

MEMORANDUM

TO: Program, Projects and Operations Subcommittee

FROM: Dick Sklenar, Project Manager

SUBJECT: City of Blair Request Regarding Compensation for Damages From Pospichal Construction Inc. For Washington County Rural Water #2

DATE: November 8, 2006

Last year, the District hired Pospichal Construction, Inc. to build a pump station and two pressure reducing vaults within the City of Blair as part of the development of the District's Washington County Rural Water #2 system now in operation. As per an agreement, the City is to compensate the District 100% for such work. The project was completed in July 2005.

On January 5, 2006, a water main break occurred at one of the pressure reducing vaults along Hwy. 30. Pospichal Construction was called to make the needed repairs under the project warranty. After 5 days, repairs were completed. The repairs immediately did not hold up once service was restored. However, the City, needing to have water service restored, immediately called in another contractor to correct the situation.

The District engineer, HGM Associates, claimed expenses of \$5,500 for inspection services during the repair effort. District staff approached Pospichal Construction to pay these claims under the warranty provisions of their construction contract. The City filed a claim with the District for damages suffered from the incident which amounted to \$17,540.94 that had been paid to their alternate contractor. In June 2006, the City of Blair indicated that they would settle for a \$5,000.00 payment from Pospichal Construction to solve the matter. Pospichal Construction declined to do so because they did not believe they were totally liable for the problems encountered.

The Blair City Council took action in August to request the District to make the City's offer of a \$5,000.00 settlement once again in writing to Pospichal Construction, Inc., with a response deadline from that firm no later than August 15, 2006 (see attached letter). Furthermore, should the contractor not be willing to accept the City's settlement offer, that the District pursue legal means of recovering all damages accrued by the City for the incident.

Subsequently, the District submitted a letter to Pospichal Construction, Inc., emphasizing again the City's offer and deadline for response. Pospichal Construction has responded with a counter-offer (attached) of \$3,290.00.

It is believed that the City will accept this counter-offer, with the understanding that \$1,710.00 be remitted by the District to HGM Associates for their claims against the District regarding this issue.

A proposed draft settlement agreement has been developed (attached), to address claims by all parties against all parties. The agreement calls for Pospichal Construction to pay \$3,290.00 to the City, the District to pay HGM Associates \$1,710.00 and all parties to release the others from future liability on the repair.

It is recommended that the Subcommittee recommend to the Board of Directors that the Acting General Manager be authorized to execute the proposed Settlement Agreement pertaining to a portion of the Washington County Rural Water #2 Project, approved as to form by the District's Legal Counsel.

SETTLEMENT AGREEMENT

DRAFT

**HGM ASSOCIATES, INC.,
POSPICHAL CONSTRUCTION, INC.,
THE CITY OF BLAIR, NEBRASKA, AND,
THE PAPIO-MISSOURI RIVER NATURAL RESOURCES DISTRICT**

THIS SETTLEMENT AGREEMENT (hereinafter referred to as "**THIS AGREEMENT**") is entered into by and among **HGM ASSOCIATES, INC.**, ("the **ENGINEER**"); **POSPICHAL CONSTRUCTION, INC.**, ("the **CONTRACTOR**"); the **CITY OF BLAIR, NEBRASKA** ("the **CITY**"); and, the **PAPIO-MISSOURI RIVER NATURAL RESOURCES DISTRICT** ("the **NRD**").

WHEREAS, the **CONTRACTOR** was retained by the **NRD** on behalf of the **CITY** to construct the Washington County Rural Water System No. 2 Project ("**the PROJECT**") according to plans and specifications prepared by the **ENGINEER**; and,

WHEREAS, a portion of the **PROJECT** ("**the SUB-PROJECT**") involved construction of a 12-inch water main, including a pump station with pressure-reducing valve, at Highway 30 and Davis Street in the **CITY**; and,

WHEREAS, after completion of the **PROJECT**, the **SUB-PROJECT** failed during operation and the **CONTRACTOR** initiated repairs, whereupon the **CITY** retained an additional contractor ("the **REPLACEMENT CONTRACTOR**"), who completed re-construction of the **SUB-PROJECT**; and,

WHEREAS, among other claims, the **CONTRACTOR** claims against the **NRD** for sums due in connection with the **CONTRACTOR'S** attempt to reconstruct the **SUB-PROJECT**; the **ENGINEER** claims against the **NRD** for additional services provided by the **ENGINEER** in connection with the reconstruction of the **SUB-PROJECT**; the **CITY** claims against the **CONTRACTOR** for sums paid to the **REPLACEMENT CONTRACTOR** for re-construction of the **SUB-PROJECT**; and,

the NRD claims against the CONTRACTOR for the cost of the aforesaid additional services of the ENGINEER.

WHEREAS, each of the parties desire to compromise and settle all of its actual and potential claims against the other parties in connection with the failure and reconstruction of the SUB-PROJECT.

NOW, THEREFORE, FOR AND IN CONSIDERATION of their mutual covenants, the parties agree as follows:

1. At a transaction to be held at the office of the NRD on the ___ day of _____, 2006, at ___ o'clock, ___ M., or at such other place and time as the parties may agree in writing, the CONTRACTOR shall pay to the CITY the sum of \$3,290.00 and the NRD shall simultaneously pay to the ENGINEER the sum of \$1,710.

2. Upon the completion of the aforesaid transaction:

a. The CONTRACTOR shall be deemed to have permanently released the CITY, the NRD and/or the ENGINEER, and shall be deemed to have agreed to hold them harmless from and against, any and all claims that the CONTRACTOR may have against them and any of them for services rendered in connection with the CONTRACTOR'S efforts to re-construct the SUB-PROJECT; and,

b. The ENGINEER shall be deemed to have permanently released the CITY, the NRD and/or the CONTRACTOR, and shall be deemed to have agreed to hold them harmless from and against, any and all claims that the ENGINEER may have against them and any of them for additional services provided in connection with the CONTRACTOR'S and/or the REPLACEMENT CONTRACTOR'S efforts to re-construct the SUB-PROJECT; and,

c. The CITY and the NRD shall be deemed to have permanently released each other, and shall be deemed to have agreed to have permanently released the CONTRACTOR and the ENGINEER and to have agreed to hold the CONTRACTOR and the ENGINEER harmless from and against, any and all claims that the NRD may have against the CONTRACTOR or the ENGINEER

DRAFT

pursuant to the original contract between the NRD and the CONTRACTOR for construction of the SUB-PROJECT, for sums paid to the REPLACEMENT CONTRACTOR for re-construction of the SUB-PROJECT and/or to the ENGINEER for the cost of the aforesaid additional services.

3. THIS AGREEMENT contains the entire agreement among the parties, and each of the parties agree that none of the other parties, nor any of officers, agents or employees of another party, have made any representation or promise with respect to THIS AGREEMENT not expressly contained herein.

4. The original contract between the NRD and the CONTRACTOR for construction of the PROJECT is ratified and confirmed in all respects.

5. THIS AGREEMENT shall be effective upon its complete execution by all the parties.

Executed by the parties as of this ____ day of _____, 2006.

HGM ASSOCIATES, INC.,

By _____
Title _____

POSPICHAL CONSTRUCTION, INC.,

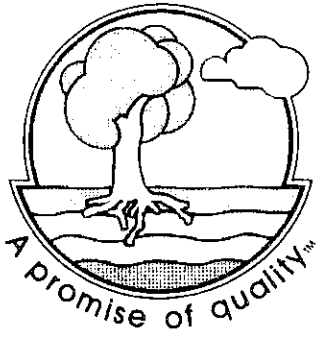
By _____
Title _____

THE CITY OF BLAIR, NEBRASKA

By _____
Title _____

**PAPIO-MISSOURI RIVER NATURAL
RESOURCES DISTRICT**

By _____
Title _____



CITY OF BLAIR

AUG 30 2006

August 29, 2006

Dick Sklenar
PMRNRD
8901 South 154th Street
Omaha, NE 68138-3621

RE: Settlement Offer

Dear Mr. Sklenar:

The City of Blair is in receipt of the settlement offer from Pospichal dated August 14, 2006 and we must respectfully decline the offer.

As for the request by Pospichal Construction for \$1710.00 the City of Blair rejected Pospichal Construction's request for this additional costs last December after a review with Jim on the circumstances surrounding the project. Bottom line is Jim failed to notify the proper individuals of his plans and as a result nothing was scheduled for shutting down the water system. This caused Jim to have to mobilize a crane twice. In addition Jim states the city took to long in shutting down the water system causing him to have idle employees. However, the inspector on the job at the time documented that his employees were busy the whole time with preparations for the PRV tie-in. For these reasons the City of Blair denied Pospichal Construction's claim for the additional crane mobilizations and down time for their employees.

The City of Blair is still offering the proposed settlement offer made to Pospichal Construction in our previous letter to PMRNRD but we must have a final answer on or before August 31, 2006. If this offer is not accepted, Blair requests the PMNRD pursue the entire claim against Pospichal Construction as outline in the city's letter. The City of Blair is also expecting Pospichal Construction to warrant their work as outline in the contract documents and does not release Pospichal Construction from their obligations on this project.

If there are any questions, please call me at 420-426-4191.

Sincerely,

Allen Schoemaker
Public Works Director

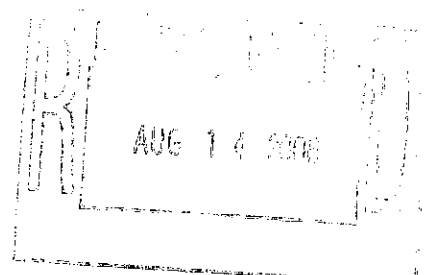
Pospichal

CONSTRUCTION, INC

445 S. 259th St., Waterloo, NE 68069
Phone: (402) 359-4251 Fax: (402) 359-4206

August 14, 2006

Marfin J. Petermann
Acting General Manager
Papio-Missouri River Natural Resources District
8901 So. 154th Street
Omaha, NE 68138-3621



RE: Letter of August 3, 2006

Dear Mr. Petermann:

I received your letter of August 3, 2006 regarding the Washington County Rural Water System No. 2. As you know I am of the firm opinion that the cause of any failure to the system was not the result of the material or workmanship of Pospichal Construction. As you also know, I am a small contractor without sufficient resources to battle the government and still hope to survive.

In response to your August 3, 2006 letter, I request that the following be part of any settlement offer:

1. Pospichal Construction be allowed a credit in the amount of \$1,710.00. This represents the claims for the expense of unnecessary crane mobilization submitted during the summer of 2005, referenced in the September 29, 2005 letter from Chris Koenig.
2. That Pospichal Construction be relieved from any further obligations or claims relating to this project. As I have maintained throughout this matter, the cause of the failure is not a result of anything done or not done by Pospichal Construction and, therefore, Pospichal Construction has fulfilled all of its obligations and wants a complete and total release from any other claims.

In exchange, Pospichal Construction will waive its claim against the NRD, the City and HGM which, as you also know, is in excess of \$25,000.00.

Please let me know if this is acceptable.

Yours very truly,

Jim Pospichal, President
DAY/sh

Pospichal

CONSTRUCTION, INC.

445 S. 259th St., Waterloo, NE 68069
 Phone: (402) 359-4251 Fax: (402) 359-4208

MEMO TO: Martin Petermann ^{FAX} 895-6543
 FROM: Jim Pospichal
 SUBJECT: Crane time.

Martin - two times I had a crane on the job and both H. G. M and the City of Blair acted like they knew nothing about it. The first time I was charged \$560. I will fax you a copy of the memo regard that time.

The second time is detailed in a memo to Chris Keenig dated July 8 - 2005 Please Review

\$1150.00
560.00
<hr/>
\$1710.00

Pospichal

CONSTRUCTION, INC

445 S. 259th St., Waterloo, NE 68069
Phone: (402) 359-4251 Fax: (402) 359-4206

Neither of the mentioned parties
wants to admit fault. I will
not accept their lying and twisting
and side stepping the true facts.
I've listened to it for 9 months
already.

I will mail you a hard copy, this
letter now - Mon. August 14, 2006.

Feel Free to call Jim.

\$5000.00
- 1710.00

\$3290.00

PAPIO-MISSOURI RIVER
NATURAL
RESOURCES
DISTRICT



8901 S. 154TH ST.
OMAHA, NE 68138-3621
(402) 444-6222
FAX (402) 895-6543
www.papionrd.org

August 3, 2006

Jim Pospichal
Pospichal Construction, Inc.
445 South 259th Street
Waterloo, NE 68069
CERTIFIED MAIL

RE: Notice of Claim
Washington County Rural Water System No. 2

Dear Mr. Pospichal:

The District is in receipt of a letter from the City of Blair offering your firm the opportunity to make a one-time payment of \$5,000 to the City, in satisfaction of the City's claim against your firm for expenditures in excess of that amount that were incurred by the City for repairing water line breaks at and near the pressure reducing vault along Highway 30. We request that your firm respond in writing to this settlement offer no later than August 15, 2006. The City is also requesting that the District file litigation against your firm should the offer not be accepted. Enclosed is the attached letter the District has received from the City.

Sincerely,



Marlin J. Petermann, P.E.
Acting General Manager

Enclosure

CC: Al Schoemaker, City of Blair
Chris Koenig, HGM Associates
Dick Sklenar, P-MRNRD

73006 MP:DS:pb file

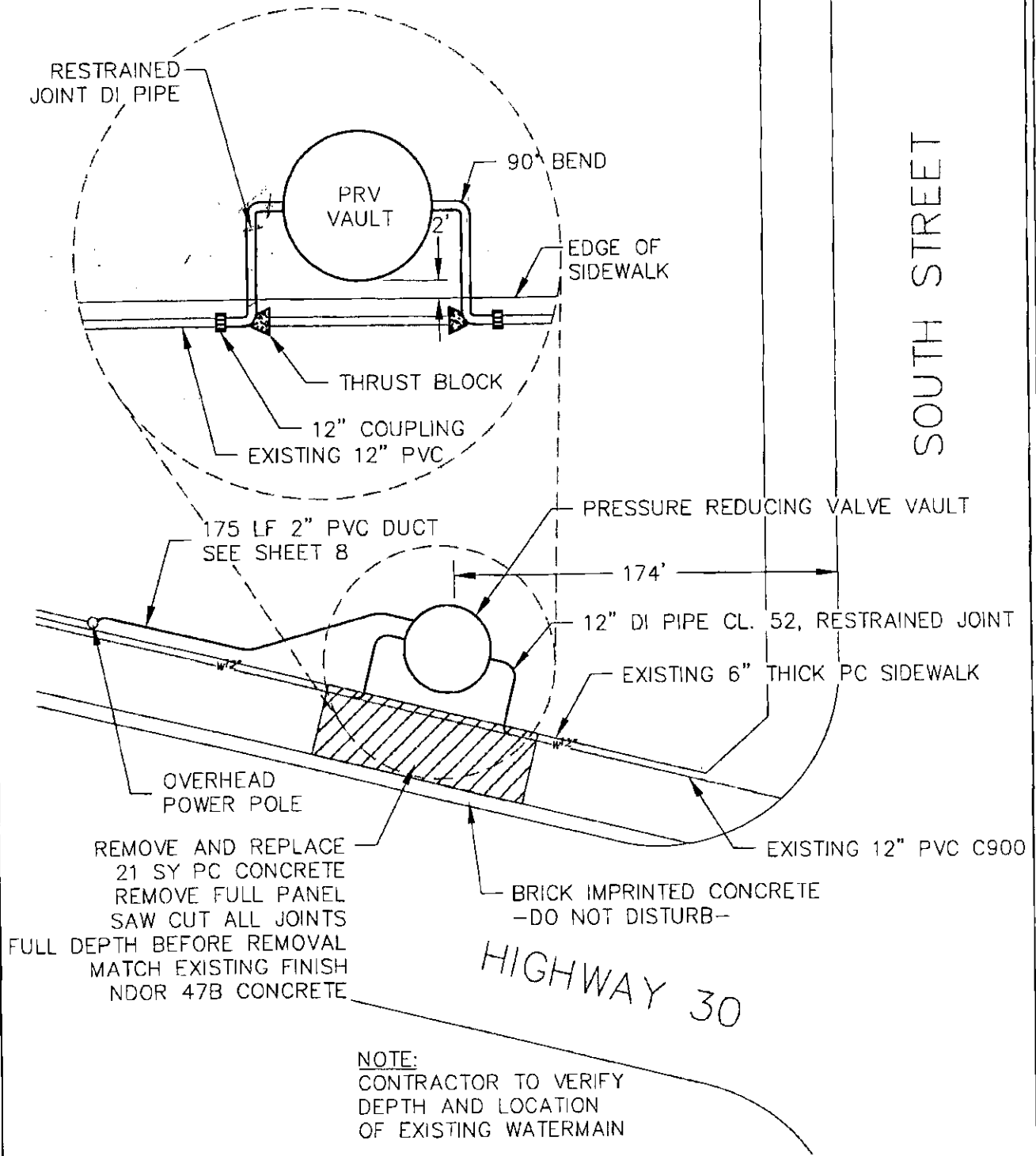
Papio-Missouri River Natural Resources District Board of Directors

Fred Conley • John Conley • Richard Connealy • Tim Fowler • Richard Jansen • Rick Kolowski
Dorothy Lanphier • Joseph Neary • John Schwoppe • Rich Tesar • Jim Thompson

fb: hgm:



NOT TO SCALE



project no. 71613
 date 10-04-04
 sheet AD2-1

project SOUTH RESERVOIR PUMP STATION
 WASHINGTON CO. RURAL WATER SYSTEM NO.2
 client PAPIO-MISSOURI RIVER NRD
 sheet PRESSURE REDUCING VALVE NO.1

BAB
 drawn
 CJK
 designed
 CJK
 approved

hgm
 ASSOCIATES INC.
 ENGINEERING ARCHITECTURE SURVEYING
 council bluffs omaha

CITY OF BLAIR
ATTORNEY

GEOFFREY C. HALL

1664 Washington St. • P.O. Box 216 • Blair, Nebraska 68008
Telephone: (402) 426-4424 • Facsimile: (402) 426-4666

July 27, 2006

Via Telefax and Regular U.S. Mail

Mr. Dick Sklenar
Papio Missouri River Natural Resources District
8901 South 154th Street
Omaha, NE 68138-3621

RE: Subject: Notice of Request to Pursue Final Settlement/Prosecution of Claim
Project: Washington County Rural Water System No. 2, Blair, Nebraska
Contractor: Pospichal Construction, Inc.

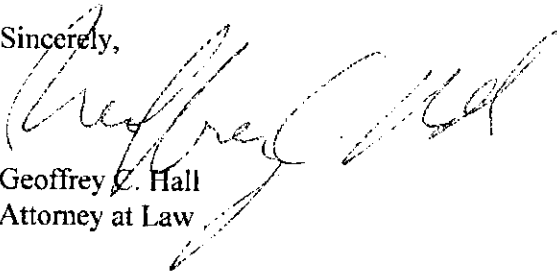
Dear Dick:

This letter confirms that the City Council of Blair, Nebraska is requesting the Papio Missouri River Natural Resources District to pursue any and all claims against Pospichal Construction, Inc. of 445 South 259th Street, Waterloo, NE. 68069 relating to the substandard work performed by said contractor relating to the project indicated above unless Pospichal Construction Inc. accepts the City of Blair's final offer of settlement.

The City of Blair is offering Pospichal a one time payment of \$5,000.00 for any alleged monies due and owing for the work on the project indicated above. It is the City of Blair's position that this is a compromise settlement and that if it is not accepted by Pospichal Construction on or before August 15, 2006, the offer will be withdrawn and the City of Blair will pursue any and all claims available.

Since the Papio MRNRD was the contracting party with Pospichal Construction, the City of Blair requests that the Papio MRNRD prosecute this matter to the full extent of the law and recover all costs expended by the City of Blair as a result of the substandard work performed by Pospichal Construction and the subsequent damages sustained by the City of Blair if this offer of settlement is rejected. Please contact Al Schoemaker, the City of Blair Public Works Director at (402) 426-4191, regarding any additional information on this matter. Thank you for your cooperation.

Sincerely,


Geoffrey C. Hall
Attorney at Law

GCH/caf

c. Al Schoemaker



111 Schilling Road
Hunt Valley, MD 21031

St. Paul Travelers Bond
Phone: 443-353-2121
Fax: 443-353-1136



April 27, 2006

hgm Associates, Inc.
5022 S. 114th Street
Suite 200
Omaha, NE 68137
ATTN: Chris Koenig, P.E.

Re: Travelers Casualty & Surety Co. of America
Bond No.: 104319202
Principal: Popsichal Construction, Inc.
Obligee: Papio-Missouri River Natural Resources District
Project: Washington County Rural Water System No. 2, South Reservoir Pump Station, Blair, NE

Dear Mr. Koenig:

We have reviewed the documentation provided in support of your claim against the above-referenced Bond for damages, allegedly suffered by the Obligee as a result of our Principal's alleged failure to correct defective work in a timely manner. We have also reviewed documentation and correspondence from our Principal regarding this matter. It would appear from the information provided to date, that there is clearly a legitimate factual dispute between the Obligee and the Principal regarding the Obligee's claim. Our Principal contends that the issues surrounding the damaged or leaking water line relate to several design failures and that it made every effort to work with the Obligee to assist in the correction of the failure, but that it was not provided the proper opportunity to complete this work. The Obligee appears to allege that it was provided the opportunity, but either failed to do so or failed to do so in a timely manner.

The Contract provisions you cite in your January 13, 2006 correspondence regarding corrective work do not specify a particular time frame in which corrective work must be completed. Although it does indicate that the Principal may be responsible for the costs of corrective work in an emergency situation when said work is completed by the Obligee, as indicated herein, our Principal denies responsibility for the leaks and has alleged that it is as a result of deficient plans and/or design. As the Surety was not afforded the opportunity to review this condition prior to it being corrected, we are left with a factual dispute between the parties. It is not the Surety's role to decide who is right once it has been determined that a legitimate factual dispute exists. Rather, factual disputes must be resolved by the trier of fact (a judge, a jury or an arbitrator) after both parties have had an opportunity to present their evidence.

As it is not the Surety's role to act as the trier of fact, we have no choice but to respectfully deny your claim.

This correspondence and all prior or subsequent communications are made with express reservation of all rights and defenses that may be available to the Surety, at law or in equity under the terms and provisions of the bond and contract documents.

Sincerely,

Kimberly D. Zanotta
Claim Counsel

Cc: Popsichal Construction