

BEFORE THE METRO CONTRACT REVIEW BOARD

|                                  |   |                             |
|----------------------------------|---|-----------------------------|
| FOR THE PURPOSE OF AMENDING THE  | ) | RESOLUTION NO. 98-2697      |
| CONTRACT BETWEEN METRO AND       | ) |                             |
| PERFORMANCE ABATEMENT SERVICES,  | ) | Introduction by Mike Burton |
| INC. FOR HAZARDOUS MATERIAL      | ) | Executive Officer           |
| ABATEMENT ASSOCIATED WITH THE    | ) |                             |
| DEVELOPMENT OF A CAPITAL PROJECT | ) |                             |
| AT THE OREGON ZOO                | ) |                             |

WHEREAS, the Oregon Zoo has previously entered into an agreement with Performance Abatement Services, Inc. for the removal of asbestos containing paint from the exterior of the Zoo's feline building; and

WHEREAS, agreement has been reached that unforeseen site conditions required additional labor, equipment, and material to perform such task;

WHEREAS, Performance Abatement Services, Inc. did perform the additional work required; now, therefore,

BE IT RESOLVED,

That the Metro Contract Review Board hereby authorizes the Executive Officer to amend the contract with Performance Abatement Services, Inc.

ADOPTED by the Metro Contract Review Board this 1st day of October, 1998.

  
\_\_\_\_\_  
Jon Kvistad, Presiding Officer

Approved as to Form:

  
\_\_\_\_\_  
Daniel B. Cooper, General Counsel

## STAFF REPORT

CONSIDERATION OF RESOLUTION NO. 98-2697 FOR THE PURPOSE OF AMENDING THE CONTRACT BETWEEN METRO AND PERFORMANCE ABATEMENT SERVICES, INC. FOR HAZARDOUS MATERIAL ABATEMENT ASSOCIATED WITH THE DEVELOPMENT OF A CAPITAL PROJECT AT THE OREGON ZOO

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Date: September 9, 1998

Presented by: Jim Maxwell

### PROPOSED ACTION

Approval to amend the existing contract between Metro and Performance Abatement Services, Inc. for additional labor, equipment, and material required due to unforeseen site conditions to remove asbestos containing paint from the exterior of the feline building associated with the development of a capital project at the Oregon Zoo.

### FACTUAL BACKGROUND AND ANALYSIS

Amendment of the existing contract (Contract No. 905855) is necessary to settle a dispute related to unforeseen site conditions and to extend the contract period.

Performance Abatement Services, Inc. first raised the issue of a skim coat between the concrete walls and the asbestos containing paint in a letter dated March 13, 1998 (Attachment A). A follow-up letter dated March 18, 1998 (Attachment B) identified the cost impact as between \$75,136 - \$96,932. Metro's designer questioned the validity of the claim. Through a series of clarifications and meetings we tried to resolve the issue but were unsuccessful.

Both parties agreed to commission an independent arbitrator to hear the facts. The mediation session was conducted on August 6, 1998. The arbitrator found that Performance Abatement Services, Inc.'s position that the "skim coat" was a changed condition because it was not disclosed in the contract documents was valid. The arbitrator also recommended a settlement of \$23,500 for the impacts resulting from this unforeseen site condition (Attachment C).

The abatement work was completed on April 23, 1998. The current contract expired on April 15, 1998. To cover that difference in the time required to reach a settlement and process an amendment and subsequent payment, this amendment extends the contract period through September 30, 1998.

Amendment No. 4 (Attachment D) also provides for a release by Performance Abatement Services, Inc. of all further claims against Metro on this contract.

**BUDGET IMPACT**

This resolution would increase the contract value by \$23,500, to be funded from the Environmental Impairment Fund.

**EXECUTIVE OFFICE RECOMMENDATIONS**

The Executive Officer recommends adoption of Ordinance No. 98-2697.



ATTACHMENT A

8015 S. W. Hunziker Road, Tigard, OR 97223  
Telephone: 503-620-7933 Fax: 503-620-9127

March 13, 1998

Mr. James Maxwell  
METRO  
Administrative Services Department  
600 Northeast Grand Avenue  
Portland, OR 97232-2736

**RE: Metro Zoo Asbestos Abatement Project – Unforeseen Conditions**

Dear Mr. Maxwell,

As you know, Performance Abatement Services, Inc. is contracted to remove approximately 20,000 square feet of asbestos and lead containing paint from inside and outside of the feline house starting on 3/16/98. After a meeting on 3/11 with Greg Baker of PBS Environmental, it is clear that there are several serious issues that need to be discussed and resolved prior to PAS starting this portion of our contract.

My understanding from the conversation that took place between Greg and my field managers is that the resultant stained concrete through out the inside and the outside of the building after chemical has been applied and removed is unacceptable. Evidently Greg feels that the remaining concrete surface after our paint stripping procedure should be perfectly clean and clear of any coloring at all. This is not only an unrealistic expectation, but does not coincide with what was directed in the contract documents. In addition, there are unforeseen conditions present that change the scope of work all together. There are three main issues which back up the fact that if PBS Environmental has the expectations which I described above for the paint removal on this project, Performance Abatement Service's Change Order's # 1 & 2, dated 2/11 are no where close to the dollar amount they need to be. The following explains our position:

**Changed Condition #1 – Unforeseen Condition**

After further examination of the outside surface of this building, it is clear that there exists a "topical surfacing material" spread intermittently over the concrete and prior to the first application of paint. This material is a kind of leveling compound similar to what is encountered when floor tile is removed, except this material looks like either a grout or concrete cream. The compound is separating in our patch areas, and in other areas it is hard and difficult to remove. This skim coat material is an unforeseen condition and is not part of our contract.



Unfortunately, the original layer of paint seems to be combined with this compound. In order to remove this material it warrants the use of mechanical means. Not only was this project not directed to be bid utilizing mechanical means, but the Specifications Section 02075, 3.12,A, states: “ no sanding, burning, or grinding will be allowed on any painted surfaces”.

### **Changed Condition #2 – Directed Work Practice In- effective**

When this project was bid in July of 97’, “Alternate Three” of the bid documents directed the contractors to remove all exterior masonry paint from the Feline Building AA utilizing a caustic based removal agent. This was in lieu of partial removal of loose and cracked paint under the base bid. This procedure was directed by PBS, and hence was bid accordingly. Based on our test patches both inside and outside of the building, this procedure does not work to PBS’s cleanliness standard. It was suggested to us on 3/11 by PBS Environmental that we better plan on using “mechanical means” if the chemical is not working. This is not an option under this contract. The project was not directed to be bid this way, and was not bid this way. And again, this suggestion directly contradicts their own specifications governing the grinding of lead containing paint.

### **Changed Condition #3 – Staining of Concrete**

It has been relayed to us by PBS that the resultant staining of the concrete surface after the use of either a caustic chemical or a non-caustic chemical, (which seems to be more effective) is utilized, is unacceptable and is expected to be removed. Performance feels that this is not a possibility under the terms of this contract. This staining, whether it be directly on the concrete surface or intermixed with the surfacing compound described earlier, is not a three dimensional material. Our contract is to “remove the asbestos containing paint from the concrete surface”. Nowhere does it state that the level of cleanliness is that of either brand new concrete, or “sand blasted” concrete. This is an unrealistic expectation when using a chemical on a porous surface of any type. In addition, during our walk through of the exterior of the building, PBS showed us test areas #3 and #4 in the back of the building; these areas show the same staining that they are having a problem with. If these areas were unacceptable at the beginning why were they shown to us? If a brand new concrete surface is what was expected when this project was bid, the direction should have been to utilize mechanical means or sand blasting.



Finally, my understanding is also that it was discussed that the concrete surface was to be painted with a red latex paint upon completion of the chemical stripping. This is not what the specifications call for. The drawings clearly states to "hand scrape and remove loose and cracked exterior masonry paint using wet methods. Encapsulate remaining paint and exposed surfaces with 1 mil latex paint, red". This also contradicts what we have been contracted to do.

As you can see, the conditions of this project have changed considerably from the time of original bid as well as the change order negotiation. Please contact me to arrange a meeting as soon as possible to attempt to resolve these problems. We want to work together with METRO to resolve these issues and keep the project on track if possible. Although PAS will plan on starting the interior friable abatement on the 16<sup>th</sup> as planned, the paint can not be addressed until we receive clarification of these issues. Presently PAS does not see this project being completed under the existing contract amount or schedule.

Sincerely,

PERFORMANCE ABATEMENT SERVICES, INC.



Michael Stocker  
Senior Estimator/Project Manager

cc Greg Baker & Ron Petti, PBS Environmental





ATTACHMENT B

8015 S.W. Hunziker Road, Tigard, Oregon 97223  
Telephone: 503-620-7933 Fax: 503-620-9127

March 18, 1998

Mr. James Maxwell  
**METRO**  
Administration Services Department  
600 Northeast Grand Avenue  
Portland, OR 97232-2736

**RE: Feline House Proposal**

Dear Mr. Maxwell,

As a result of our meeting on 3/16 concerning the inability of a chemical removal agent to effectively remove the asbestos and lead paint at the feline house, Performance has proceeded in gathering information relating to alternative methods to achieve the expected results. Through numerous conversations in house, with equipment vendors, and with other firms within our industry, all abrasive-mechanical removal options have been ruled out. These options include removal by needle guns, dyna-scalers, sand blasting, walnut shell blasting, or ice blasting. It is clear after my investigation that the associated time and costs related to these options are far beyond what is feasible for this project.

Instead, Performance recommends the use of high pressure power washing in addition to the application of the specified chemical removal agent in order to effectively remove this material. After yesterday's trial and error session testing several different power washers, it is clear that the most effective and time efficient method is going to be the use of the 3500 psi power washer, after one application of chemical. This conclusion was made after several combinations of power washing with and without first utilizing chemical was attempted.

Our investigation showed us that we have a number of different variables through out the facility including, different pours of concrete, different applications of skim coating, different types of paint, and differing paint thickness and hardness. Nowhere did we find that power washing alone was effective enough to remove all the layers of paint material without significant time and unwanted destruction to the concrete itself. In fact, the application of paint in the grottos in particular is so hard that even the 5000-psi power washer would not take off the base layer when attempting it with out chemical removal first. This portion of the building is of considerable concern in that it may even require two applications of chemical prior to the power washing process.



Although the power washing process looks to be the answer to the level of cleanliness we want to achieve, this process is going to be both costly and time consuming. Presently Performance Abatement is under a 30 day contract to complete this building utilizing the chemical process only. After adding the power washing procedure, we propose two separate schedule options and associated costs in order to complete this project. These costs are based on the productivity results achieved yesterday.

As relayed to PBS yesterday, the amount of time to just remove this paint from the wall is approximately 1 square foot/per 2 minutes after one application of chemical. This is just the power washer productivity. It does not include the labor required to set up barriers, manage water flow, filter water, additional debris packaging and handling, setting up of scaffolding in order to handle the machinery safely, and equipment rental. It should be noted that with 2 washers operating at the same time, we would be generating upwards of 4200 gallons of water per day to manage. The labor involved in controlling this speaks for itself. None of these labor-intensive issues are part of the original contract to remove this paint. The following is our proposal to complete this new scope of work:

**OPTION 1- Contract Extension**

Option 1 includes extending the existing schedule 20 working days. This option will require an 8-man crew including the foreman to be on site during strait time hours, weekdays only, for 1 additional month over the existing contract time.

**Lump Sum Add: \$ 75,136.00**

**OPTION 2- Overtime to Complete within Existing Schedule**

Option 2 includes completion of the work within the existing contract time frame with a 10-man crew. This will require all 10 men to work 12 hours shifts Monday through Friday and 8-hour shifts on Saturday and Sunday. All work over 8 hours and on Saturday is overtime prevailing wage, and Sunday work is double time. Completion date will be April 14<sup>th</sup> as contracted.

**Lump Sum Add: \$ 96,932.00**

If you have any questions concerning this proposal please contact me.

Sincerely,

**PERFORMANCE ABATEMENT SERVICES, INC.**  
  
Michael Stocker  
Senior Estimator





ATTACHMENT C  
CM/DR  
14657 S.W. TEAL BLVD., SUITE 241  
BEAVERTON, OREGON 97007  
503-579-0700

August 7, 1998

Metro Washington Park Zoo  
4001 S.W. Canyon Road  
Portland, Oregon 97221-2799

Attn: Jim Maxwell

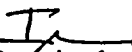
Ref: Mediation of METRO/P.A.S. Asbestos Abatement Dispute  
Personal Services Contract No. 920786

Subj: Recommended Settlement of Dispute

Attached is my recommended settlement of the dispute between METRO and P.A.S. pertaining to the removal of asbestos containing paint from the exterior surfaces.

Also attached is my independent memo which defines the basis for entitlement and the calculation of the settlement amount.

Thank you for the opportunity to serve you.


  
Don Irwin, P.E., Esq.

8/6/98

P.A.S. AND METRO HEREBY AGREE TO RESOLVE THE COST AND ENTITLEMENT ISSUES RAISED IN P.A.S. LETTER DATED 5/8/98, AS FOLLOWS:

1. METRO TO ISSUE CHANGE ORDER TO PAS IN THE INCREASED AMOUNT OF \$23,500.00 FOR FULL AND FINAL SETTLEMENT OF ALL COSTS RELATED TO THIS MATTER.
2. P.A.S. AGREES TO FULL AND FINAL RELEASE OF ALL CLAIMS AGAINST METRO UNDER THIS CONTRACT, UPON PAYMENT OF \$23500.00
3. METRO AGREES TO EXECUTE A CHANGE ORDER AND DELIVER PAYMENT TO P.A.S NO LATER THAN OCTOBER 1, 1998.

  
for METRO

  
for P.A.S.

## MEMORANDUM FOR THE RECORD

1. On August 6, 1998, METRO and its consultant (PBS), and the asbestos abatement contractor (P.A.S.), presented to me their respective positions regarding an on-going dispute over costs related to removal of asbestos containing paint from the exterior of certain building surfaces. In advance of the hearing, PBS prepared and delivered to me a notebook, which I thoroughly reviewed prior to the hearing, containing all relevant documentation in support of both METRO's and P.A.S.'s positions.
2. P.A.S. letter dated May 8, 1998 (TAB 5 in notebook) summarizes what is at dispute. The key issue is whether the contractor encountered an unknown site condition which entitles the contractor to be compensated for increased costs due to that condition while performing the specified exterior paint removal.
3. The contract in question was awarded to the low bidder, P.A.S. The base bid and Alternate #3 required the contractor to "Strip all exterior masonry paint... with a caustic based removal agent."
4. The difficulty in removing exterior paint is highly dependent upon the substrate materials under the paint. The contract documents are silent on the substrate material, except for the use of the word "masonry" in Alt. #3.
5. The contractor encountered a "skim coat" between the exterior paint and building wall substrate. The contractor alleges that the "skim coat" was a changed condition because it was not disclosed in the contract documents. The contractor's bid was based upon Alt #3.
6. Prior to contract award to P.A.S., METRO through its consultant knew that the skim coat material existed. The extent of its existence under the exterior paint, however, was not known.
7. Under the terms of this contract, a contractor's bid is reasonable if it is based upon removal of the paint from "masonry" surfaces using a "caustic based removal agent". The contractor has no duty in preparing its bid to perform a field investigation to determine whether other unknown substrate materials exist, with or without asbestos, and to alter its bid price accordingly. Here, the pre-bid field investigation was performed by the owner, not the contractor. The contractor's

visit to the site prior to bid would not change the contractor's obligations as defined in the specifications and drawings.

8. The "skim coat" encountered is not disclosed anywhere in the contract documents and not reasonably construed within the normal meaning of "masonry". Therefore, a changed or differing site condition was encountered by the contractor.

9. The contractor alleges that, as a result of the "skim coat", it incurred additional costs beyond what it bid. They are additional labor and consumables necessary to support asbestos abatement labor, increased amounts of the chemical removal agent, and increased equipment rental costs.

10. METRO, PBS, and DEQ required P.A.S. to remove the exterior paint in an effective and timely manner. The contractor used a chemical removal agent which was approved by METRO and PBS. In some cases, multiple applications of the chemical were required. Furthermore, to meet the required DEQ cleanliness standard, the contractor pressure washed a large majority of the surfaces, approximately 3/4 of them, in addition to applying chemical agent.

11. The contractor was obligated to bid the project based upon the use of a chemical remover. METRO impliedly warrants through this contract requirement that the chemical remover would be effective. In fact, it was not on all of the surfaces. The contractor is entitled to be compensated for its costs to pressure wash and to deal with the increased difficulty of exterior paint removal as a result of the "skim coat" which was not disclosed to the bidder.

12. P.A.S. supports its labor request with daily logs. The number of mandays claimed as additional to perform the exterior paint removal are considered reasonable. Also, the charged rate of \$50/hr is considered reasonable. It is a composite rate for the hourly cost of labor. This includes approximately \$7/hr for consumables and small tools. Because pressure washing was not contemplated in the bid documents, the contract includes no unit pricing for this work.

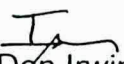
13. P.A.S. requests compensation for the quantity overrun in the amount of chemical removal agent used. P.A.S. should have anticipated that some exterior paint would require more than one application. Actual invoices for the cost of the material are included in the claim. However, the documentation submitted does not delineate an equitable apportionment of these costs.

14. The pressure wash equipment rental costs are supported by actual invoice. These are reasonable.

15. The contract allows for markups of 15% on labor and 10% on materials and rental equipment. Applying these markups, my independent cost estimate of a fair resolution to this dispute is as follows:

|    |  |               |                    |
|----|--|---------------|--------------------|
| A. | Additional labor, without consumables:               |               |                    |
|    | 44 MD x \$40/hr x 8 hr/MD =                          | \$14,080.00   |                    |
|    | + 15% markup   | \$2,112.00    |                    |
|    | Subtotal   | \$16,192.00   |                    |
| B. | 1) Added chemical agent:                             |               |                    |
|    | Estimate 25% of overrun as beyond original bid req't |               |                    |
|    | 25% of \$7605.00 =                                   | \$1901.00     |                    |
|    | 2) Added equipment to pressure wash:                 |               |                    |
|    | Actual invoices =                                    | \$1882.00     |                    |
|    | 3) Added consumables to support added labor          |               |                    |
|    | \$7/hr x 352 hrs =                                   | \$ 2464.00    |                    |
|    | 4) Subtotal =  | \$6247.00     |                    |
|    | + 10% markup   | \$625.00      |                    |
|    | Subtotal =   | \$ 6872.00    |                    |
| C. | Estimate of amount due P.A.S:                        |               |                    |
|    |  | Labor:        | \$16192            |
|    |  | M&E:          | \$6872             |
|    |  | GL:           | \$975              |
|    |  | <b>TOTAL:</b> | <b>\$23,739.00</b> |

16. In sum, I consider \$23,500.00, coupled with a release by P.A.S. of all further claims against METRO, as a fair and reasonable settlement of this dispute.

  
Don Irwin, P.E., Esq.

**ATTACHMENT D**

**AMENDMENT NO. 4  
CONTRACT NO. 905855**

This Agreement hereby amends the above titled contract between Metro, a metropolitan service district, and PERFORMANCE ABATEMENT SERVICES, INC. hereinafter referred to as "Contractor."

This amendment is a change order to the original Scope of Work as follows:

1. Contractor shall provide all labor, equipment and material as necessary to complete the Metro Washington Park Zoo scope of work for the Oregon Project as described herein. The scope of work for general purposes includes:

Settlement of a dispute, summarized in Performance Abatement Services, Inc. letter dated May 8, 1998, related to unknown site conditions effecting the removal of asbestos containing paint from the exterior of the feline building.

This amendment releases all claims and disputes against Metro under this contract. The contract period is extended to September 30, 1998.

Change Order 4 Total: \$23,500.00

2. Except for the above, all other conditions and covenants remain in full force and effect.

In Witness to the above, the following duly authorized representatives of the parties referenced have executed this agreement:

PERFORMANCE ABATEMENT  
SERVICES, INC.

METRO

\_\_\_\_\_  
SIGNATURE

\_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE

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