



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

Date: September 15, 2004
To: Ways & Means/Budget Committee

Subject: Kellington Construction, Inc. v. City of Minneapolis.
Hennepin County District Court File No.: 03-018584

Recommendation: That the City Council approve settlement of the above litigation for payment of \$200,000 to Kellington Construction, Inc. and its attorneys Fabyauske, Westra and Hart, payable from Fund/Org. 6900 150 1500 8650 for its work on the Convention Center Expansion, and a release of other funds currently held for approved work. The City Attorney is further authorized to execute any documents necessary to effectuate the settlement.

Previous Directives:

Prepared by: Peter W. Ginder, Acting Deputy City Attorney, Civil Phone: 673-2478

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 6900 150 1500 8650
- Request provided to the Budget Office when provided to the Committee Coordinator

Background/Supporting Information

Kellington Construction, one of the many prime contractors that worked on the Minneapolis Convention Center Expansion Project (MCCX), sued the City in November 2003. Kellington worked on numerous phases of interior construction such as steel stairways, the three turntables in the auditorium, concrete walls and operable (movable) walls in the conference rooms. Kellington claims that the City failed to properly coordinate the job and delayed its work. Kellington claims its work was delayed by other contractors getting in their way, by directions from the City (Construction Manager—Mortenson Thor (M/T)) to work "out-of-sequence," by delays in responses to requests for clarification to plans and specifications from the architect and by the City "over-inspecting" its work.

In response to Kellington's lawsuit, the City has counter-claimed that any Kellington delays were caused by its own mistakes and deficiencies. M/T believes we can show numerous examples based on construction records. To the extent the City can prove responsibility on Kellington for these portions of these large project extras, the counterclaim would amount to about \$850,000 and could significantly offset Kellington's claims.

Both Kellington and the City have serious legal hurdles standing in the way of recovery. For example, the contract places notice requirements on the City, and Kellington, for claims of this type. Such notices originally may not have been met by either party. The result could be a bar to one or both on their respective claims. Further, some courts have found that when both parties are partially responsible for delays complained of in a project, neither party may recover and no allocation of fault is pursued. Kellington points out that the City continued to use Kellington throughout the project, and pay it change order amounts. Kellington will argue the City has therefore waived any claims against Kellington. By the same token, Kellington seeks damages above and beyond the \$2 million dollars in change orders it has already been paid. It too faces strong City defenses for these amounts.

In July 2004, after the initial exchange and analysis of documents, Kellington requested a meeting with us to discuss settlement prior to the deposition schedule, otherwise beginning on September 8 with our depositions of the Kellington witnesses. After an exchange of information about each party's position, the attorneys and their respective expert consultants met on August 12, 2004. Before the meeting, Kellington had given us a claim book ("Request for Equitable Adjustment" or "RFEA"), for settlement purposes, which set forth a basis for a claim in the amount of about \$1,000,000, including \$200,000 for its turntable contractor, Westmont Industries. The remaining \$800,000 claim amount is based primarily on their expert's analysis of Kellington's labor inefficiency. Their labor inefficiency claim was in turn based on the number (numerous) and timing (late in project) of Change Orders in the MCCX Project, about 800 Change Orders to Kellington including minor changes of insignificant amount.

Kellington submitted its \$1,000,000 claim on August 12, and we presented the City's counterclaim of around \$850,000. We invited them to submit a settlement demand for the City's consideration and to see how far apart the parties are at this time. Kellington later submitted its settlement demand of \$500,000 (plus they would hold the City harmless on claims of subcontractors), plus the contract balance (undisputed) of about \$166,000.

At the September 3, 2004, closed session, the City's outside attorneys, Kennedy & Graven discussed this lawsuit in detail and received direction from the Council. This is a very favorable outcome to this case at this stage of the litigation. The estimated cost to pursue this case through extensive discovery, motions, and trial could be \$300,000 considering attorneys' fees, expert fees, and copying costs. Any trial carries with it the risk that the City as a defendant would be required to pay some damage amount. Though the City has a counterclaim, there is the risk that Plaintiff would be entitled to a net recovery. If added to the litigation costs, such cost would be very significant considering the damages claimed.

Therefore, payment at this early stage of \$200,000 is a very favorable outcome from the standpoint of total expenditures, elimination of risk, and reallocation of City staff resources. The firm position taken by the City regarding the Kellington claim, and the threat created by the counterclaim, were significant factors in Kellington's agreement to a substantial reduction to its original (\$1 million) and threatened (\$2.5 million) claim.

The settlement also is a complete release and indemnity from any claims that may be brought by Kellington subcontractors. The City holds retainage for work satisfactorily performed that has been unpaid

to date. For these reasons, we strongly recommend acceptance of this settlement. It is consistent with previous direction given by the City and no new terms and conditions have been raised by Kellington.