Burien
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MEMORANDUM

TO: Honorable Mayor and Members of the City Council

FROM: Mike Martin, City Manager

DATE: April 4, 2011

SUBJECT: Agenda Modification, April 4, 2011

Administration has requested the addition of Business Agenda Item 8 "e."

Recommended Motion:

Move to affirm the April 4, 2011, Agenda as amended to add Business Agenda Item 8 "e" Motion to approve a settlement agreement with TransTech Electric, Inc. and Frank Coluccio Construction Company, regarding TransTech's claim against the City in the Coluccio v. Burien litigation.

CITY OF BURIEN
AGENDA BILL

Agenda Subject: Motion to approve a settlement agreement with TransTech Electric, Inc. and Frank Coluccio Construction Company, regarding TransTech's claim against the City in the Coluccio v. Burien litigation		**Meeting Date:** April 4, 2011
Department: Legal	**Attachments:** 1. Proposed Settlement Agreement	**Fund Source:** N/A **Activity Cost:** N/A **Amount Budgeted:** N/A **Unencumbered Budget Authority:** N/A
Contact: Craig Knutson, City Attorney		
Telephone: (206) 248-5535		
Adopted Initiative: Yes X No	**Initiative Description:**	

PURPOSE/REQUIRED ACTION:
The purpose of this agenda item is for the City Council to consider approving a settlement agreement with Frank Coluccio Construction Company and TransTech Electric, Inc., regarding TransTech's claim against the City in the Frank Coluccio Construction v. Burien litigation.

BACKGROUND (*Include prior Council action & discussion*):
There have been several unresolved issues between the City of Burien and Frank Coluccio Construction Company and its subcontractor TransTech Electric, Inc., regarding payment for above ground electrical work performed by TransTech for the 1st Ave. South Improvement Project. The issues relate primarily to cost overruns and delay. The amount of TransTech's claim against the City is approximately $602,500. Attached is a proposed agreement with Frank Coluccio Construction Company and TransTech Electric, Inc. that will settle TransTech's claim.

The settlement agreement provides the following:

(1) Payment by the City in the amount of $ 177,902 to Frank Colluccio Construction Company for the benefit of TransTech Electric, Inc. for all work that was performed by TransTech;
(2) Payment to Frank Colluccio Construction Company in the amount of $12,453 for the contractor's markup for the work performed by TransTech;
(3) Upon finalization of the settlement agreement and payment by the City, TransTech Electric, Inc. shall release to the City all light fixtures, poles, and banners still in its possession relating to the 1st Ave. So. Improvement Project ;
(4) Mutual release and dismissal of all claims by TransTech Electric, Inc. on the project and in the the Frank Colluccio Construction litigation in King County Superior Court; and
(5) The agreement is contingent upon approval by the Bankruptcy Court, because TransTech is currently in bankruptcy proceedings.

Approval of this settlement agreement will resolve the City's liability exposure with TransTech Electric, Inc. for the 1st Ave. So. Improvement Project and the Frank Colluccio Construction Company v. Burien litigation.

OPTIONS (*including fiscal impacts*):
1. Approve the settlement agreement as presented.
2. Do not approve the settlement agreement as presented.

Administrative Recommendation: Approve the settlement agreement as presented.
Committee Recommendation: N/A
Advisory Board Recommendation: N/A
Suggested Motion: Move to approve the settlement agreement with Frank Colluccio Construction Company and TransTech Electric, Inc. and authorize the City Manager to sign the agreement.

Submitted by: Craig Knutson **Administration**	Mike Martin **City Manager**
Today's Date: April 1, 2011	**File Code:** \\File01\records\CC\Agenda Bill 2011\040411ls-Transtech Settlement Agreement.docx

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT ("Agreement") is entered into and effective this 31st ~~25th~~ day of March, 2011 between Frank Coluccio Construction Company ("Coluccio"), TransTech Electric, Inc. ("Transtech"), and the City of Burien ("Burien") for the purpose of memorializing a full and final settlement of Transtech's claims against Coluccio and Burien reached during mediation with Christopher Soelling on March 14, 2011. This Agreement is expressly limited to claims arising from Transtech's work and in no way affects any claim arising from any work performed by Coluccio or any of Coluccio's other subcontractors or suppliers.

WHEREAS, the City of Burien ("Burien") undertook a road improvement project in 2006, referred to as the 1st Avenue South Improvement Project ("Project"), which involved 14 blocks of 1st Avenue South and included underground sewer and water installation; underground installation of utility lines for Puget Sound Energy ("PSE"), Seattle City Light ("SCL"), Quest, Verizon Comcast, and Burien; and general sidewalk and street improvements, and

WHEREAS, Coluccio was the low bidder and was awarded a contract for all of the work associated with the Project (the "Contract"), and

WHEREAS, Coluccio entered into a subcontract with Transtech for the above ground electrical work of the Project, and

WHEREAS, Coluccio has commenced a lawsuit in King County Superior Court, Cause No. 10-2-07215-2 KNT, which includes claims for work performed by Transtech.

NOW, THEREFORE, for mutual consideration and pursuant to the terms set forth in this Agreement, Coluccio, Transtech, and Burien (the "Parties") agree as follows:

1. Burien shall pay Coluccio for the benefit of Transtech, one hundred seventy seven thousand nine hundred two and 00/100 dollars ($177,902.00) for all work performed by Transtech for the Project and in full and final settlement of all claims brought or which could have been brought in the pending lawsuit in the King County Superior Court, Cause No. 10-2-07215-2 KNT on behalf of and for work performed by Transtech under its Subcontract with Coluccio for the Project. Coluccio shall pay the $177,902.00 to Transtech subject to the terms of this Agreement.

2. Burien will pay Coluccio $12,453.00 for markup on the $177,902.00 payment to Coluccio for the benefit of Transtech in full and final settlement of all claims brought or which could have been brought in the pending lawsuit in the King County Superior Court, Cause No. 10-2-07215-2 KNT on behalf of and for work performed by Transtech under its Subcontract with Coluccio for the Project, including claims for markup and interest. Coluccio shall keep for itself said $12,453.00 payment.

3. Upon the Parties obtaining all necessary approvals of this Agreement and payment of the amounts set forth in paragraphs 1 and 2, Burien and Coluccio shall enter into a Stipulation and Order of Dismissal as to Transtech for all claims brought or which could have been brought in the pending lawsuit in the King County Superior Court, Cause No. 10-2-07215-2 KNT on behalf of and for work performed by Transtech under its Subcontract with Coluccio.

4. As a condition of this Agreement, upon the Parties obtaining all necessary approvals of this Agreement and payment of the amounts set forth in paragraphs 1 and 2, Transtech shall cause to be released to Burien all luminaires, davit arms, luminaire poles and related fittings and hardware, signal system arms and poles and all other such appurtences relating to the Project in Transtech's possession and/or control. This Agreement is predicated on Burien's satisfaction with the luminaires, davit arms, luminaire poles and related fittings and hardware, signal system arms and poles and all other such appurtences relating to the Project, which shall be made available to Burien for its review prior to the settlement payment.

5. As a condition of this Agreement, upon the Parties obtaining all necessary approvals of this Agreement and payment of the amounts set forth in paragraphs 1 and 2, Transtech shall cause to be released to Burien the Banners manufactured and sold by North Coast Electric Company~~Supply~~ for the Project. This Agreement is predicated on Burien's satisfaction with the Banners, which shall be made available to Burien for its review prior to the settlement payment.

6. This Agreement is also predicated on approval of its terms and conditions by the Federal Bankruptcy Court having jurisdiction over Transtech's pending bankruptcy action. ~~and approval by the Burien City Council.~~ Transtech shall diligently seek bankruptcy court approval. Coluccio at its sole option and upon notice to the other Parties may cancel and void this Agreement if said approval is not obtained within 60 days of the effective date~~execution~~ hereof.

7. Payment of the $177,902.00 shall be due within ten (10) days of approval by the Bankruptcy Court or approval, as required by Washington State laws, of the settlement by the City of Burien City Council, whichever is later, and subject to the conditions in paragraphs 4 and 5 above.

8. If the Bankruptcy Court does not approve the settlement, it shall be null and void and not referred to by any party for any purpose in the future.

9. Transtech shall obtain dismissal of, and fully indemnify, defend and hold harmless Coluccio and its surety, Safeco Insurance Company of America ("Safeco") from and against all lawsuits, loss, liens, claims, attorney fees and costs (now existing or that arise in the future), that arise out of, are connected with or relate to Transtech's work on the Project, including but not limited to claims against Coluccio and Safeco's bond(s) by North Coast Electric Company. Within 20 days after bankruptcy court and Burien City Council approval of this Agreement, Transtech shall cause to be settled, released and have dismissed with prejudice the claims against Coluccio, its bonds and Safeco in the lawsuit commenced by North Coast Electric Company under King County Superior Court Cause No. 09-2-46148-1 KNT ("North Coast Lawsuit"). Coluccio may withhold funds from the $177,902.00 settlement proceeds and/or Transtech's subcontract retainage for payment and settlement of the North Coast Lawsuit and Coluccio's attorney fees and costs associated therewith until that matter has been settled and claims against Coluccio and Safeco dismissed, Coluccio and Safeco has been released and any Coluccio or Safeco attorney fees or costs in that matter have been reimbursed to Coluccio or Safeco.

10. The Parties hereby forever mutually release each other from any and all claims, costs and attorney fees arising from Transtech's subcontract and claims made on Transtech's

behalf by Coluccio on the Project and in the King County Superior Court Cause No. 10-2-07215-2 KNT. This Agreement does not release Transtech's claim for any part of the Subcontract retainage held by Coluccio. This Agreement does **not** relate to and does **not** release, settle, or dismiss Coluccio's claims against Burien for work performed by any entity other than Transtech, including but not limited to Coluccio's claims for work performed by Coluccio, Active Construction, Inc., and Terra Dynamics, Inc.

11. This Agreement is binding upon, and shall benefit, each of the Parties above named, together with all partners, parent and subsidiary entities of those parties and partners, as well as all predecessors and successors of any of the foregoing, along with all affiliates of the any of the foregoing, and all owners, officers, directors, and employees of any of the foregoing, and their spouses and marital communities, together with all insurers, all attorneys, all successors, heirs, assigns, or transferees, direct or remote, of any of the foregoing.

12. The releases, other conditions and the consideration identified herein are given in full settlement and compromise of doubtful and disputed claims. It is expressly understood and agreed that none of the Parties or any of their respective insurers, respective owners, spouses, agents, employees, independent contractors, representatives, partners, parent entities, subsidiaries or affiliates, admits any liability to each other by entering into this Agreement, such liability being expressly denied, and the execution or performance of this Agreement shall not be for any purpose construed as an admission of liability.

13. This Agreement contains all the agreements and commitments of the Parties relating to the claims referenced in this Agreement and included in the releases. This Agreement is intended by the Parties as a final expression of their agreement and, therefore, incorporates all negotiations of the Parties and is the entire agreement of the Parties. This Agreement supersedes and replaces all prior agreements. This Agreement may not be amended, waived or modified in any way without the prior written consent of the Party against whom the amendment, waiver, or modification is sought to be enforced.

14. The Parties declare and represent that in making this Agreement, it is understood and agreed that each has read it carefully, knows the contents and has signed as a free, reasoned and independent act. Each relies wholly upon its own judgment, belief and knowledge and has not been influenced to any extent whatsoever in entering this Agreement by any representations or statements made by any other Party, or by any person or persons representing any other Party.

15. In entering into this Agreement, each Party hereto represents that it has relied upon the advice of an attorney of its own choice concerning the legal consequences of this Agreement; that the terms of this Agreement have been completely read and explained to each Party by its attorneys; and that the terms of this Agreement are fully understood and voluntarily accepted.

16. Should any part, term or provision of this Agreement be decided or declared by the courts to be, or otherwise found to be, illegal or in conflict with any laws of the State of Washington or the United States, or otherwise be rendered unenforceable, or ineffectual, the validity of the remaining parts, terms, portions, or provisions shall be deemed severable and shall not be effected thereby, providing such remaining parts, terms, portions or provisions can be

construed in substance to constitute the Agreement that the Parties intended to enter into the first instance.

17. The recitals are included as a part of the Agreement and incorporated herein for that purpose.

18. Each Party represents and warrants that no other person or entity has, or has had, an interest in the claims, demands, obligations, or causes of action referred to in this Agreement and that each Party has the sole right and exclusive authority to execute this Agreement.

19. This Agreement shall be construed in accordance with the laws of the State of Washington, notwithstanding the operation of any conflict or choice of law statutes or decisional law to the contrary.

20. The Parties agree that they may plead this Agreement as a complete bar and defense to all actions which may be commenced by or on behalf of any of the Parties against any of the other Parties with respect to claims which are released under the terms of this Agreement.

21. The Parties agree that any dispute(s) as to the terms of this Agreement shall be submitted to Christopher Soelling for final resolution. If either Party brings an issue before Mr. Soelling regarding the terms of this Agreement or brings any action to enforce such Party's rights hereunder, the prevailing party in such action shall be entitled to recover reasonable attorneys' fees and costs incurred in connection with such action, whether in pretrial, trial, arbitration, or appeal in any proceeding including bankruptcy, or in any action to enforce a judgment or award.

22. This Agreement may be executed and delivered in separate counterparts, each of which, when all are so executed and delivered, shall be deemed an original and together shall constitute a single instrument.

Frank Coluccio Construction Co.

By: _____
Joseph Coluccio

The City of Burien

By: _____
Mike Martin, City Manager

TransTech Electric, Inc.

By: _____