

December 19, 2002

To the Honorable
The Common Council of the
City of Milwaukee
Room 205 – City Hall

Dear Council Members: **Re: *Super Excavators, Inc. v. City of Milwaukee*; Case No. 01-CV-001325**

Enclosed is a resolution recommending settlement of the above-referenced matter. We ask that the resolution be introduced and referred to the Committee on Judiciary and Legislation for its recommendation.

This case arose out of a contract, totaling approximately \$5.4 million, entered into between the City and Super Excavators, Inc. for the construction and installation of a network of 108-inch-diameter combined-sewer relief tunnels beneath a number of streets located on the north side of the City. One of these tunnels ran beneath West Brown Street from North 26th Street to North 29th Street. Super Excavators, Inc., utilized a tunnel-boring machine (“TBM”) to excavate this tunnel approximately 55 to 60 feet beneath the surface of West Brown Street. In July 1998, Super Excavators’ TBM encountered an unexpectedly large volume of water that engulfed the TBM and the tunnel excavation, allegedly resulting in the settlement of the TBM below grade. As a consequence, Super Excavators was required to sink a recovery shaft to retrieve the TBM and hoist it to the surface. It was unable to resume work on the project until those operations were completed and a new TBM procured for further tunneling operations. Super Excavators incurred approximately \$800,000.00 of unanticipated expenses as a result, although it was eventually able to successfully complete the project.

Super Excavators subsequently filed a claim against the City, contending that the influx of water that eventually caused the TBM to settle was attributable to an unanticipated subsurface condition—an old City-owned 72-inch-diameter sewer also located beneath West Brown Street, approximately 15 feet above the 108-inch-diameter tunnel that was being excavated. Subsequent investigation revealed that the old City-owned sewer did have a two-foot hole at its bottom located a short distance east of the spot at which the TBM settled.

The City and Super Excavators were unable to resolve this claim, and Super Excavators consequently brought suit in Milwaukee County Circuit Court against the City, both in contract and in tort, for costs and damages that it claimed it incurred as a consequence of the TBM settlement. The City was able to secure dismissal of the tort claims, but was not successful in its attempt to win summary judgment on the contract claims.

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The parties conducted settlement negotiations (at times with the assistance of a mediator), and were eventually able to reach a full and final settlement of Super Excavators' claim in the amount of \$376,046.00. Funding for this settlement will be available through an account maintained by the Department of Public Works. We believe that this settlement is in the best interests of the City of Milwaukee, and therefore recommend its approval.

Very truly yours,

GRANT F. LANGLEY
City Attorney

RUDOLPH M. KONRAD
Deputy City Attorney

LINDA ULISS BURKE
Special Deputy City Attorney

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Assistant City Attorney
SSM:lmb
enclosures
c: Ronald Leonhardt, City Clerk
Mariano Schifalacqua, DPW Commissioner
1029-2001-729:61631