



School Board Briefing/Proposed Action Report

Informational (no action required by Board) **Action Report** (Board will be required to take action)

DATE: September 1, 2015
FROM: Dr. Larry Nyland, Superintendent
LEAD STAFF: Dr. Lester “Flip” Herndon, Associate Superintendent Operations;
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(206) 252-0115
Richard Best, Director of Capital Projects & Planning;
rlbest@seattleschools.org; (206) 252-0647

I. TITLE

Authorization for Settlement

For Introduction: September 23⁹, 2015

For Action: September 23⁹, 2015

II. WHY BOARD ACTION IS NECESSARY

Board Policy No. 6220, Procurement, requires Board approval of all contracts and agreements in excess of \$250,000. The proposed Settlement Agreement and Release (“Agreement”) would exceed that amount and requires Board approval.

III. FISCAL IMPACT/REVENUE SOURCE

If authorized, a one-time expenditure for \$500,000, plus sales tax, would be made to Absher Construction Company (“Absher”).

The revenue source for this motion is Capital Funds.

Expenditure: One-time Annual Other Source

IV. POLICY IMPLICATION

Contracts over \$250,000 in value must be approved by the School Board under Board Policy No. 6200, Procurement. A settlement agreement is a contract.

V. RECOMMENDED MOTION

I move that the School Board ratify the Agreement in the amount of \$500,000, plus sales tax with Absher. Immediate action is in the best interest of the District.

VI. BOARD COMMITTEE RECOMMENDATION

This claim was discussed in an Executive Session of the School Board in August 2015. This claim was also reviewed at the Executive Committee meeting on September 17, 2015. The Committee reviewed the motion and moved the item forward to the full Board with a recommendation for approval.

VII. BACKGROUND INFORMATION

The District contracted with Absher as the general contractor/construction manager to construct the Nathan Hale High School Project 2: Renovation (“Project”). Absher subcontracted with Prime Electric, Inc. (“Prime”) for the electrical work on the Project.

During the Project, disputes arose as to changes, delays, and impacts on the Project. Prime filed a lawsuit against Absher, relating to the Project. This Agreement, if ratified, will settle all remaining disputes related to the Project, including but not limited to, all delay and impact claims by Absher, Prime, and any other subcontractors or suppliers of any tier on the Project.

After this dispute is resolved, District staff will present to the School Board at a future meeting “Final Acceptance” documents, which will close out the Project.

VIII. STATEMENT OF ISSUE

Whether the School Board should ratify the Agreement between the District and Absher.

IX. ALTERNATIVES

If the Agreement is not ratified, the lawsuit and claim will move forward and the District will be forced to participate in extensive litigation. Additional legal defense costs will be incurred and the amount of damages required by Prime, through Absher, will increase to its prior seven figure demand. The amount of any damage award becomes very uncertain.

X. RESEARCH AND DATA SOURCES / BENCHMARKS

N/A

XI. TIMELINE FOR IMPLEMENTATION / COMMUNITY ENGAGEMENT

Upon approval of this motion, the contingency in the Agreement is satisfied and payment will be made within 30 days.

XII. ATTACHMENTS

- Settlement Agreement and Release

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is entered into as of August 28, 2015, by and among the Seattle School District No. 1, also known as Seattle Public Schools, a Washington school district ("School District"); Absher Construction Company ("Absher"); and Prime Electric, Inc. ("Prime"). Collectively these are the "Parties."

Recitals

- a. *The School District contracted with Absher as general contractor/construction manager to construct the Nathan Hale High School Project 2: Renovation (the "Project").*
- b. *Absher subcontracted with Prime for the electrical work on the Project.*
- c. *During the Project disputes arose as to changes, delays and impacts on the Project.*
- d. *Prime filed a lawsuit against Absher in King County Superior Court, Cause No. 13-2-19489-9, relating to the Project (the "Lawsuit").*
- e. *The Parties negotiated the claims at a mediation on August 28, 2015. The Parties have reached an agreement expressed herein to resolve any and all claims arising from or related to the Project. Absher and Prime negotiated a settlement agreement pertaining only to Absher / Prime claim issues ("Absher / Prime Agreement").*

Agreement

1. By this Agreement and in consideration of the respective agreements of the Parties, and except as specifically reserved in this Agreement, the Parties intend to achieve a full and complete settlement and compromise of all claims, disputes and controversies among them arising out of the work performed on the Project, and any and all claims by or against any of the Parties that relates in any manner to the Project, including all claims that Absher presented or could have presented on behalf of their employees, subcontractors, and suppliers of any tier, including but not limited to Prime. This Agreement is contingent upon formal ratification by the School District's Board of Directors; this Agreement will be presented to the Board at the next regularly scheduled board meeting on September 9, 2015. This Agreement shall be null and void, strictly confidential, and subject to ER 408 and Chapter 7.07 RCW, unless all Parties sign this Agreement and the School District's Board of Directors ratifies the Agreement in an open public meeting.

2. The School District shall pay Absher Five Hundred Thousand Dollars (\$500,000.00), plus sales tax. Absher has a separate agreement with Prime as to payment between Absher and Prime that does not affect the School District. These payments shall settle all remaining disputes related to the Project, including but not limited to all delay and impact claims by Absher, Prime, and any other subcontractor or supplier of any tier on the Project. Absher and Prime reserve those rights between each other set forth in the Absher / Prime Agreement, which rights do not affect the School District. Of these two payment amounts, the School District shall pay Absher within thirty (30) days of formal ratification by the School District's Board of Directors, and Absher shall pay Prime within ten (10) days of receipt of payment from the School District. Any late payments under this Agreement shall be subject to interest at a twelve percent (12%) annual rate. Prime's and Absher's releases against the School District are not dependent upon payment from Absher to Prime.

3. Upon formal ratification of this Agreement by the School District's Board of Directors, the Project will then be presented to the Board of Directors for Final Acceptance in the ordinary course of business. Following Final Acceptance and upon receipt of all statutorily required releases, the School District will release Absher's retainage bond. Upon payment of the amounts above, Absher and Prime shall execute a stipulation and order of dismissal, with prejudice and without costs, in the Lawsuit.

4. Except for the obligations under this Agreement and as specifically reserved in this paragraph, the School District, on behalf of itself, its officers, directors, employees, assigns, and agents, past and present, and anyone acting on its behalf, Absher, on behalf of itself, its officers, directors, subsidiaries, employees, assigns, and agents, past and present, and anyone acting on its behalf, and Prime, on behalf of itself, its officers, directors, subsidiaries, employees, assigns, and agents, past and present, and anyone acting on its behalf, hereby fully and mutually release and discharge one another from any and all debts, obligations, promises, agreements, contracts, actions, causes of action, claims, and demands of any and every nature whatsoever, known or unknown, asserted or unasserted, vested or contingent, which exist, have existed or may have existed, or which hereafter can, shall or may exist, that relate to the Project, and all claims that the Parties have or could have made on behalf of themselves, their employees, insurers, contractors, subcontractors and suppliers of any tier for the Project. Specifically excepted from this release are the issues addressed in the Absher / Prime Agreement, which issues do not affect the School District. The Parties each reserve their rights and claims for any unexpired warranty obligations, any latent defects, and to indemnify or contribution relating to or arising out of personal injury or property damage as provided in the Contract Documents. Absher and Prime release any claim they may have, under subrogation rights, third party beneficiary rights, or otherwise, against DKA/Heery, Mahlum, and

any other consultant to the School District and their sub-tier consultants to the extent that such claims relate to the Project. The Parties reserve claims for breach of this Agreement.

5. Absher agrees to defend, indemnify and hold harmless the School District and its officers, directors, employees, assigns, and agents, past and present, and anyone acting on its behalf from and against any and all claims arising out of the Project, including costs and attorneys' fees, whether known or unknown, by Absher's subcontractors or suppliers of any tier, or made on behalf of Absher, including its employees.

6. Prime agrees to defend, indemnify and hold harmless Absher and its officers, directors, employees, assigns, and agents, past and present, and anyone acting on its behalf from and against any and all claims arising out of the Project, including costs and attorneys' fees, whether known or unknown, by Prime's subcontractors or suppliers of any tier, or made on behalf of Prime, including its employees.

7. This Agreement is entered into to avoid the expense, inconvenience and uncertainty of legal proceedings between the Parties related to the Project. Execution of this Agreement shall not constitute an admission by any Party of any liability of any kind.

8. This Agreement contains all of the promises and covenants made by the Parties, except for those contained in the Absher / Prime Agreement regarding this Project that does not affect the School District. In executing this Agreement, each Party warrants that it is relying solely upon its own judgment and knowledge, and that it is not relying on any statement or representation made by the other Party or its agents.

9. All costs and attorneys' fees incurred by the Parties shall be borne by the Party incurring them, except that the prevailing Party shall be entitled to any and all costs and expenses, including attorneys' fees, incurred in enforcing this Agreement.

10. This Agreement shall bind the heirs, successors, representatives and assigns of each Party. Each of the Parties warrant that they have not assigned their claims to any other entity.

11. The Parties acknowledge that they have been represented by counsel in the negotiations of this Agreement and, being fully advised as to the legal effect of this Agreement, have executed this instrument freely and voluntarily. This Agreement has been mutually drafted by the Parties.

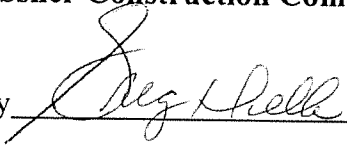
12. The provisions of this Agreement are severable and, if any part of it is found to be unenforceable, the other paragraphs shall remain fully valid and enforceable. This Agreement shall survive the termination of any arrangements contained herein. This Agreement may be executed in counterparts and by facsimile.

13. All questions with respect to construction of this Agreement and the rights and liabilities incurred hereto shall be decided by Chris Soelling acting as arbitrator pursuant to RCW 7.04A. The arbitration shall be conducted in accordance with the laws of the State of Washington, without regard to its choice of law provisions.

14. If any one of the Parties fails to execute this Agreement, then this Agreement shall be null and void, of no effect, and subject to Evidence Rule 408 and RCW 7.07.030.

15. The individuals executing this Agreement below have authority to bind their principals and do bind them by executing this document. The terms and conditions set forth above are agreed upon and effective as of the date of the last signature entered below.

Absher Construction Company

By 

Date: 8-28-15

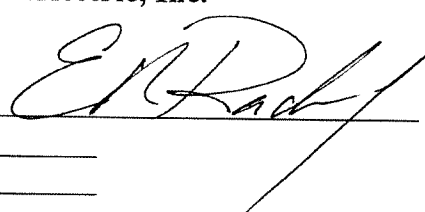
Seattle School District No. 1

By 

Dr. Lester "Flip" Herndon
Assistant Superintendent

Date: 8/28/15

Prime Electric, Inc.

By 

Date: 8-28-15