# CITY OF WEST DES MOINES
# CITY COUNCIL MEETING COMMUNICATION

**ITEM:** Approval of Settlement Agreement – Athene/IEDA/City of West Des Moines **DATE:** February 23, 2015

Resolution - Approval of Settlement Agreement

**FINANCIAL IMPACT:** None.

**BACKGROUND:** In 2008, Aviva (now known as Athene), the Iowa Department of Economic Development (now known as the Iowa Economic Development Authority (IEDA)), and the City of West Des Moines signed a contract (P0701M01259) as part of the High Quality Job Creation Program that outlined job creation requirements for Aviva. Also in 2008, Aviva and the City of West Des Moines signed a development agreement that outlined job creation requirements for Aviva.

The State's requirements for job creation by Aviva were different and separate from the City's requirements. The development agreement between Aviva and the City requires that Aviva, and now Athene, annually prove to the City how many people they employ, which is tied to a tax rebate. Aviva, and then Athene have been timely in providing this information and have maintained the required job levels to receive the tax rebate.

However, the required number of jobs required by IEDA in the High Quality Job Creation Program contract has not been met. In response to the deficient job levels, IEDA and Athene have agreed to a Settlement Agreement. Since the Settlement Agreement is in reference to the original contract signed by the three parties, the City of West Des Moines must also sign the Settlement Agreement.

**OUTSTANDING ISSUES** (if any): There are no outstanding issues.

**RECOMMENDATION:** That the City Council pass a resolution, authorizing the Mayor to sign the Settlement Agreement.

**Lead Staff Member:** Naomi Hamlett, AICP, Community and Economic Development

**STAFF REVIEWS**

| | |
|---|---|
| Department Director | Clyde E. Evans, Director, Community and Economic Development CEE |
| Appropriations/Finance | |
| Legal | JBW |
| Agenda Acceptance | RTJ |

**PUBLICATION(S)** (if applicable)

| | |
|---|---|
| Published In | N/A |
| Dates(s) Published | N/A |

**SUBCOMMITTEE REVIEW** (if applicable)

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|---|---|---|---|
| Committee | Finance & Administration | | |
| Date Reviewed | February 11, 2015 | | |
| Recommendation | ☑ Yes | ☐ No | |

Attachments: Exhibit I – Settlement Agreement
Exhibit II – Resolution

## EXHIBIT I

## SETTLEMENT AGREEMENT

THIS AGREEMENT, between the Iowa Economic Development Authority (hereinafter referred to as "IEDA" and formerly known as the Iowa Department of Economic Development) and Athene USA Corporation (formerly known as Aviva USA Corporation and hereinafter referred to as "Business" which shall include successors and assigns);

WHEREAS, IEDA awarded to Business a $1,000,000 Forgivable Loan from the Physical Infrastructure Assistance Program (PIAP), a $500,000 Forgivable Loan and $132,000 Loan from the Community Economic Betterment Account (CEBA) and $13,392,500 of tax credits from the High Quality Jobs Creation Program (HQJC) pursuant to the terms of Master Contract Number P0701M01295 (Funding Agreement Numbers 08-PIAPIVFGF-004, 08-CEBAIVFGF-017, and 08-HQJC-038) and exhibits attached thereto, which was approved by IEDA's Board of Directors on September 25, 2007, (referred to as the "Contract");

WHEREAS, under the Contract, to receive the full amount of the PIAP and CEBA funds, Business was required to create 544 new jobs, all of which met the qualifying wage of $22.99 per hour including benefits, and to receive the full amount of the HQJC tax credits, Business was required to create 485 jobs which met the qualifying wage of $28.29 by the Project Completion Date of September 30, 2012, maintain the project jobs for 2 years until the Project Maintenance Date of September 30, 2014, and meet certain investment requirements; and

WHEREAS, IEDA disbursed the $1,000,000 PIAP Forgivable Loan and the $632,000 CEBA Loan/Forgivable Loan pursuant to the terms of the Contract; and the $132,000 CEBA Loan has been repaid and the $1,000,000 PIAP Forgivable Loan and the $500,000 CEBA Forgivable Loan have been forgiven in full; and

WHEREAS, Business filed claims with the Iowa Department of Revenue totaling $1,659,078 of tax credit benefits, pursuant to the terms of the Contract; and

WHEREAS, on the Project Maintenance Date of September 30, 2014 Business had not maintained the required jobs; and

WHEREAS, as a result of this job shortfall, Business acknowledges its obligation to repay a portion of the benefits and funds awarded under the Contract; and

WHEREAS, Business is desirous of reaching a settlement with IEDA in which Business would agree to reduce the maximum HQJC tax credit benefits by $4,020,975; and

WHEREAS, the IEDA Board of Directors approved a Negotiated Settlement on December 19, 2014, on the terms and conditions described herein;

NOW, THEREFORE, for good and valuable consideration, receipt of which is hereby acknowledged, the parties agree as follows:

1. **Acknowledgement of Job Shortfall.** Business acknowledges its job shortfall under the terms of the Contract. Business has failed to maintain 544 new qualified jobs above a base employment of 591 full-time equivalent jobs ("FTE") for the CEBA and PIAP Awards, and 485 qualified jobs above a base of 428 full-time equivalent ("FTE") jobs for the HQJC Award through the Project Maintenance Date as specified in the Contract.

2. **Settlement Terms:**

    a. **Total award reduction.** The maximum amount of the HQJC Award is reduced by $4,020,975.
    b. **Full repayment.** The award reduction in (2)(a) serves as full repayment of all obligations owed by Business under default or any other provisions under the Contract and any funding agreements for the job shortfall listed in (1).
    c. **HQJC Funding Agreement.** The HQJC funding agreement and the Master Contract shall terminate upon execution of this Settlement Agreement, but the parties agree that Business's rights to claim tax credits under those agreements shall continue in full force and effect pursuant to the timelines laid out in the agreements, subject to the reduced award listed in (2)(a).

3. **Expenses.** Each party is responsible for the legal fees and other expenses incurred in entering into this Settlement Agreement. If IEDA is required to bring suit to enforce the terms of this Settlement Agreement, and if IEDA substantially prevails in recovering any or all of the amounts demanded in such suit, Business agrees to pay to IEDA all expenses incurred or paid by IEDA, including attorney's fees and court costs in connection with such enforcement action.

4. **Successors and assigns.** This Settlement Agreement shall be binding upon and inure to the benefit of Business and IEDA, and each of their respective legal representatives, successors and assigns.

5. **Severability.** If any provision of this Settlement Agreement is held invalid by any court, the remainder shall not be invalid, but shall be enforced as written consistent with the purposes of this Settlement Agreement and the intent of the parties.

6. **Integration.** This Settlement Agreement represents the full agreement between the parties concerning settlement of amounts owed due to Business's job creation shortfall under the Contract and no promise or expectation of any further consideration has been made by any party.

7. Upon execution of this Settlement Agreement, the CEBA and PIAP Funding Agreements are hereby considered terminated, including all rights and obligations of any party to such agreements and all related documents.

8. Upon execution of this Settlement Agreement, Article 6 of the Master Contract is hereby considered terminated and all security or collateral held thereunder may be released by Business.

9. Business freely and voluntarily enters into this Settlement Agreement.

*-This section is deliberately left blank. Signature Page follows.-*

IN WITNESS, WHEREOF, the undersigned approve and execute this Settlement Agreement effective as of the date last stated.

**FOR IEDA:**

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Deborah V. Durham, Director Date

**FOR BUSINESS:**

Erik H. Osterhus Jan. 23, 2015

Signature Date

SVP, General Counsel & Secretary

Name and Title

**FOR COMMUNITY:**

_____

Signature Date

_____

Name and Title

# EXHIBIT II

Prepared by: NHamlett, Community and Economic Development. P.O. Box 65320. West Des Moines, IA 50265-0320. 515-273-0770
When Recorded, Return to: City Clerk. City of West Des Moines, and P.O. Box 65320. West Des Moines. IA 50265-0320

## RESOLUTION

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF WEST DES MOINES, IOWA AUTHORIZING THE MAYOR TO SIGN THE SETTLEMENT AGREEMENT REGARDING MASTER CONTRACT #P0701M01259 BETWEEN THE IOWA ECONOMIC DEVELOPMENT AUTHORITY (FORMERLY IOWA DEPARTMENT OF ECONOMIC DEVELOPMENT), ATHENE USA CORPORATION (FORMERLY KNOWN AS AVIVA USA CORPORATION) AND THE CITY OF WEST DES MOINES**

**WHEREAS,** in July of 2008, the City of West Des Moines entered into a contract (#P0701M01259) with the Iowa Department of Economic Development (now known as Iowa Economic Development Authority or "IEDA") and Aviva to award Aviva financial assistance based on high quality job creation;

**WHEREAS,** Aviva USA has since been purchased by Athene USA, who has assumed all responsibilities of said contract;

**WHEREAS,** Athene has not maintained/created the required jobs by the project maintenance date of September 2014;

**WHEREAS,** IEDA and Athene have settled on terms of the job shortfall;

**WHEREAS,** the job requirements listed by IEDA in said contract are different than job requirements listed in the development agreement between the City and Athene, and are not the subject of this action;

**NOW, THEREFORE,** the City Council of the City of West Des Moines authorizes the Mayor to sign the Settlement Agreement.

**PASSED AND APPROVED** on the 23rd day of February 2015.

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Steven K. Gaer, Mayor

**ATTEST:**

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Ryan T. Jacobson
City Clerk