

## **OVERVIEW OF PARMLY BILLINGS LIBRARY DISPUTE**

A number of claims have arisen out of the demolition of the old library building. We have had two mediations, each lasting two days, as well as numerous follow-up conversations. We have a settlement opportunity that we have been told is the best we can do. If the case does not settle, litigation is a certainty. The City of Billings will either file a suit or be sued.

The claims and damages are complicated and detailed. The purpose of this memo is to provide a general overview of the primary claims and damages. It does not address every dollar of damages or set forth in detail the various legal theories.

### **The parties involved in the claims and proposed settlement**

#### Will Bruder + Partners (Bruder) and O2 Architects

Bruder was the architect for The City on the Project. Bruder's offices are in Arizona. O2 Architects is an architectural firm in Billings. Bruder entered into a contract with O2 to provide assistance to Bruder on the library project.

#### Northern Industrial Hygiene (NIH)

The City contracted with NIH for the pre-demolition asbestos inspection and for additional asbestos inspection and testing during demolition.

#### Jackson Contracting Group (JCG)

JCG was the successful bidder for the construction of the new library and the demolition of the old building, paving the new parking lot and the associated landscaping.

#### LM Excavating (LM)

JCG subcontracted the demolition of the building to LM. JCG delegated the preparation of a demolition plan to LM.

#### Vertex

Vertex was brought into the project by LM's surety to help complete the demolition.

#### The City of Billings

The City of Billings owned the old library building and built the new library.

## **No Admission of Liability**

The parties' willingness to enter into the settlement is not an admission of liability or fault by anyone. There are many reasons to settle a claim, including avoiding the costs, time and inconvenience of being involved in a lawsuit.

## **Demolition and Disposal**

The old library building was known to include asbestos containing material (ACM). Therefore, the demolition was subject to EPA National Emission Standards for Hazardous Air Pollutants (NESHAP) and Montana's Asbestos Control Act (ACA). These Acts required a thorough pre-demolition inspection for ACM and various permits. NIH performed the asbestos inspection in December of 2012 while the old library was still being used.

The original demolition plan called for debris from the old building being used as fill for the basement of the old library building. Disposing on-site uses saves the cost of hauling debris to the landfill and hauling in fill, and also saves landfill fees. On-site disposal required the removal and disposal of all "soft" materials because such materials could not be used for fill. In addition, any regulated asbestos containing materials had to be removed. Demolition began in early 2014 with Safetech performing abatement of the asbestos identified in the NIH inspection, plus \$10,000 in additional abatement of items missed by NIH in its asbestos inspection. LM began soft demolition in February of 2014, removing carpet and other materials that could not be used as fill for the basement.

On March 25, 2014, demolition stopped because JCG/LM had failed to obtain a NESHAP permit. Work was suspended for 27 days until JCG/LM obtained the necessary permits.

Work resumed on April 21 when the NESHAP permit was issued. On at least three occasions, LM stopped work because of what it claimed was ACM. Each time, the material was tested and no asbestos was found. On April 24 additional ACM's were discovered in the garage and parapet. NIH's pre-demolition inspection missed both the garage and the parapet. NIH performed a second asbestos inspection in April. It was decided that demolition and abatement would occur concurrently, which required abatement to occur after 5:00 p.m. and on weekends. Safetech completed the abatement on May 2. The additional abatement costs were \$67,118.22.

The major demolition of the building began on May 12, but was shut down just one week later. On May 19, JCG sent LM notice of default of the demolition contract and put the demolition on hold. JCG cited "two serious life-threatening incidents and [LM's] repeated lack of manpower and appropriate equipment." One event was LM dropping the excavator into the basement. While getting the excavator unstuck, LM caused debris to fall into the basement. The other event was LM allegedly nearly taking down structural elements that could have caused the old library to fall on to the new library. JCG stopped further work by LM until LM prepared a new demolition plan on how to safely take down the building. JCG required a plan that was approved by an engineer and which met OSHA requirements. That revised plan was not approved by JCG until August 11, 2014, causing a delay of 84 days. JCG also asked that LM's surety, take over the demolition, and Vertex became involved in the demolition.

While demolition was suspended by JCG, Mr. Thompson of DEQ inspected the site on May 25. He saw debris in the basement from the excavator incident and determined the debris violated the Solid Waste Management Act. Mr. Thompson would only allow very limited types of debris to be used as fill in the basement, and the on-site disposal plan had to be scrapped.

On May 29, 2014, DEQ performed an asbestos inspection after an anonymous complaint. At that time, about 20% to 30% of the building was down and in piles, and work had stopped while LM prepared a demolition plan. LM had been driving over the debris to crush it to (1) segregate it and (2) prepare the material for onsite disposal. DEQ took samples for no more than 15 minutes and found alleged ACM, including one piece of window glazing compound.

On June 5, 2014, DEQ sent a letter prohibiting further work on the site. DEQ required inspection and removal of non-SWMA compliant materials from the basement. In addition, DEQ claimed that all the debris on the ground contained regulated asbestos containing materials (RACM) and therefore had to be handled as asbestos-contaminated waste. DEQ took the position that if building materials containing non-friable asbestos were run over and "ground" by an excavator, the asbestos had become friable and therefore RACM. DEQ also took the position that the 2012 pre-demolition asbestos inspection by NIH was not adequate. Therefore, any materials that were not tested in 2012 were assumed to be RACM. NIH and The City unsuccessfully contested the DEQ's position.

Removal of the RACM debris started on June 23. This work was done by Safetech and could be done even though LM had not completed the revised demolition plan. The first month was spent removing debris from the basement from the excavator incident. The debris had to be wrapped in plastic "burritos" and hauled to the landfill for disposal as hazardous waste. JCG assisted by bringing in equipment and a certified operator. The last of the RACM debris was removed on August 30, 2014.

Demolition of the buildings resumed on September 2 and was completed in mid-October. During this work, additional ACM materials were found, including in the elevator and front entry. The asbestos was removed at a cost of \$12,259.00. The abatement delayed demolition for one day. The work was not completed in time to complete the paving of the new parking lot or landscaping. The project was shut down for the winter and completed in the spring and early summer of 2015.

### **Increased Demolition and Disposal Costs**

The original contract price for asbestos abatement, demolition and disposal of the old library building was \$441,000. The actual costs were \$1,481,699. There were two primary causes of the increased costs. First, the contract was based on a demolition plan using on-site disposal. When the DEQ rejected the on-site disposal plan in May of 2014, all debris had to be disposed of off-site and fill had to be brought in. That increased the disposal costs by \$437,419. The City is responsible for the costs of off-site disposal.

The second reason for the increased costs was DEQ's determination in May of 2014 that the debris piles on site contained RACM. As noted, the DEQ declaration that the debris was contaminated with asbestos meant special handling and disposal of the debris was required. The City is responsible for what the disposal costs would have been had the debris been non-RACM, but not for the additional costs caused by the presence of RACM. Part of the extra cost was additional landfill charges of \$88 per ton for RACM debris versus \$17 per ton for non-RACM debris. The remainder is additional handling costs. This resulted in additional costs of \$528,422 caused by the presence of alleged RACM.

The City did nothing that caused the debris piles to become contaminated. However, as the owner of the building, state and federal law made The City strictly liable for the presence of asbestos and the additional cleanup costs. The City sought recovery for these extra costs from all the contractors and subcontractors under various theories. Unlike The City, the contractors were not strictly liable. The City would have to prove that the contractor's negligence caused asbestos to be in the debris pile. For example, The City would have to show that a reasonable inspection would have discovered the asbestos that the DEQ found in the debris pile, which may be difficult to do if the asbestos was hidden behind sheetrock or layers of paint. A jury would ultimately decide who should bear what percentage of the entire costs.

The City had other additional expenses related to asbestos. The major costs were:

Increased Landfill Disposal Costs for RACM materials	\$528,422
Unnecessary soft demolition	156,214
Cost of emergency asbestos abatement	23,492
Additional asbestos abatement	<u>12,259</u>
	\$727,558

### **Delay Claims**

The other issues arising from the demolition are claims for damages caused by the delay in completing the project. The demolition of the building and construction of the parking garden was scheduled to be completed by the end of June, 2014. It was not finished until June of 2015. The City, JCG, LM and Vertex all made claims for damages for delay. JCG, LM and Vertex made claims against The City, claiming that that approximately 125 days of delay were caused by the presence of asbestos, such as the DEQ shut down of the site in June of 2014, the time it took to remove the alleged asbestos contaminated debris from the site, and other delays caused by the discovery of asbestos containing materials during demolition. We believe the delay claims are approximately \$1,000,000.

The City disputed these claims. JCG and LM were responsible for extended delays caused by their failure to obtain permits required by state and federal law and because JCG stopped work on the project until LM prepared a new demolition plan. Much of these periods of delay overlapped. Therefore, even though the DEQ stopped further demolition at the site while

the alleged asbestos containing debris was removed, no additional demolition could have been done because JCG/LM did not have an approved demolition plan. The City believes the delay caused solely by asbestos related issues was around 30 days.

The legal term for this issue is concurrent and non-concurrent delay. There is no law in Montana on this issue, so it is impossible to predict an outcome if this matter goes to trial. The jury may ultimately have to decide who caused the delays and what damages, if any, the delays caused.

### **The City's Delay Claims**

The City incurred \$100,000 in costs for having to carry this project over the winter. The delays were primarily the result of asbestos that was not discovered during the inspection.

### **The Settlement Offer**

The City of Billings would receive a total of \$175,000. NIH will pay The City \$150,000. JCG has agreed to reduce the amount they are owed under the contract with the City by \$25,000.

The contractors will settle the delay claims of JCG, Vertex and LM. The amount paid by the contractors is confidential.

NIH, The City, JCG, LM, Vertex, O2 and Bruder will enter into a mutual release of claims against each other arising out of the demolition of the library building.

If this matter is not resolved, The City's only recourse is to file suit against the contractors and subcontractors to recover its damages. Even if The City did not file suit, JCG will almost certainly sue The City. This would be a complicated case, with numerous factual issues, legal issues, and issues requiring expert testimony. The case would probably be set for trial two years from now, and the actual trial would last two weeks. Attorney fees and experts would be at least \$250,000, plus significant time and effort by the City Attorney's Office, Bill Cochran and Tina Volek. Although \$175,000 is significantly less than The City's claims, settling avoids the risk of an unfavorable outcome at trial and avoids the certainty of substantial costs to The City.

As previously mentioned, the parties' willingness to enter into the settlement is not an admission of liability or fault by anyone. There are many reasons to settle a claim, including avoiding the costs, time and inconvenience of being involved in a lawsuit.