

SULTAN CITY COUNCIL

AGENDA ITEM COVER SHEET

ITEM NO: C - 5

DATE: April 26, 2007

SUBJECT: Inflow & Infiltration Reduction Project, Phase II
Settlement Agreement

CONTACT PERSONS: City Administrator Knight
Public Works Director Dunn
Engineer Jon Stack

SUMMARY:

The issue before the Council tonight is a settlement agreement between the City of Sultan and Mosbrucker Excavating Inc. Staff has provided the Final Payment request including retainage and settlement for Council approval.

BACKGROUND:

The Inflow & Infiltration (I & I) Reduction Project Phase II, Schedules B & C, were awarded to Mosbrucker Excavating, Inc. on June 21, 2004 with notice to proceed on July 12, 2004. When starting the project the subcontractor Trenchless encountered difficulty in dewatering the site on First Street. There were cost over runs on the project due to what Mosbrucker Excavating considered a change of ground conditions. Trenchless was the subcontractor that started the dewatering portion of the contract for the I & I Project as the ground water and soil conditions were identified, Mosbrucker replaced Trenchless with Slead. Which created the cost over run for an additional dewatering of the I & I Project.

On November 21, 2006 the City Council accept the construction project as complete.

Notice of Claim was filed on the City of Sultan by Mosbrucker Exacavting, Inc on June 20, 2006 in the amount of \$170,063.05. Since that time, City Attorney Graafstra has been working with Mr. Evans, Mosbrucker Attorney, on a settlement. The week of April 2, 2007 a settlement was agreed upon pending approval by Sultan Council at the April 24, 2007 City Council Meeting.

The City Council discussed the issues as pending litigation at Sultan Council Meetings during executive sessions in December, 2006, and March, 2007. The City's options were going to court or negotiating a settlement – City Council

directed staff to negotiate - that settlement is the proposal on the agenda at this meeting.

FISCAL IMPACT:

The proposed settlement with Mosbrucker is \$80,000.00 plus tax of \$6,800.00 for a total of \$86,800.00 payable on the May 10, 2007 Council Meeting. The retainage of \$39,706.39 will be released on completion of final reporting to the Departments of Revenue and Labor and Industries as required in the Settlement Agreement item number 5. Mosbrucker also agrees to take any further actions required by the contract to close out the project at no further charge to the City of Sultan.

This is a cost that is not covered by the original Public Works Trust Fund Loan for the I & I Project therefore it will be paid from the Cumulative Reserve Utility Fund.

RECOMMENDED ACTION:

- 1) Authorize the Mayor to sign the Settlement Agreement that Attorney's Graafstra and Evans have drafted for City Council approval,
- 2) Release \$86,800 to be paid to Mosbrucker Excavating, Inc. on May 10, 2007 Council Meeting under voucher approval. The City of Sultan will also be required to send the State of Washington the Letter of Completion and any other required documents.

When the City of Sultan receives verification of the appropriate forms and documents having been filed with the State of Washington, the City will release the retainage in the amount of \$39,706.39

MOTION:

COUNCIL ACTION:

DATE: April 26, 2007

ATTACHMENTS:

- Final Payment including Retainage and Settlement, dated April 19, 2007
- Proposed Settlement Agreement with Attachment A
- June 20, 2006 Notice of Claim

SETTLEMENT AGREEMENT

This Settlement Agreement is made this _____ day of April, 2007 between the City of Sultan, Washington, a Washington municipal corporation (hereinafter "City") and Mosbrucker Excavating, Inc., a Washington corporation (hereinafter "Mosbrucker").

WHEREAS, City and Mosbrucker are parties to a public works contract dated _____, 2004 for I & I Reduction Program Phase 2 Utility and Street Improvements (the "Contract");

WHEREAS, City issued Mosbrucker a notice to proceed on _____, 2004 as set out in Attachment A;

WHEREAS, Mosbrucker commenced work under the Contract;

WHEREAS, City accepted the work on _____, but the parties have not agreed on a final pay estimate and Mosbrucker has reserved and submitted a claim to the City on June 16, 2006;

WHEREAS, Mosbrucker and a subcontractor, Trenchless Construction Services litigated in arbitration a claim by Trenchless for compensation despite Trenchless' termination from the work;

WHEREAS, the parties also wish to provide for an agreed acceptance of the work, an agreed, revised final pay request, a method of agreed project closeout, and to settle all claims between them;

NOW, therefore, City and Mosbrucker agree as follows:

1. Acceptance of work. City accepts the work, effective as of _____. All contract warranties shall run from that date. Council action of acceptance was taken on _____.
2. Payment by City. In addition to all payments made heretofore, City hereby agrees to pay Mosbrucker its retainage of \$39,706.39 and a further addition to the contract amount of \$80,000, and Washington State Sales tax on the addition of \$6,800.00. Said payments shall be made in regular course in accordance with the City's normal contract practices. Mosbrucker shall be

required to submit a further and final pay estimate and request consistent with this agreement.

3. Release of Claims. Mosbrucker, for itself and any successors and assigns, in consideration of the payment specified in paragraph 2 hereof, hereby releases, acquits and discharges the City, its officers and employees, including its design and engineering consultants, of all claims known or unknown on account of the Contract, all change orders, force account or other orders, and any other bases for additions to the contract and the payment of Washington State Sales Tax. This release specifically includes any claim for delay associated with work on the project and as such this Settlement Agreement and release includes but is not limited to claims for unabsorbed overhead, so-called Eichleay damages, damages for loss of economies of scale, damages for mobilization or remobilization, and any and all other damages associated with the delay, however characterized.
4. Indemnity for claims by subcontractors. To the extent that Mosbrucker has used any subcontractors on the project, including but not limited to Trenchless Construction Services, LLC, Mosbrucker hereby agrees to save and indemnify City of all claims of subcontractors known or unknown on account of the Contract, any change order, any force account work, or addition to the Contract, and any and all delay associated with the work on the project. This indemnity includes but is not limited to claims for all work, and all claims for delay, including claims for unabsorbed overhead, so-called Eichleay damages, damages for loss of economies of scale, damages for mobilization or remobilization, and any and all other damages associated with delay, however characterized. This indemnity shall extend to all attorneys fees and costs incurred by the City to defend any claim by a subcontractor and to all attorneys fees and costs incurred by the City to enforce the terms of this indemnity.
5. Cooperation. Mosbrucker agrees to cooperate in final reporting to the Departments of Revenue and Labor and Industries and to take any further actions required by the contract to close out the project at no further charge to the City.
6. Complete Agreement. This Settlement Agreement is a complete agreement concerning its subject matter, and any and all previous discussions are merged into this Settlement Agreement. This Settlement Agreement may

not be amended except by a subsequent written agreement signed by the parties.

7. Enforcement. The parties agree that enforcement of this Settlement Agreement shall not follow the claims process of the Contract. This Settlement Agreement shall be enforced only by an action in the Superior Court. The parties agree to venue and jurisdiction in the Snohomish County Superior Court.

Dated: _____

CITY:

CITY OF SULTAN, WASHINGTON

By: _____

Dated: _____

MOSBRUCKER:

MOSBRUCKER EXCAVATING, INC.

By: _____

ATTACHMENT A
SETTLEMENT AGREEMENT

NOTICE TO PROCEED

CITY OF SULTAN
I&I REDUCTION PROGRAM PHASE 2, UTILITY AND STREET IMPROVEMENTS

Date: June 16, 2004

To: Mosbrucker Excavating, Inc.
P.O. Box 745
Bothell, WA 98011

Re: Schedules B & C
Project I & I Reduction Program, Phase 2
Project No: _____
Contract _____

You are hereby notified to commence WORK in accordance with the Contract dated June 21, 2004, on or before July 12, 2004, and you are to complete the WORK within 100 consecutive working days thereafter. The date of completion of all WORK is therefore November 30, 2004.

John Stack
Signature

Receipt of this NOTICE TO PROCEED is hereby acknowledged this, the 15th day of July, 2004.

CONTRACTOR: Mosbrucker Excavating, Inc.
BY Richard Johnson
TITLE: PRM. MGR

Please sign and return one copy of this Notice to Proceed Acknowledgement to:

City Engineer

P.O. Box 1199

Sultan, WA 98294

Notice of Claim

June 20, 2006

To: Jon R. Stack, P.E.
City Engineer, City of Sultan, Washington
Public Works Department
City Hall
319 Main Street
Sultan, WA 98294

From Mosbrucker Excavating, Inc.
P.O. Box 745
Bothell, WA 98041

Re: Unforeseen Conditions Requiring Additional Dewatering Expense

Jon,

Please consider this Mosbrucker Excavating, Inc.'s formal claim for additional compensation relating to the unforeseen conditions encountered during the I&I Reduction Program Phase 2 Utility and Street Improvements Project.

As you know, we engaged Trenchless for dewatering on the project. It claimed and we denied that unforeseen subsurface conditions existed. After consideration of the evidence and hearing from a number of witnesses, including the City Superintendent of Public Works Tony Beedle, an independent arbitrator determined that in fact,

From the evidence, there did exist a type I differing site condition in that existing subsurface or latent physical conditions at the site differed materially from those in indicated in the contract documents – namely the Nelson geotechnical report.

.....

Differing site conditions consisted of larger than anticipated cobbles and boulders and the failure to disclose that much of the park area and south of the project around Manholes 1 and 2 had been bulldozed or dredged from the bed of the Skykomish River.

See Arbitrator's Reasoned Decision on the Merits, at page 5-6. A copy is attached at Ex. A.

We provided notice to you of the differing site condition and you acknowledged the same in granting us a 30 day extension.

As a result of the differing site conditions, we have incurred damages computed as follows:

\$67,017.21 Trenchless Award including \$15,302.54 in attorney's fees, Exhibit A
 \$4,250.00 American Arbitration Association fees, Exhibit A
\$4,126.00 Arbitrator's Fees, Exhibit A
 \$75,393.21

 \$227,671.00 Amount paid to Slead Construction for dewatering, Exhibit B, attached.

 \$303,064.21 Total paid to Trenchless and Slead.
 \$60,612.84 Markup for overhead and profit at 20%.
\$46,636.00 Attorney's fees incurred in defending against Trenchless' claims, Ex. C, attached.
\$410,313.05 Total dewatering costs.

 \$237,250.00 Paid by City to us for dewatering.

 \$170,063.05 Net amount due.

Like you, we would like to have this claim resolved with a minimal amount of additional costs and look forward to your prompt response.

Under penalty of law for perjury or falsification, the undersigned,

Robert Mosbrucker, president

of Mosbrucker Excavating, Inc.

hereby certifies that the claim for extra compensation and time, if any, made herein for work on this contract is a true statement of the actual costs incurred and time sought, and is fully documented and supported under the Contract between the parties.

Dated 6/20/06

Robert Mosbrucker
Robert Mosbrucker, president

Subscribed and sworn before me this 20 day of June, 2006

Isabelle Ferrand
Notary Public

My Commission Expires: 01/23/2010

