

**RESOLUTION NO. 2005- 223 R**

**A resolution authorizing the City Manager to execute a Partial Settlement Agreement between Benco Contracting, Inc., Safeco Insurance Company, and the City of Victoria concerning the 2003-04 Red River Heights and Hollywood Boulevard Utility Improvements Project; and declaring an effective date.**

IT IS RESOLVED BY THE CITY COUNCIL OF THE CITY OF VICTORIA, TEXAS:

1.

The City Manager is authorized to execute a Partial Settlement Agreement between Benco Contracting, Inc., Safeco Insurance Company, and the City of Victoria concerning the 2003-04 Red River Heights and Hollywood Boulevard Utility Improvements Project, in the stated amount therein of **\$145,182.41**, in the form attached as **Partial Settlement Agreement**, with minor modifications to form as approved by the City Attorney.

2.

This resolution shall become effective immediately upon adoption.

PASSED, this the 20<sup>th</sup> day of December, 2005.

AYES: **6**

NAYS: **0**

ABSTENTIONS: **0**

APPROVED AND ADOPTED, this the 20<sup>th</sup> day of December, 2005.



ATTEST:

*Scarlet Swoboda*  
SCARLET SWOBODA, City Secretary

Distribution:    Legal Department  
                      Finance Department  
                      Personnel Department

*Will Armstrong*  
WILL ARMSTRONG, Mayor of the  
City of Victoria, Texas  
  
APPROVED AS TO LEGAL FORM:  
*David Atmar Smith*  
DAVID ATMAR SMITH, City Attorney

Copies Sent: DECEMBER 21, 2005

## **PARTIAL SETTLEMENT AGREEMENT**

This Partial Settlement Agreement ("Agreement") is made between Benco Contracting, Inc. ("Benco"), Safeco Insurance Company ("Safeco") and The City of Victoria, Texas ("City") (referred to collectively as the "Parties") as of December \_\_\_, 2005.

### **RECITALS**

WHEREAS, Benco and the City entered into a written contract ("Contract"), in connection with construction of the project known as "2003-04 Red River Heights and Hollywood Boulevard Utility Improvements Project" ("Project"); and

WHEREAS, Safeco, as Surety, and Benco, as Principal, provided statutory performance and payment bonds (respectively "Performance Bond" and "Payment Bond", sometimes referred to collectively as the "Bonds"), pursuant to Chapter 2253 of the Texas Government Code, in connection with the Project; and

WHEREAS, Benco has completed the Project, but certain disputes, claims and controversies have arisen between the Parties in relation to, among other things, without limitation, the timeliness of Benco's performance, the compliance of the executed work with respect to the requirements of the Contract, the adequacy and sufficiency of the contract documents, the necessity of the performance of warranty, guarantee, remedial and/or corrective work, Safeco's obligations under the Performance Bond and amounts due Benco under the Contract (collectively "Claims"); and

WHEREAS, on or about November 20, 2004, a natural flood occurred, which flood involved, in part, Cedar Street, North Cedar Street, Cypress Street, North Cypress Street and East Cypress Street (the "Flood"). Further, the Flood has resulted in claims being filed by one or more of the residents of the affected area as against Benco and the City, and by the City against Benco and Safeco and ("Flood Claims"); and

WHEREAS, Benco, Safeco and the City desire to reach a settlement on any and all of the Claims, such that the only matters or claims remaining unresolved subsequent to execution and performance of this Agreement shall be the Flood Claims, in connection with all of which Flood Claims and claims against the Payment Bond, which Benco, Safeco and the City reserve, without limitation, all of their respective rights, defenses, claims, counterclaims, cross-claims, third-party actions and privileges (collectively "Reserved Claims").

### **AGREEMENTS**

For and in consideration of the covenants, releases, promises and payments herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by Benco, Safeco and the City, Benco, Safeco and the City have agreed and do hereby agree as follows:

1. Within 14-calendar days of the date of Benco's and Safeco's execution of this Agreement, the City shall pay to Safeco the total sum of ONE HUNDRED FORTY-FIVE THOUSAND ONE HUNDRED EIGHTY-TWO and 41/100 DOLLARS (\$145,182.41); and
2. Excepting only as expressly otherwise provided in this Agreement, upon payment to Safeco as provided in Paragraph 1 above, Safeco and Benco shall be deemed to have released, settled, compromised and waived any and all of their respective Claims, as may be applicable, against the City, such that the City shall not be obligated to make any further payment to either Benco or Safeco on account of Benco's performance under the Contract; and
3. Excepting only as expressly provided otherwise in this Agreement, upon Benco and Safeco's execution of this Agreement, the City shall be deemed to have released, settled, compromised and waived any and all its Claims, as may be applicable, against Benco and Safeco, such that neither Benco or Safeco shall thereafter have any obligation or duty to perform any work of any type at the Project; and
4. Benco, Safeco and the City agree that this Agreement shall in no way be construed to nor does it release, compromise, settle, affect, abridge, modify, alter or change any of their respective rights, defenses, offsets, counterclaims, cross-actions, third-party actions or other rights with respect to the Flood or the Flood Claims or claims on the Payment Bond.

5. Further, this Agreement shall not affect, amend, modify, alter, abridge or change any of Safeco's obligations under the Payment Bond, which obligations shall be in accordance with the provisions of Chapter 2253 of the Texas Government Code.

6. Benco and Safeco agree that nothing in this Agreement is intended to nor shall it affect, amend, abridge, change or modify any of their respective rights under any other written agreement.

**GENERAL PROVISIONS**

7. This Agreement is the joint product of the Parties hereto and shall not be construed more strictly against one party by virtue of said party's participation in the drafting of its terms and conditions.

8. This Agreement is for the sole benefit of the Parties hereto, and is not intended to confer any right, nor is it intended to create any obligation with respect to any party that is not a signatory or party to this Agreement, although this Agreement may preserve their rights.

9. The invalidity of any part or provision of this Agreement shall not impair or affect in any manner whatsoever the validity, enforceability or effect of the remainder of this Agreement.

10. This Agreement shall bind the Parties and their respective successors and assigns and shall not be modified or amended except by written document duly executed by the Parties or their respective successors and assigns.

11. The laws of the State of Texas shall govern and control the interpretation of this document, the documents executed in connection therewith, and all claims and disputes concerning same. Any dispute as to this Agreement or its enforcement shall be resolved in District Court in Victoria County, Texas. Prevailing party shall be entitled to recover attorney fees and all costs incurred as a result of the lawsuit from the non-prevailing party.

12. This Agreement shall be executed in multiple counterparts, each of which counterpart shall be considered an original counterpart of equal dignity with all other original counterparts.

**BENCO CONTRACTING, INC.**

**SAFECO INSURANCE COMPANY**

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**THE CITY OF VICTORIA, TEXAS**

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**APPROVED BY:**

**CITY OF VICTORIA, TEXAS LEGAL DEPARTMENT**

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_