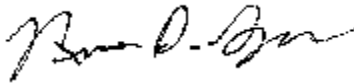


City of Calistoga

Staff Report

TO: Honorable Mayor and City Council
FROM: Richard Spitler, City Manager
DATE: February 21, 2012
SUBJECT: Settlement Agreement with Page Construction Company over the Community Pool Construction Project

APPROVAL FOR FORWARDING:



Richard Spitler, City Manager

1 **ISSUE:** Consideration of a Resolution to authorize the City Manager to enter into
2 a settlement agreement over a community pool construction claim by Page
3 Construction Company and subcontractors in the amount of \$800,000.

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5 **RECOMMENDATION:** Adopt Resolution.

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7 **BACKGROUND:**

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9 This arbitration case arises from the construction of the Calistoga Community
10 Pool by Page Construction Company (Page). On August 11, 2010, Page filed a
11 claim with the City in the amount of \$1,777,637 for additional compensation
12 allegedly due for work on the project. There were also four stop notice lawsuits
13 filed by subcontractors on this project with the Napa County Superior Court in the
14 total amount of \$665,760.62 which were ordered consolidated with the Page vs.
15 Calistoga case.

16
17 On January 23, 2012, the parties (Page, City and subcontractors) attended
18 mediation with Randy Wulff acting as mediator. At the conclusion of the
19 mediation, the parties agreed to a settlement in the amount of \$800,000 to be
20 paid by the City to Page subject to the execution of a mutually acceptable written
21 settlement agreement. The settlement would be paid by the City in three
22 installments: \$267,000 on February 24, 2012; \$267,000 on March 15, 2012 and
23 \$266,000 on April 15, 2012. The settlement also provides for Page to make

24 certain payments to its subcontractors upon receipt of the installment payments
25 by the City to Page.

26
27 The Settlement Agreement incorporating the above terms is attached to this Staff
28 Report.

29
30

31 **DISCUSSION:**

32 The Page contract balance for the community pool construction (i.e., the original
33 amount of the contract and approved change orders, less payments to Page to
34 date) is \$913,501 calculated as follows:

35

36	Original Contract Amount:	\$3,681,000
37	Total (estimated) Change Orders:	\$68,892
38	Less Amount Paid to Date:	<u>\$2,836,391</u>

39

40	Contract Balance:	\$913,501
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41

42 Thus, the proposed settlement of \$800,000 is \$113,501 less than the contract
43 balance which would otherwise be due to Page Construction.

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45 **FISCAL IMPACT:**

46 The total payment of \$800,000 would be charged to the community pool
47 construction capital improvement project account. The funding for this would be
48 from the 2007 Capital Lease Funds. The present balance of these funds, which
49 are in a Deutsche Bank account, is \$1,081,747.

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52 **ATTACHMENTS:**

- 53 1. Draft Resolution
- 54 2. Draft Agreement

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RESOLUTION-XXX

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CALISTOGA, COUNTY OF NAPA,
STATE OF CALIFORNIA AUTHORIZING THE CITY MANAGER TO ENTER INTO A
SETTLEMENT AGREEMENT OVER A COMMUNITY POOL CONSTRUCTION CLAIM BY
PAGE CONSTRUCTION COMPANY AND SUBCONTRACTORS IN THE AMOUNT OF
\$800,000.**

WHEREAS, on August 11, 2010, Page filed a claim with the City in the amount of \$1,777,637 for additional compensation allegedly due for work on the Calistoga Community Pool project. There were also four stop notice lawsuits filed by subcontractors on this project with the Napa County Superior Court in the total amount of \$665,760.62 which were ordered consolidated with the Page vs. Calistoga case; and

WHEREAS, on January 23, 2012, the parties (Page Construction Company, City and subcontractors) attended mediation with Randy Wulff acting as mediator. At the conclusion of the mediation, the parties agreed to a settlement in the amount of \$800,000 to be paid by the City to Page Construction Company subject to the execution of a mutually acceptable written settlement agreement; and

WHEREAS, at its February 21, 2012 regular meeting the City Council reviewed the terms of the proposed settlement agreement and has found the terms acceptable to settle the pending claims against the City and City of Calistoga claims against Page Construction company; and

WHEREAS, it is in the interest of the City of Calistoga to participate in this settlement agreement for the benefit of its residents.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Calistoga hereby authorizes the City Manager to enter into a settlement agreement over a community pool construction claim by Page Construction Company and subcontractors in the amount of \$800,000 as set forth in detail in Attachment 1 to this Resolution.

NOW, THEREFORE, BE IT FURTHER RESOLVED that the City Manager is authorized to dispense funds in the amount of \$800,000 from the 2007 Capital Lease Funds in accordance with the terms of the approved settlement agreement.

PASSED, APPROVED, AND ADOPTED by the City Council of the City of Calistoga at a regular meeting held this **21st day of February, 2012** by the following vote:

AYES:

NOES:

ABSTAIN/ABSENT:

JACK GINGLES, Mayor

ATTEST:

AMANDA DAVIS, Deputy City Clerk

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made by and among City of Calistoga ("City"), Page Construction Company ("Page"), Waterworks Industries Inc ("WWI") and John Benward Company ("Benward"), with regard to the arbitration action entitled Page v. City, Office of Administrative Hearings ("OAH") Case No. A-003-2011 and the lawsuits filed with the Napa County Superior Court by WWI, Koreen Bros, Benward and Adams ("Lawsuits") which have been ordered consolidated with the OAH case. The OAH case and the Lawsuits are collectively referred to herein as the "Actions".

City, Page, WWI and Benward, are collectively referred to in this Agreement as "Parties." The project which is the subject of this Agreement is known as the Calistoga Community Pool Facility ("Project").

The Parties desire to settle and compromise certain claims relating to the Actions according to the terms of this Agreement;

NOW, THEREFORE, in consideration of the promises and mutual covenants contained herein, the Parties agree as follows:

1. **NO ADMISSION OF LIABILITY**

This Agreement is a mutual compromise and is not intended to be, nor shall it be construed as, an admission of liability by any party to any other party.

2. **SETTLEMENT AMOUNT**

A. City agrees to pay Page the total sum of \$800,000 in three installments of \$267,000 on February 24, 2012; \$267,000 on March 15, 2012 and \$266,000 on April 15, 2012.

B. Page agrees to pay WWI the total sum of \$220,000 in three equal installments seven (7) days after the above dates.

C. Page agrees to pay Benward the total sum of \$150,000 in three equal installments seven (7) days after the above dates.

D. Navigators (Insurance Company for WWI) agrees to pay Page the total sum of \$100,000 on or before February 24, 2012 on behalf of WWI.

3. **DISMISSALS OF ACTIONS**

Within ten (10) days of receipt of the final settlement payment due from the City, Page will file with the OAH a dismissal of the arbitration complaint with prejudice.

Within ten (10) days of receipt of the final settlement payment due from Page, WWI will file a dismissal with prejudice of both the OAH case and the Lawsuit filed by WWI with the Napa County Superior Court.

Within ten (10) days of receipt of the final settlement payment due from Page, Benward will file a dismissal with prejudice of both the OAH case and the Lawsuit filed by Benward with the Napa County Superior Court.

4. SCOPE OF CLAIMS RELEASED

Except as expressly set forth in this Agreement, and subject to the obligations created or continued by this Agreement, each party to this Agreement, for itself, and its representatives, predecessors, successors, attorneys, assigns and agents, and each of them, does hereby fully remise, release and forever discharge each party to this Agreement, their representatives, predecessors, successors, assigns, officers, agents, consultants, directors, stockholders, owners, servants, employees, sureties, architects, engineers, insurers, attorneys and affiliated and subsidiary corporations or companies, past and present, and each of them, of and from any and all manner of actions, suits, liens, debts, dues, damages, claims, sums of money, obligations, liabilities, judgments, bonds, executions and demands of every nature, kind and description whatsoever, whether known or unknown, and whether suspected or unsuspected, either at law, in equity or otherwise, which may have arisen under and by virtue of the laws of any jurisdiction, which any party to this Agreement has had or claims to have had or now has or claims to now have in connection with any damages allegedly caused by the Project that is the subject of the Actions. Each party expressly waives and relinquishes all rights and benefits afforded by Section 1542 of the California Civil Code, which provides as follows:

"A General Release does not extend to claims which the Creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his settlement with the debtor."

5. EXCEPTIONS TO RELEASE

A. The Parties agree that the release provided by the Agreement does not serve as a release of the claims for latent defects as defined by Code of Civil Procedure Section 337.15, claims based upon existing contractual warranties and equipment warranties and claims for indemnity for any claims or actions asserted by third parties for personal injury, death or property damages.

B. Page agrees to defend, indemnify and hold harmless the City from any claims, actions, lawsuits of any kind by any subcontractors, sub-subcontractors and/or suppliers of any tier who are not parties to this Agreement which claim any payment due from the City related to the Project.

C. WWI agrees to defend, indemnify and hold harmless Page from any claim for payment by WWI subcontractors or suppliers of any tier.

6. RECISSION OF NOTICE OF TERMINATION OF CONTROL

Within ten (10) days of the receipt from Page of the dismissal required of Page by Paragraph 3 of this Agreement, the City agrees to send a letter to Page rescinding as of May 20, 2010 the City's letter of May 20, 2010 to Page terminating Page's control of the Project.

7. NO ASSIGNMENT

The Parties hereto, and each of them, represent and warrant to each other that they have not heretofore assigned or transferred or purported to assign or transfer to any person,

firm, association, corporation or other entity, any claim or cause of actions based on or arising out of, or in connection with any matter, fact, claim or cause of actions alleged or referred to in this Agreement.

8. BINDING EFFECT

This agreement shall be binding upon, and shall inure to the benefit of the Parties hereto and their respective heirs, successors, representatives and assigns.

9. CALIFORNIA LAW

The Parties hereby agree that this Agreement is made, executed and entered into and is intended to be performed within the State of California, and that this is a California agreement that is to be construed as such under California law.

10. EXPENSES

Each party hereto shall bear their own respective attorneys fees, costs and expenses of any kind arising out of any and all claims which have been settled by the terms of this Agreement. However, the foregoing does not include defense cost claims that WWI is seeking to recover from carriers.

11. CONSTRUCTION OF AGREEMENT

The Parties agree that this Agreement was jointly prepared through negotiations of the Parties and the provisions of the Agreement are not to be strictly or liberally construed for or against any of the Parties.

12. ENTIRE AGREEMENT

This Agreement contains the entire agreement and understanding among the Parties hereto and supersedes and replaces all other prior negotiations, proposed agreements and agreements, written and oral. The Parties further declare and represent that no promise, representation or agreement not herein expressed has been made.

13. AMENDMENTS

No amendment, modification, waiver or termination of this Agreement shall be binding unless executed in writing by the Parties to be bound thereby.

14. COUNTERPARTS AND SIGNATURES

The Parties agree that this Agreement may be executed in counterpart and that each fully executed copy of the Settlement Agreement shall have the same binding force and effect as an original. The Parties further agree that facsimile and signatures transmitted by email shall have the same force and effect as original signatures.

The undersigned hereby agree to the terms of this Settlement Agreement and represent and warrant that they have authority to sign this Settlement Agreement.

Dated: February _____, 2012

PAGE CONSTRUCTION, INC.

By: _____
(SIGNATURE)

PRINT NAME: _____

PRINT TITLE: _____

Dated: February _____, 2012

CITY OF CALISTOGA

By: _____
(SIGNATURE)

PRINT NAME: Richard Spitler

PRINT TITLE: City Manager

Dated February _____, 2012

WATERWORKS INDUSTRIES, INC.

By: _____
(SIGNATURE)

PRINT NAME: _____

PRINT TITLE: _____

Dated: February _____, 2012

JOHN BENWARD COMPANY

By: _____
(SIGNATURE)

PRINT NAME: _____

PRINT TITLE: _____

APPROVED AS TO FORM:

Dated: February _____, 2012

MCINERNEY & DILLON

By: _____
Timothy L. McInerney
Attorneys for Page Construction, Inc.

Dated: February _____, 2012

MICHELLE MARCHETTA KENYON, CITY
ATTORNEY AND BURKE, WILLIAMS &
SORENSEN, LLP

By: _____
Brian A. Pierik, Esq.
Attorneys for City of Calistoga

Dated: February _____, 2012

KILPATRICK TOWNSEND &
STOCKTON LLP

By: _____
Eric J. Phillips
Attorneys for Waterworks Industries,
Inc.

Dated: February _____, 2012

BRAUN & MELUCCI, LLP

By: _____
William J. Braun
Attorneys for John Benward
Company