

# Memorandum



Date: September 22, 2005

Agenda Item No. 12(B)1

To: Honorable Chairman Joe A. Martinez and Members,  
Board of County Commissioners

From: George M. Burgess  
County Manager

Subject: Performing Arts Center Acceleration

## BACKGROUND

On July 27, 2004, I presented the Board with the Performing Arts Center (PAC) project restructuring plan. As you will recall, at that time, the project was two years behind schedule, had in excess of \$75 million of asserted and threatened claims from the contractor and its' subcontractors, and over \$8 million of threatened claims for additional compensation from the architect and its' subconsultants.

In addition to describing the situation at that time, several analyses on how to address these issues were presented along with the potential pitfalls associated with each. Based on the best information available now, the most probable outcome of continuing with either of the termination scenarios or continuing with the same contractual and organizational structure in place prior to the July 27, 2004 restructuring would have resulted in a revised opening date after June, 2007, with additional costs from claims, general conditions, extended overhead, and other fixed costs estimated to be in excess of \$180 million. Due to the magnitude of this exposure, the reality existed that the project would have come to a halt by late 2004, along with causing the financial downfall of a number of local subcontracting firms.

The restructuring plan approved by the Board on July 27, 2004 provided for a number of important actions, including changing the form of contract from a Guaranteed Maximum Price to an Agency Construction Manager, establishment of a completion date of August 4, 2006, settlement of known claims from the contractor, the 12 major subcontractors and the architect, and establishment of a project reserve account.

Since the restructuring plan was implemented in August 2004, significant progress has been made. With eleven months remaining before the first performance, the project is 84% complete. We are in the most difficult and challenging phase of the work: interior finishes. I am pleased to report that despite the complexity of the work at this time, the quality of workmanship not an issue and that one of the key objectives of the restructuring plan has been achieved by various team members working cooperatively to help ensure the project's success and that no local firms have failed financially.

As will be detailed below, due to a variety of reasons, the project schedule has sustained sufficient slippage to place the completion date of August 4, 2006 in jeopardy if aggressive action is not taken. Completing the PAC on the approved schedule is important for several

reasons, including minimizing additional claims which might be asserted by subcontractors for failing to meet the timeline, as well as additional costs for continued general conditions and project payroll. Furthermore, the Performing Arts Center Trust (PACT) has executed agreements for performances in the Center starting in late August 2006, which if missed, will result in significant financial penalties to the PACT. The entire project team has worked hard to define the issues adversely impacting the work, and to develop a course of action which provides the best opportunity for completion on August 4, 2006.

In late June, 2005, the need for additional financial support for the project first surfaced, primarily to settle anticipated subcontractor claims and cover the costs of selective subcontractor acceleration. However, I wanted any additional cost requirement verified and accurately estimated. It was not until this past August, that the full magnitude of need, including an increased level of acceleration, was detailed. Realizing that additional financial resources would be required to complete the project, and, in particular, to have the best likelihood for completion on August 4, 2006, we began simultaneously looking at ways to further reduce our internal costs without adversely impacting the work, and having discussions with our contractor, Performing Art Center Builders (PACB), and private sector partners (PACT and Foundation) on ways they could assist. PACB agreed to provide a \$3.4 million deduct change authorization. This has had a positive impact for the project and has, in part, assisted in the initial phase of this acceleration plan.

We have also had discussions with the PACT and Foundation regarding additional financial support for the project from the private sector. The County showed its' strong commitment to the project in July 2004 with the infusion of an additional \$67.7 million of public funds.

### **SHORTAGE OF LABOR**

Like most projects of this size and complexity, the PAC's need for manpower reflects a bell curve when plotted against time. Immediately after the restructuring of the contracts in July, 2004, labor totals for the project increased to approximately 550 daily workers. Projections were that manpower would need to steadily increase to approximately 750 workers by late spring 2005. This increase was necessary to produce the amount of in-place construction to allow for an August, 2006 opening.

Unfortunately, a series of significant unforeseen events have occurred that are impacting our ability to meet these goals. Most notably, the subcontractors have been reporting that due to the tremendous amount of major construction that had recently begun in the area, their labor pools were extremely low or even exhausted. The May 22, 2005 article in The Miami Herald summarized this best by illustrating that there are currently thirty major projects under construction with an additional thirty-five being planned that could start in the very near future.

## **WEATHER IMPACTS**

As part of the restructuring agreement, a revised critical path schedule was issued as the guide to reaching the August, 2006 opening date. While the particulars of this schedule were numerous, this schedule outlined the order in which the critical activities were to be completed. Unfortunately, immediately after the contracts were restructured in 2004, the project was faced with preparing for four hurricanes within a two-month period. Based on the information provided by PACB, production on the site was impacted by approximately 27 days. Furthermore, since restructuring, we have experienced 113 days of sufficient rainfall which have disrupted the installation of the exterior envelope of the project with an additional 22 days of heavy rainfall which stopped all production on the exterior stone. Due to these weather occurrences, work associated with stone erection, windows and roofing were significantly impacted. While rain days were anticipated in the schedule, the magnitude of these occurrences forced the anticipated completion dates of these activities along with all subsequent activities to be delayed.

## **CHANGES REQUIRED BY INTERNAL AND EXTERNAL FACTORS**

In addition to the challenges caused by the labor situation and weather impacts, internal changes have exacerbated the situation. Although there is no one particular cause for these occurrences, they can be grouped into the following categories:

- Modifications required to comply with local building codes and ADA requirements.
- Extreme fluctuations in the insurance market which led to increased insurance premiums.
- Functional enhancements necessary to coordinate the architecture, structure and mechanical systems.
- Resolution and coordination of conflicts determined at the time of installation.
- Correction of non-conforming work.
- Reimplementation of required scope previously deleted (i.e. telecommunication and security systems).
- User requested upgrades such as wood floors, kitchen equipment, additional toilets, and the conversion of storage spaces to offices.
- Corrections necessary to overcome value engineering decisions made at the start of the project.

In all, since the July, 2004 restructuring of the contracts, there have been over 1,752 requests for change orders from the subcontractors in response to the numerous clarifications made to allow the work to proceed on a continuous basis. Currently, over \$6 million in these changes have been approved and paid from the Board-approved Change Authorization Account. An additional \$10 million in requests is under review for merit and/or quantum.

## **RECOVERY PLAN**

Understanding the reality of the situation with a finite labor pool, and in order to overcome the previously described challenges, as well as to minimize costs while providing the best opportunity to meet our targeted completion date, we propose the following budget adjustments which total \$24.3 million:

- **Acceleration Efforts - \$12.7 million:** This is the aggressive effort the Project Team and PACT will undertake in order to achieve the August 4, 2006 final completion date. Acceleration can be grouped in three areas: 1) subcontractor premium time and/or additional field resources; 2) costs associated with Project's general conditions; and 3) costs associated with PACB's payroll/supervision and core field staff/labor.
- **Additional General Conditions and Payroll-\$500,000 and \$1.2 million:** At the time of restructuring, PACB's General Condition and Payroll budgets were estimates and these additional costs are mainly due to the costs of security and daily clean-up. Due to the increased pedestrian traffic, additional security measures had to be implemented to ensure a site secure from vagrants and other unauthorized persons whose intent toward the Center's installed work could be malicious (i.e. graffiti on the building). Normal daily cleanup, as seen on typical construction sites, is not sufficient in order to facilitate the amount of fundraising tours that are conducted daily.
- **Non-Recoverable Back Charges-\$1.5 million:** The reality of combining an extraordinary number of dissimilar materials, installed by different trades at different times, will invariably lead to mistakes. Unfortunately, when work is done in an incorrect or untimely manner, other contractors are required to either correct the deficient work or modify their work to conform to the prior work left in place. The process of making the adjustments between contractors, referred to as back-charging, usually ends up becoming the responsibility of the Construction Manager to implement. The \$1.5 million reflects a cost that the Project is projecting as unrecoverable back-charges that the County has to pay and will not be able to recoup without costly litigation.
- **Securing Yet to be Purchased Contracts-\$1.4 million:** As of restructuring, PACB had not yet acquired all the trades necessary to complete the work as required by the Contract Documents. At the time of restructuring, it was anticipated that there would be Contingency available to purchase these contracts but, for reasons discussed above, the Contingency was exhausted.
- **Claims Support Services-\$1.0 million:** Although it is an unfortunate reality of complicated and complex construction projects, claims are likely to arise. The Project needs to ensure the proper claim analysis is undertaken in order to accomplish the most reasonable settlement during negotiations.

- Project Contingency-\$6.0 million: As witnessed by the vast number of changes to the project documents that were unanticipated and unforeseen at the time of the restructuring, contingency items range from code issues to field conditions. Due to the number of issues that continue to occur, and based upon the cost data projected combined with the difficulty of the work remaining, it is prudent to replenish this contingency.

In addition to the requested \$24.3 million of new funds as detailed above, it is recommended that a separate reserve of \$10 million be established for use in settling subcontractor claims. Based on the Project's historical information and understanding of the issues, using a conservative reduction rate should yield a probable outcome of \$10.0 million. Taking a proactive approach to resolve outstanding issues early may even reduce this amount further.

All such claims would initially be reviewed by PACB for recommendation and a separate analysis of these claims would be undertaken by URS, or another claims consultant, for merit and quantum. If we are successful in reaching an agreement on a particular claim, payment would be made from the claims reserve fund. It would be my recommendation that the Board delegate to me the authority to settle such claims up to the full amount of this reserve account in order to expedite settlement of issues, which will also assist in completion of the work by August 2006.

The claims consultant will analyze all claims. In those instances where we are unable to reach a settlement, a unilateral Change Order or Change Authorization for those portions of any claims that the claims consultant determines are valid, will be issued; and, if litigation ensues for the remainder of the claim, I will ask the County Attorney's Office to defend staff's and the claims consultant's conclusion. If the reserve fund becomes insufficient to pay the amounts necessary to fund (i.) valid claims, (ii.) settlement amounts, and (iii.) litigation costs, in connection with disputed claims, appropriate funding will be identified and recommended for Board approval.

### **PRIVATE SECTOR and OMNI TAX INCREMENT DISTRICT (CRA) SUPPORT FOR THE RECOVERY PLAN**

On July 13, 1993, the Board approved the Operating Management Agreement between Miami-Dade County and the PACT (Resolution R-860-93). This Agreement set forth the rights and responsibilities of each of the parties and provided a schedule for monetary installments to the County to help fund the design and construction of the PAC. This agreement has been amended four times to keep pace with the dynamics of the Project. In July 2004, as part of the restructuring, the Foundation committed to raise an additional \$5.0 million to assist with the construction of the PAC. With this commitment, the Foundation's total obligation is \$85 million, which breaks down as follows:

- \$42.2 million for design and construction
- \$21 million to fund an operating endowment
- \$11.8 million for the PACT's 12-year capital campaign
- \$5.0 million for pre-opening PACT expenses
- \$5.0 million for the restructuring contribution

As of this date, the PACT has remitted to the County \$22.2 million for design and construction. The next installment of \$20 million is due to the County on September 30, 2005. The PACT has requested to re-schedule the \$20 million payment to be due no later than August 4, 2006, to afford them additional time to further their fund raising efforts. The PACT remains committed to remit the \$5.0 million restructuring payment by December 31, 2005. Any changes to the previously approved payment schedule will require review and approval by the Board.

As of September 2005, the Performing Arts Center Foundation has \$2.0 million of available cash and \$13 million in legally binding pledges which are payable over the next several years, and which may be used as collateral for future financing purposes. Furthermore, a leading prospect for the \$20 million naming gift has been identified and negotiations with that prospect are actively underway.

This project represents the County's largest public/private partnership. The PACT and the Foundation have committed to do additional fundraising to provide a \$1.5 million annual payment to the County in order to help service a \$34.3 million loan to be issued by the County. The pledge for this loan is a budget to appropriate from a non-ad valorem tax pledge, to be paid back over a 20-year period. The PACT endowment in the amount of \$21.0 million will serve as a primary pledge to the County.

The Omni CRA contributes \$1.43 million annually to assist with the project. I have met with the City Manager and the Mayor of Miami regarding further opportunities for the Omni CRA to provide additional financial support to complete this capital project, as well as assist with the long-term operation of the Center. We have, throughout the history of the project, worked closely with all stakeholders to ensure that the Center is integrated into the fabric of the City of Miami. In my conversations with the City Manager and Mayor, both recognized what this project has represented to the emerging rebirth of the City, and they have stated their commitment to work with the County and our private sector partners in providing additional financial support. These officials have indicated a willingness to support a 30% commitment of the total revenues collected in the Omni Tax Increment District, on top of its' current contribution of \$1.43 million, over the life of the Omni CRA. A portion of these funds could be utilized along with additional private sector dollars for repayment of the County issued loan.

## **CONCLUSION**

As previously noted in this memorandum, the PAC is 84% complete, and we are aggressively working to complete work as scheduled in eleven months. With the support of this Board, and that of previous Boards, this project has been in some phase of development for over 15 years. I think we would all agree that we have come too far, overcome too many hurdles, and that failure to complete this County-owned complex is not an option.

There is no doubt that the PAC project represents the most significant project in the Omni Tax Increment District in spurring redevelopment and new growth. We can take pride in what this catalytic project has been able to accomplish for this district and for our entire community, and

for what the Center will represent for future generations. The Board should also be recognized for their strong leadership last year, and throughout the history of this project in addressing the magnitude of issues which have confronted the development of the PAC. Without your support, we would not have been able to refocus and re-energize the project.

As I advised the Board on July 27, 2004, when the PAC restructuring plan was approved, there were no options, including realignment, which could guarantee certainty with regard to time or budget to finish the project. With over thirteen months behind us since restructuring, I am absolutely convinced, however, that the course of action authorized by the Board was the correct action.

Based on the Board's direction, I will memorialize the terms and conditions of this PACT loan in an agreement to be presented to the Board in the near future. After review and consultation with all the affected parties, this is the best course of action available to complete the PAC in this current environment.



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Assistant County Manager