



Request for City Council Committee Action From the City Attorney's Office

Date: December 11, 2006
To: Ways & Means/Budget Committee
Subject: City of Minneapolis v. Architectural Alliance
Hennepin County District Court File No. 04-002367

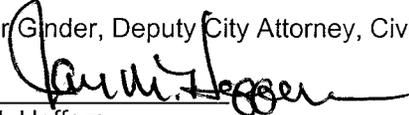
Recommendation: That the City Council approve final settlement of the above litigation by accepting payment of \$142,500.00 by Architectural Alliance ("AA") to the City as damages for defective design and supervision at the Currie Maintenance Facility in the City and authorize the City Attorney's Office, by and through the law firm of Kennedy and Graven, to execute any documents necessary to effectuate the settlement.

Previous Directives: In October 2005, the City Council approved a partial settlement of this litigation involving Knutson Construction Services in the amount of \$30,000 relating to claims brought by the City for negligent installation of the trench drain at the Currie Facility. In August 2004, the City Council approved a partial settlement involving AA, Knutson and Cain Ouse, Inc., a consultant to AA, for \$40,100 relating to claims brought by the City for faulty HVAC design at the Currie Facility.

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Approved by:


Jay M. Heffern
City Attorney

Presenter in Committee: Jay M. Heffern, City Attorney

Financial Impact (Check those that apply)

- No financial impact - or - Action is within current department budget.
(If checked, go directly to Background/Supporting Information)
- Action requires an appropriation increase to the Capital Budget
- Action requires an appropriation increase to the Operating Budget
- Action provides increased revenue for appropriation increase
- Action requires use of contingency or reserves
- Other financial impact (Explain): Fund/Org. 6200 1500 680 6822
- Request provided to the Budget Office when provided to the Committee Coordinator

Community Impact:

City Goals: Build Community

Background/Supporting Information

On June 17, 2003, the City sued Knutson and AA for breach of contract and negligence for defects in the Currie Maintenance Facility, completed in stages during 1999 and 2000. The HVAC and negligent installation issues brought in this litigation were settled as noted above. This would release AA from claims the City brought or could have brought in the remaining issues in this litigation involving the architect's design of a concrete floor that is delaminating in certain areas, and the architect's supervision of a defectively installed trench drain. The remaining allegations against AA involve:

1. Negligent supervision of the trench drain system that was installed throughout the maintenance area of the Facility; and
2. Defective design of the concrete floor in the maintenance areas of the Facility.

Attempts were made early in the litigation to settle the matter through informal discussions and exchange of information and before filing the case with the Court in late 2003. No offers of settlement were made by the defendants.

To date, the focus of discovery in this case has been the statute of limitations governing defective and unsafe conditions to improvements to realty such as the Facility. The statute requires that claims brought against architects and general contractors must be served within two years of discovery of injury "arising out of the defective and unsafe condition." Shortly after the Facility was substantially completed in early 2000, problems with the concrete floor and trench drain were noted in City staff emails and discussed by maintenance staff and supervisors. The problems identified in 2000 were, in our view and the view of our expert consultant, American Engineering Testing ("AET"), a different set of injuries from those alleged in the current litigation.

After extensive depositions of numerous City staff involved in the construction and day-to-day use of the Facility and the extensive production and review of emails retrieved from City staff computers, defendants brought a motion for summary judgment that was heard on April 11, 2005. By order and memorandum dated June 20, 2005, the Court granted the motions, finding that the City discovered the floor and trench drain injuries in 2000. Other than allowing an estoppel basis for the City to proceed against AA and Knutson on the trench drain, the Court's decision barred the City from pursuing these claims further.

The City appealed to the Minnesota Court of Appeals. By decision filed August 15, 2006, the Court of Appeals reversed and remanded the decision by the District Court. The appellate court found fact issues in dispute whether the relevant injuries claimed in this lawsuit were discovered in 2000 and various other errors in the District Court decision. After remand, the District Court established an amended scheduling order setting the trial date for July 7, 2007.

Significant expert review and discovery remains. Prior to recommending discovery, the City and AA used a mediator and met on October 30, 2006 in an attempt to settle the case. It was unsuccessful but the parties continued the settlement negotiations, resulting in this recommended settlement.

Reasons for Settlement Recommendation.

Despite the full reversal of the District Court's decision by the Court of Appeals, a number of risks and costs remain that support the settlement amount of \$142,500.00.

First, based on an AET report of damages to the concrete floor and trench drain system, the City faces repair costs up to approximately \$400,000 to \$500,000 for the concrete floor and up to \$125,000 for the trench drain system. These prospective repairs are based on those areas that have been found by AET to have insufficient concrete cover on the floor area and are vulnerable to rusting rebar that has already corroded to the point of visible concrete spalling. The trench drain system was improperly installed and may be inadequate to withstand the weight of vehicles used in the Currie Facility. It is apparent that much of the entire trench drain system will need to be replaced sooner than its reasonable expected life. These repair estimates are based on full replacement over a wide area, much of which is not yet showing signs of distress.

Factors that could reduce or bar recovery for the defects at the Facility are as follows. The statute of limitations defense is still available on both the floor and trench drain. The cost of defending this issue at trial will be significant given the numerous witnesses and extensive facts regarding the alleged 2000 discovery of the injury as set against the 2002 discovery the City maintains. Assuming the City defeats the statute of limitations defense on one or both of the claims, there is a dispute between the experts retained by the parties over whether the flaw in the concrete floor was caused by contractor negligence or improper design. Contractor negligence would absolve AA of responsibility for some or all of the floor delamination, in part because the City has already settled with Knutson but also because

contractor error would validate the 2000 discovery argument barring the claim on statute of limitations. Another issue will be the City's maintenance of the floor and whether it reasonably sealed and cleaned the floor to reduce the chloride ion (salt) penetration that the City asserts has caused the floor and trench drain to deteriorate. City records on this issue are not definitive. The City's use of heavy tracked vehicles in the Currie facility will also be an issue used by AA to demonstrate abuse of the floor.

The trench drain claim remaining against AA is based on improper supervision of the faulty installation. AA's defense to the City's claim is that the contractor is solely responsible for the means and methods of installation. The contract and law in Minnesota favors AA on this issue, but it is not definitive. Authoritative case law from other states more applicable to these facts, however, could cause the Court to give the issue to the jury, which is likely to favor the City.

Finally, if the City proves its claim was timely and that AA caused the damage, the repair cost will be contested and, therefore, the award could be significantly less than the amount argued by AET. It is yet another contested issue that carries a range of possible outcomes.

All of the above issues create cost and the risk of no recovery or a significantly compromised recovery.

We recommend approval of this settlement as favorable to the City under the circumstances. Upon settlement, the City would release AA from matters arising out of the litigation but would retain its right to recover for other defects that may be discovered between now and the year of repose for the Facility, 2010. By law, all construction or design defects discovered after 2010 at the Facility cannot be pursued in court.