L. SANTELLE  
United States Attorney

By:

  
CAROL L. KRAFT  
Assistant United States Attorney

JOSEPH R. WALL  
Assistant United States Attorney

AGREED AND CONSENT TO:

MIRON CONSTRUCTION CO, INC.

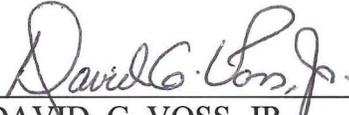
Date: 02.19.14

By:

  
STEPHEN P. HURLEY  
Attorney for Miron Construction Company, Inc.

Date: 2-21-14

By:

  
DAVID G. VOSS, JR.  
President and Chief <sup>Executive</sup> Operating Officer  
Miron Construction Company, Inc.

Date: 2-21-14

By:

  
DAVID G. VOSS, JR. Individually

Date: 2/26/14

By:

  
FRANKLYN M. GIMBEL  
Attorney for David G. Voss, Jr.

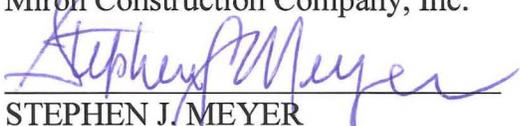
Date: 2-20-14

By:

  
DEAN J. BASTEN, Individually  
Secretary/Treasurer and Chief Financial Officer  
Miron Construction Company, Inc.

Date: 2-19-14

By:

  
STEPHEN J. MEYER  
Attorney for Dean J. Basten

## MIRON ET AL. STATEMENT OF FACTS

The United States of America, states the following as facts in support of the Non-Prosecution Agreement:

1. MIRON CONSTRUCTION CO, INC. (MIRON) is a Wisconsin corporation whose principal office is located at 1471 McMahan Drive, Neenah, Wisconsin. It is, and since 1918, has been, engaged in the business of construction services. In relation to the activities described herein, it functioned either as a construction manager or a design builder. In brief, a construction manager is an entity that is responsible for construction, day-to-day oversight of a construction project, including oversight of the construction site, management of vendors and trades, and communication with the project owner throughout the construction project. As a general rule, an independent architectural firm, hired by the project owner, works with the construction manager to develop the project plans and specifications. In brief, a design-builder is a construction manager that is responsible for developing the project plans and specifications.

2. At all times relevant to this Factual Statement, DAVID G. VOSS, JR. (VOSS), was the President and Chief Executive Officer of MIRON and was its co-owner. He was responsible, though not solely, for overseeing all functions of the business, including the administration and operations of daily commerce.

3. At all times relevant to this Factual Statement, DEAN J. BASTEN (BASTEN) was Secretary, Treasurer, and Chief Financial Officer of MIRON. He was a Certified Public Accountant and prior to his employment at MIRON, was employed by an outside accounting firm and was the field auditor who worked on the annual MIRON audit. In his employment with MIRON, he was responsible for the oversight of all accounting functions, including Accounts Payable, Accounts Receivable, Payroll, satisfying reporting requirements to the IRS and financial institutions, and coordinating outside audits to insure compliance with relevant state and federal laws.

4. Between 2003 and 2008, MIRON entered into cost-plus contracts with five (5) Wisconsin public school districts for the purpose of constructing new school buildings and additions to, or remodeling of, existing school buildings. In order to raise money for the projects, the school districts held public referenda, by which school districts obtained taxpayer approval for the expenditure of construction costs that would be generated through property tax dollars. In a typical case, the referendum amount was established through negotiations between the school board, or its district administrator, and MIRON estimators, among others. The referendum amount was established before any project plans or specifications had been developed by an architect or by MIRON.

5. During the time period that is the subject of this Factual Statement, at the direction of VOSS, the estimators applied a percentage modifier to their projected cost of labor for the school projects, thereby increasing their estimate of those projected costs by the stated percentage. The employ of the percentage modifier to reach an estimate, was not disclosed to the school district. After approval of the referendum, and usually after construction had begun, the parties agreed to a guaranteed maximum price which was established by contract and was usually in the form of an Amendment or a change order. In connection with these school projects, the school districts and MIRON signed construction contracts, which were in the form of industry standard American Institute of Architects (AIA) or Associated General Contractors of America (AGC) contracts. The school districts were identified as the project "Owner," and MIRON was identified as the project "Construction Manager" or "Design Builder." MIRON's construction contracts generally took two forms. One type was called a stipulated sum contract, also known as a fixed-price contract, which provided for payment in the amount of a stipulated or fixed sum. The second type, referred to above, was called a cost-plus contract, which provided for payment based on the cost of the work, as defined in the contracts, plus a construction manager or design builder fee, which was expressed as a percentage of the actual project cost, with a negotiated guaranteed maximum price. This Factual Statement and the companion Agreement is in connection with MIRON's representations of the amount of actual costs in the "cost plus" contracts with the five public school districts.

6. During the 2003-2008 time period covered by the companion Non-Prosecution Agreement, MIRON entered into cost-plus contracts with the following five school districts: DePere, DC Everest, Marathon, Waunakee, and Abbotsford. In those contracts, MIRON represented that its construction manager or design builder percentage was a sum ranging from 1.75% to 3 % of the total contract price. Those contracts defined chargeable Labor Costs as "wages" or "wages paid." In reality, MIRON billed overhead and other expenses to its labor charges by applying a mark-up to labor above what it paid a laborer in wages and attendant burden. MIRON's billed labor charges after application of the mark-ups were made at levels which were at or near the estimating modifier.

7. In addition, in connection with its accounting practices, MIRON engaged in the practice of "cost smoothing." In its internal ledgers, MIRON transferred costs which had been incurred on less profitable jobs to other more profitable ones, including some school district projects. While MIRON's financial statements recorded accurate gross profit or loss, the supplemental schedules appended to those statements was inaccurate.

8. This factual summary is provided for the purpose of setting forth a factual basis for the Agreement. It is not a full recitation of the facts adduced during the government's investigation of the alleged activity.

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