



1345 Quarry Street, Suite 101
Corona, CA 92879

LETTER OF TRANSMITTAL

Date: 4/21/20

Company: City of San Clemente
Public Works Department
910 Calle Negocio, Ste 100
San Clemente CA 92673

Attn: Tom Bonigut, Public Works Director/ City Engineer

Project: Street Rehabilitation of Calle De Los Molinos, Calle De Industrias and Avenida Navarro –
Project Nos. 16352 & 16353

Re: Response to City’s Correspondence Dated 3/12/20 Re Final Termination Proposal and
Settlement Discussions

Dear Mr. Bonigut,

Please allow this to serve as a response to your letter dated March 12, 2020 regarding our Final Termination Proposal re Project Nos. 16352 & 16353 (collectively, “Project”), which included the unpaid outstanding costs incurred by EBS for the referenced projects, including legal fees and “Eichleay Formula” costs.

As you are aware, EBS previously had billed the City of San Clemente (“City”) \$34,350.00 to cover contractual cost through the end of November 2019 for the Project. EBS acknowledges that payment has been received from the City in this amount. The final payment request provided to the City by EBS on February 27, 2020 included additional cost incurred up to the termination date of the contract for the Project (i.e., February 14, 2020). To refresh your recollection, the sums demanded, which were evidenced by back-up documentation also provided in my prior correspondence to you, were as follows:

Cost for bonds:	\$ 9,178.00
Final Survey Cost:	\$ 2,400.00
Attorney’s Fees:	\$ 6,824.25
Time Impact (Eichleay):	\$31,068.48
Total Presently Due and Owing:	\$49,470.73

The City has refused to pay the lion’s share of these sums. In fact, to date, no additional sums have been paid. Instead, on March 12, 2020, we received written correspondence from you on behalf of the City (“Correspondence”) stating that on **March 2, 2020**, the City Council had approved terminating the above-referenced construction contract for the Project. You also provided comments regarding the final payment requested by EBS, which we, in turn, now address here:

(1) **Cost of Bonds.** In your Correspondence you state that the City already has paid EBS in full for the Mobilization Bid Item No. 1, which included the costs associated with bonds per the progress payment paid by the City to EBS on October 31, 2019. We do not dispute having received this payment. However, we are not sure you and/or the City fully understand how bonding works for contractors like us. Each year, EBS has a \$25 million cap for bonded work that it can contract for company-wide. In 2019, EBS paid a premium for the Project (in fact, it bonded for more than \$1 million worth of work for the Project).



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By doing so, EBS could not seek this amount of bonded work from other customers because this amount was tied up by EBS's contract with the City. We also now know that the City's contract with EBS ultimately was terminated because of the City's own lack of due diligence, preparedness and negligent misrepresentations/omissions during the bidding process for the Project, specifically with regard to the actual conditions of the work site. Undoubtedly, the City was aware of these conditions, but failed to disclose them. The City, therefore, not only has caused EBS loss of the benefit of the bargain under the terms of the contract for the Project (because the City failed to do its due diligence and disclose the actual site conditions when it put the Project out to bid), but it also has caused EBS further damage by unnecessarily tying-up over \$1 million in EBS's bonded-work capacity for more than six months now. In fact, to date, the City has not released EBS's bond -- which means that, among other things, the City is preventing EBS from being able to obtain over \$1 million of other bonded work. Furthermore, if this bond renews prior to the City's release, EBS will incur further unnecessary costs related to its renewal. This is unacceptable and is compensable.

(2) **Final Survey Cost.** In your Correspondence, you state that the City will pay \$2,400 for the Final Cost Survey. To date no such payment has been made. Please provide this payment immediately.

(3) **Attorney's Fees.** In your Correspondence, you state that per the terms of the executed Agreement for Construction of Public Works between the City and EBS dated June 18, 2019 ("Contract"), that EBS is not entitled to attorney's fees because EBS chose to engage attorneys as a result of an internal business decision made at EBS's sole discretion. You, therefore, state that EBS is not entitled to the recoupment of its attorney's fees pursuant to, among other things, the terms of the Contract. What you fail to state and recognize, however, is that the City and the City alone has caused what we consider to be foreseeable harm to EBS because it failed to do its due diligence regarding the true condition of the work site prior to putting the Project out for bid and contracting with us. The City repeatedly misrepresented the condition of the work site and the actual scope of work to us. It was only after we were awarded the Contract and went back onsite for an in-depth field analysis that we realized that the information and documentation/drawings provided by the City when the job was bid-out was incomplete, that it did not accurately reflect or match the actual conditions in the field, and that it did not accurately reflect the actual scope of work required at these locations. We then very quickly relayed to the City that the scope of work needed to be changed quite a bit in order to mitigate against anticipated damage resulting from the very old fragile asbestos waterlines that are buried beneath the surface of the roadways. The exact location/elevation and condition of these very risky waterlines had not been previously disclosed to us by the City; and further, no soils report for these streets had been provided by the City. **Again, upon our discovery of these very serious problems, we immediately informed the City of these issues.** Specifically, we pointed out to the City and its employees/representatives (in meeting after meeting and phone-call after phone-call) time and time again that these waterlines absolutely needed to be dealt with (meaning removed and replaced/upgraded) **before** we could safely move in heavy equipment (including very heavy concrete trucks carrying hundreds of tons of material, heavy demo and compaction equipment, etc.) to demo these streets, recompact them, repave them, etc., per Contract. The City officials acknowledged to us that these waterlines and their poor condition literally are an accident waiting to happen. **However, for months the City took no further action to resolve these issues.** In fact, a meeting was held onsite in **October 2019** by and between EBS, the City's Public Works Department (i.e., your department) and San Clemente Water District. At this meeting, everyone was in agreement that the original scope of work could **not** be accomplished given the location and condition of these waterlines. It also was decided that the City's Public Works Department would provide EBS with a different scope of work (which, at the time, we believed would be a plan that would fully mitigate against the accidental breakage of these old pipes). **Almost five weeks later**, the City provided an addendum to the original plan and scope items; but, all the City had done was merely eliminate three (3) of the dozens of items listed and kept the rest as originally bid. So much time had been wasted at this juncture, with no real solution offered by the City because the remaining scope still was problematic as it did not address the moving, removing and replacing of these old fragile asbestos pipes buried right under the asphalt. It became abundantly clear given all of the discussion that had taken place that the City simply wanted to band-aid around this very serious and dangerous issue. Specifically, the City was ignoring the fact that its plan was not feasible because it still required heavy equipment onsite to remove and replace the existing conditions of these streets, to cut the existing subgrade in order to accomplish



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new elevations, to bring heavy compaction equipment onto these streets in order to achieve the standard 90-95% compaction on all the remaining pavement scope, and to bring in loaded material delivery trucks. We explained these problems to City officials at meeting after meeting and communication after communication. We explained *ad nauseum* that the location of these old and fragile asbestos pipes greatly heightened the risk of damaging/breaking them. Most of the time, the City had very little to offer in response.

In December 2019, another meeting was held onsite, where individuals from your department **insisted that the Project start immediately**, and that any problems that occur be addressed “after the fact” or on a “case by case basis” once issues are encountered in the field. At this meeting, we again explained that what the City was proposing after months and months of going back and forth was **not** a solution. In fact, the City was offering nothing to mitigate against an almost guaranteed disaster. There was little doubt that these pipes were going to break. Furthermore, we explained that per the Contract, if these old and fragile asbestos pipes became damaged as a result of our work (which undoubtedly would have occurred once heavy equipment was brought onsite) or if any public or private property incurred damage as a result of the breakage of these pipes during or resulting from our work, that the repair costs and liability would belong to EBS and **not** the City (incidentally, we asked the City to correct us if we are incorrect in this regard, and neither the City nor its attorneys have ever advised us of anything to the contrary). It was only after reaching this point in the discussion, where we very clearly had advised the City of all of the issues with these previously undisclosed old and fragile asbestos pipes, and the City’s insistence that the Project proceed anyway, that we were left with no choice but to involve our attorneys to deal with this issue. The City simply was not budging from its unreasonable position to proceed. So, the single January 27, 2020 meeting mentioned in your Correspondence - - the one where you claim EBS cancelled on January 24, 2020 and therefore some “path forward” could not be agreed to - - is disingenuous. The January 27, 2020 meeting was cancelled because it would have been yet another colossal waste of time given that months and months of meetings had resulted in no path forward other than the City insisting that the Project proceed pretty much as bid. Plus, the City’s lawyers and our lawyers already were in discussion at this point. So, yes - - although EBS made the decision to involve lawyers, it was because of the City’s continued insistence that the Project proceed despite countless meetings and discussions between us and the City without reaching any sort of a reasonable resolution.

It also should be mentioned that each time EBS was asked to attend these repeated in-person meetings with City personnel to discuss the same issue over and over again (without the City ever offering a viable solution), EBS incurred additional unnecessary costs because it was forced to send a Union Operator, as well as Project Managers and company owners, among others, back and forth to San Clemente for basically nothing. Again, the issue raised by us (i.e., the old and fragile asbestos pipes right beneath the asphalt) should not have been a surprise or novel issue to the City. In fact, both the Water Department and the City are and have been fully aware that these waterlines would almost certainly become damaged and break during EBS’s performance of the Contract.¹ After EBS’s discovery of these pipes, we repeatedly suggested to the City representatives/agents that all of the watermain and service lines needed to be replaced and brought up to current standards prior to any finish pavement work by EBS. We explained why multiple times. We also advised that we were willing to discuss and consider a Change Order for the performance of the work required to update the water main and service lines before proceeding with any finish pavement work (and we asked the City to come up with the scope, parameters, etc., as well as a soils report for the whole project), after which we would provide a quote for the proposed work. The City failed to do any such thing.

¹ In fact, we later learned that the reason the Water Department was onsite in December 2019 was because they were installing emergency shut-off valves due to the condition of these asbestos pipes; but, both the City and the Water Department failed to tell EBS anything in this regard at the time or prior.

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Therefore, the real facts when considering EBS's damages are as follows: (1) that EBS discovered the issue with these pipes on its own after the bidding process without any disclosure or accurate soils report from the City; (2) that over the course of many months beginning in the Fall of 2019, EBS actively participated in countless meetings and conversations with the City regarding these pipes and the fact that the City had failed to mention them during the bidding process; (3) that the City has caused delay after delay with regard to offering a viable and workable solution for the issues related to these pipes and the original scope of work agreed to for the Project; (4) that the City has failed to provide anything other than a band-aid "solution" (which actually was not a solution at all) by merely eliminating three of the dozens of items in the Project's original scope of work and keeping the rest of the scope of work as originally bid; and, (5) that in December 2019, the City's insisted that EBS start the Project and just deal with problems as they occur at EBS's own risk. As you can see, the City's actions, omissions, reaction, timeline and decisions have been unreasonable thus far - - particularly with regard to insisting that the project proceed in December 2019 basically "as bid." This ultimately led to EBS having little option but to involve EBS's attorneys. To this end, based on the unreasonableness of the City's actions and omissions throughout this process and the Project, beginning with the City's misrepresentations and omissions about the actual condition of the work site, the old and fragile asbestos pipes buried just beneath the asphalt at the work site, and the City's lack of providing an accurate soils report, we believe that we are entitled to recoup all of the monies we have spent thus far on attorneys stemming from the City's obvious actions, omissions and wrongdoing.

4. **Time Impact.** The City has taken the position that it already has paid EBS in full for the mobilization bid item (except for the remaining survey payment noted above), that EBS performed no other work on the project other than what was required of the mobilization bid item, and that the project and contract time was effectively suspended while the parties attempted to resolve the issue of the differing site condition. Based on the forgoing, the City claims that EBS is not entitled to any time impact costs. The City is incorrect in this regard. First and foremost, the delays were directly caused by the City misrepresentations and omissions during the bidding process regarding the actual condition of the work site, as well as the City's failure to provide an accurate soils report. Furthermore, despite the multiple meetings between EBS and the City over the course of months - - wherein EBS incurred costs and expenses associated with sending a Union Operator and others to meeting after meeting in San Clemente, among other things - - the Project was further and unreasonably delayed by the City because its engineers and personnel did not and could not come up with a reasonable amended scope of work; and, instead, suggested band-aid amendments to the original scope of work and an unreasonable demand that the Project proceed and problems be dealt with as they occur. None of what was suggested by the City were solutions - - particularly since the City did not dispute the fact that if the Project proceeded and the pipes became damaged and/or if public and/or private property suffered damage due to the breakage of these old and fragile asbestos-pipes, that EBS would be liable for any such damage. Again, it took the City months and months to finally reach its articulated position - - **way past the time frame for any mobilization bid item.** EBS simply was strung along and caused to incur more and more cost and expense. To this end, the harm caused to EBS directly and indirectly as a result of the City's misrepresentations, omissions and delays is justifiably recoupable and should be paid by the City immediately.

Having said all this, in the spirit of cooperation and resolution, EBS would like finality and closure regarding this matter. As such, EBS is willing to accept the total sum of **\$42,646.48** as the full and final contract termination amount from the City. Effectively, for the purposes of compromise and settlement only, EBS is willing to forgo the recoupment of its attorney's fees at this juncture, but reserves all of its rights under the law to pursue any such sums or claims against the City should the City and EBS not resolve their issues.



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Finally, we recognize the hurdles that most have been faced with in recent weeks given the COVID-19 pandemic. We, therefore, understand that the City may not be able to respond quickly to the herein correspondence. To this end, please be advised that EBS's compromised offer relayed in this letter remains on the table until accepted in writing or until 5:00 p.m. on May 16, 2020, whichever comes sooner. In the meantime, should you have any questions, please do not hesitate to contact me.

Sincerely,

Thomas Nanci, President
EBS General Engineering, Inc.

cc: Job Folder # 19078