Memorandum

MIAMI-DADE COUNTY

Date: May 5, 2009

To: Honorable Chairman Dennis C. Moss and Members, Board of County Commissioners

Agenda Item No. 12(A)(1)

From: George M. Burgess
County Manager

R. A. Cuevas, Jr.
County Attorney

Subject: Settlement Agreement with Great American Insurance Corporation of lawsuit: *Great American Insurance Company v. Miami-Dade County,* Case No. 1:08-cv-22323-KMM (United States District Court, Southern District of Florida).

Recommendation

It is recommended that the Board approve the attached Settlement Agreement between Miami-Dade County, Florida (the "County") and Great American Insurance Company ("Great American") in the amount of $496,878.27 (of this amount, $414,105.77 represents amount for work performed and not in dispute). This settlement resolves all claims in the lawsuit captioned *Great American Insurance Company v. Miami-Dade County,* Case No. 1:08-cv-22323-KMM (United States District Court, Southern District of Florida) and all disputes between the County and Great American related to the completion of the construction of Miami-Dade Fire Rescue Stations 65 (East Homestead Station) and 66 (Villages of Homestead Station) (the "Projects").

Background

In 2006 the Miami-Dade Fire Rescue Department contracted with the firm of Pino-Kaoba & Associates, Inc. (the "Contractor") for the design-build construction of two fire stations in the Homestead area: East Homestead Station 65 (Project No. DB04-FIRE-02, Contract No. MDFRD D-B 10) and the Village of Homestead Station 66 (Project No. DB04-FIRE-03, Contract No. MDFRD D-B 11). A notice to proceed for Station 65 was issued on May 9, 2006 and for Station 66 on January 12, 2006. Both stations were scheduled to be substantially complete in the Spring of 2007. Final certificates of occupancy for both stations were scheduled to be obtained in the early fall of 2007.

In the fall of 2007, at around the time when the projects were both substantially complete, the Contractor walked out on the job. The County issued the Contractor notices of deficiencies and notices to cure. The Contractor did not cure the deficiencies and was terminated for cause on March 4, 2008.

The County met with Great American, the surety that issued payment and performance bonds on the projects, in order to coordinate the completion of the outstanding work. A dispute arose between the County and Great American regarding Great American's obligations and responsibilities to complete the outstanding work pursuant to the bonds. Unable to come to an agreement, in May of 2008, the County issued Great American a formal demand to complete the work within three months pursuant to the bonds. Great American did not perform the work and was terminated by the County in August of

2008. At around the time of the termination, Great American filed a lawsuit against the County claiming that they were entitled to the remaining contract proceeds, seeking to enforce an alleged completion agreement with the County and in the alternative seeking to be discharged of its obligations pursuant to the bonds.

Prior to the first scheduled mediation, the parties have resolved their differences and have agreed to a settlement under the terms described below and as detailed in the attached Settlement Agreement.

Of the original authorized combined total contract amount of $4,413,588.70, a total of $3,354,017 has been paid out, leaving a contract balance of $1,059,571.70. As part of this Settlement Agreement, the County will pay to Great American from this contract balance the sum of $496,878.27 (the settlement amount). Of this amount $414,105.77 represents work that was previously performed, is due and owing, and has never been in dispute, but payment has not been made because a proper pay request was never submitted. The remainder, $82,772.50, represents amounts that are in dispute. After paying Great American this settlement amount, the contract balance will be $562,693.50. The County will retain this entire contract balance. Of this remaining amount, $440,716 represents unused dedicated and contingency allowance account funds that were never a part of the dispute. The remainder, $121,977.50, represents amounts that were in dispute. Of this amount, the $46,750 represents liquidated damages withheld, $227.50 represents a credit that the County is taking for lapsed insurance coverage, and $75,000 represents additional contract balance that the County has set aside to perform the outstanding completion work. The current estimated cost of the outstanding completion work is less than $50,000.

Both the County and Great American are releasing each other from all claims related to these projects, with the exception that the County retains the right to make warranty claims and claims for latent defects. In addition, Great American's obligation to ensure that all subcontractors and suppliers are paid pursuant to the payment bonds issued is unaffected by this agreement. Furthermore, Great American is also issuing a release to the County on behalf of the Contractor.

In order to minimize the time and expense necessary to fully litigate this matter through trial and based on the facts of this case as outlined above, the County Manager and the County Attorney recommend approval of this settlement.

Station 65 received a temporary certificate of occupancy on October 22, 2007 and a final certificate of occupancy on October 31, 2007. Station 66 received a temporary certificate of occupancy on July 13, 2007 and a final certificate of occupancy on September 18, 2007. Both stations have been in operation and serving the residents of southern Miami-Dade County since those dates.

Assistant County Manager

MEMORANDUM

(Revised)

TO: Honorable Chairman Dennis C. Moss and Members, Board of County Commissioners

DATE: May 5, 2009

FROM: R. A. Cuevas, Jr. County Attorney

SUBJECT: Agenda Item No. 12(A)(1)

Please note any items checked.

_____ "4-Day Rule" ("3-Day Rule" for committees) applicable if raised

_____ 6 weeks required between first reading and public hearing

_____ 4 weeks notification to municipal officials required prior to public hearing

_____ Decreases revenues or increases expenditures without balancing budget

_____ Budget required

_____ Statement of fiscal impact required

_____ Bid waiver requiring County Mayor's written recommendation

_____ Ordinance creating a new board requires detailed County Manager's report for public hearing

✓ Housekeeping item (no policy decision required)

✓ No committee review

Approved _____ Mayor
Veto _____
Override _____

Agenda Item No. 12(A)(1)
5-5-09

RESOLUTION NO. _____

RESOLUTION APPROVING THE SETTLEMENT AGREEMENT OF THE LAWSUIT BETWEEN GREAT AMERICAN INSURANCE COMPANY AND MIAMI-DADE COUNTY, CASE NO. 1:08-CV-22323-KMM, IN THE AMOUNT OF $496,878.27 RELATING TO THE CONSTRUCTION OF MIAMI-DADE FIRE RESCUE STATION NO. 65 (PROJECT NO. MDFRD D-B 10) AND STATION NO. 66 (PROJECT NO. MDFRD D-B 11); AND AUTHORIZING THE MAYOR OR DESIGNEE TO EXECUTE THE SETTLEMENT AGREEMENT AND ALL OTHER DOCUMENTS NECESSARY TO IMPLEMENT THE AGREEMENT

WHEREAS, this Board desires to accomplish the purposes outlined in the accompanying memorandum, a copy of which is incorporated herein by reference,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that this Board hereby approves the attached Settlement Agreement ("the Agreement") in the amount of $496,878.27, of the lawsuit between Great American Insurance Company and Miami-Dade County, Case No. 1:08-cv-22323-KMM, filed in the United States District Court Southern District of Florida, relating to the construction of Miami-Dade Fire Rescue Station No. 65 (Project No. MDFRD D-B 10) and Station No. 66 (Project No. MDFRD D-B 11), in substantially the form attached hereto and incorporated herein; and authorizes the County Mayor or designee to execute the Agreement, and to execute all other documents necessary to implement the Agreement.

The foregoing resolution was offered by Commissioner ,

who moved its adoption. The motion was seconded by Commissioner

and upon being put to a vote, the vote was as follows:

Dennis C. Moss, Chairman
Jose "Pepe" Diaz, Vice-Chairman

Bruno A. Barreiro	Audrey M. Edmonson
Carlos A. Gimenez	Sally A. Heyman
Barbara J. Jordan	Joe A. Martinez
Dorrin D. Rolle	Natacha Seijas
Katy Sorenson	Rebeca Sosa
Sen. Javier D. Souto	

The Chairperson thereupon declared the resolution duly passed and adopted this 5th day of May, 2009. This resolution shall become effective ten (10) days after the date of its adoption unless vetoed by the Mayor, and if vetoed, shall become effective only upon an override by this Board.

MIAMI-DADE COUNTY, FLORIDA
BY ITS BOARD OF COUNTY
COMMISSIONERS

HARVEY RUVIN, CLERK

Approved by County Attorney as
to form and legal sufficiency. D. F.

By:_____
Deputy Clerk

Daniel Frastai

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SETTLEMENT AGREEMENT

THIS AGREEMENT made this ___ day of _____, 2009, is by and between The Board of County Commissioners of Miami-Dade County, Florida (the "County" or "MDFR" or the "Owner") and Great American Insurance Company ("Great American" or the "Surety")(collectively, the "Parties").

RECITALS

A. On or about June 6, 2006, the County and Pino Kaoba & Associates, Inc. ("Pino" or "Contractor") entered into a Lump Sum Design-Build Contract referred to as the "Design Build East Homestead Fire Rescue Station No. 65, MDFRD D-B-10" contract (the "Station 65 Contract").

B. In connection with the Station 65 Contract, Great American, as surety, issued a Performance and Payment Bond on behalf of Pino, as principal, and in favor of the County, as Obligee, bearing bond number 4930784 and containing a penal sum in the amount of $1,945,000 (the "Station 65 Bond").

C. On or about December 27, 2005, the County and Pino Kaoba & Associates, Inc. ("Pino" or "Contractor") entered into a Lump Sum Design-Build Contract referred to as the "Design Build Village of Homestead Fire Rescue Station No. 66, MDFRD D-B-11" contract (the "Station 66 Contract").

D. In connection with the Station 66 Contract, Great American, as surety, issued a Performance and Payment Bond on behalf of Pino, as principal, and in favor of the County, as Obligee, bearing bond number 4930773 and containing a penal sum in the amount of $2,310,705.00 (the "Station 66 Bond").

E. The Station 65 and Station 66 projects are collectively referred to in this Agreement as the "Projects."

F. The Station 65 Bond and the Station 66 Bond are collectively referred to in this Agreement as the "Bonds."

G. The County declared Pino to be in default of its obligations under the Station 65 and Station 66 Contracts and terminated its right to complete the Projects.

H. The County demanded that Great American complete the Projects.

I. Disputes arose between the County and Great American, which resulted in the County's declaration that Great American had defaulted under its obligations under the Bonds, and Great American's assertions that it was discharged of its obligations under the Bonds.

J. In connection with the disputes between the Parties, Great American filed suit against the County in the United States District Court for the Southern District of Florida, in an

action styled and numbered as *Great American Insurance Co. v. Miami-Dade County, Florida,* Case No.: 1:08-cv-22323-KMM (the "District Court Action").

K. Without admitting any liability or fact of whatsoever kind or nature, the Parties have a made a business decision to resolve their disputes and the parties have agreed to settle their disputes as set forth in this Agreement.

TERMS OF AGREEMENT

NOW THEREFORE, in consideration of the promises, and other good and valuable consideration, and the mutual covenants set forth herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Recitals. All of the Recitals set forth above are true and correct and are incorporated herein by reference.

2. Effect of Payment. The execution of this Agreement is a matter of convenience and neither the payment nor the acceptance of the Settlement Proceeds identified in paragraph 3 will be considered as an admission of any fact or liability whatsoever.

3. Consideration and Payment Terms. In full settlement of all claims between the Parties, the County will pay Great American the total amount of Four Hundred Ninety-Six Thousand, Eight Hundred Seventy-Eight Dollars and Twenty-Seven Cents ($496,878.27) (the "Settlement Proceeds"), the sufficiency of which Great American acknowledges. The Settlement Proceeds are calculated as follows:

Station 65:

Contract Balance:	$291,750.00
Unassessed Liquidated Damages:	($22,500.00)
Change Order for Signage	$6,105.77
Adjusted Contract Balance	$275,355.77

Station 66:

Contract Balance:	$321,000.00
Unassessed Liquidated Damages:	($24,250.00)
Lapse in Insurance Coverage:	($227.50)
Adjusted Contract Balance	$296,522.50

From the sum of the Adjusted Contract Balances on the Projects ($571,878.27), the Parties have agreed that the County shall deduct Seventy-Five Thousand Dollars ($75,000.00). After subtracting that amount, the remaining amount constitutes the Settlement Proceeds.

4. **Timing of Payment of Settlement Proceeds.** The County shall deliver the Settlement Proceeds within thirty (30) days following Board of County Commissioners approval of this Settlement Agreement, and the expiration of the County Mayor's ten (10) day veto period. The County shall make the check representing the Settlement Proceeds payable to Great American Insurance Company. The County shall deliver the check to Great American's counsel, Brett D. Divers, Esq., c/o Mills Paskert Divers P.A., 100 North Tampa Street, Suite 2010, Tampa, FL 33602.

5. **Release by Great American.** *Save and except for* the obligations set forth in this Agreement, all of which survive the execution of this Agreement, Great American hereby acknowledges and agrees that the Settlement Proceeds are being paid in full settlement and satisfaction of all claims that Great American may have against the County or the County Released Parties (as hereinafter defined) arising from or out of the District Court Action, and Great American does hereby for itself, and its agents, officers, directors, managers, members, stockholders, employees, affiliates, subsidiaries, parent companies, successors, attorneys, assigns, and on behalf of Pino Kaoba, its agents, officers, successors, and assigns (the "Great American Releasing Parties") fully remise, release, acquit and forever discharge the County, and its commissioners, constituents, agents, managers, members, employees, successors, attorneys and assigns (the "County Released Parties"), of and from any and all duties, rights, claims, demands, actions and causes of action, civil or administrative remedies, of any nature whatsoever, whether arising at law or in equity, by reason of any matter, cause, happening or thing, from the beginning of time, occurring before and including the date of this Agreement, that in any way relate to: (a) the District Court Action; (b) the Bonds; or (c) the Projects.

6. **Release by The County.** *Save and except for* the obligations set forth in this Agreement, *and* the limitation at the end of this paragraph, all of which survive the execution of this Agreement, the County does hereby for itself and for its commissioners, constituents, agents, managers, members, employees, successors, attorneys and assigns (the "the County Releasing Parties"), fully remise, release, acquit and forever discharge Great American and its agents, officers, directors, managers, members, stockholders, employees, affiliates, subsidiaries, parent companies, reinsurers, successors, attorneys and assigns (the "Great American Released Parties"), of and from any and all duties, rights, claims, demands, actions and causes of action, civil or administrative remedies, of any nature whatsoever, whether arising at law or in equity, by reason of any matter, cause, happening or thing, from the beginning of time, occurring before and including the date of this execution of this Agreement, that in any way relate to: (a) the District Court Action; (b) the Bonds; (c) the Projects; (d) any and all claims for statutory or common law "bad faith" against Great American that relate to the manner or timeliness in which Great American handled or settled the County's claims; and (e) any and all claims arising under chapter 624 or 626, *Florida Statutes*, that relate to the County's claims against the Bonds or Great American regardless of when such claim arose or accrued. THIS RELEASE DOES NOT RELEASE GREAT AMERICAN FROM: (A) CLAIMS ON EITHER OF THE PROJECTS RELATING TO WARRANTY OBLIGATIONS UNDER THE STATION 65 OR STATION 66 CONTRACTS/PROJECTS; or (B) CLAIMS RELATING TO LATENT DEFECTS IN THE WORK PERFORMED ON THE PROJECTS BY PINO. AS TO SUCH CLAIMS, THE PARTIES RESERVE ALL RIGHTS, CLAIMS, AND DEFENSES. THE COUNTY

REPRESENTS AND WARRANTS THAT, AS OF THE DATE OF THIS AGREEMENT, IT IS NOT AWARE OF ANY WARRANTY OR LATENT DEFECT CLAIMS THAT MAY EXIST.

7. **Limitation on warranty obligation and Great American's monetary obligation.** The County acknowledges and agrees that under no circumstances shall Great American's liability arising out of any claim excepted from the County's Release in paragraph 6(A) and 6(B) above exceed the penal sums of either the FS 65 or FS 66 bonds..

8. **Completion of the Projects**. The County shall be responsible for completing the Projects and agrees that Great American has no responsibility or obligation to do so.

9. **Project Specific Agreement.** The Parties acknowledge and agree that Great American, as surety, may have issued bonds for principals other than Pino on County projects. It is the intent of the Parties that this Agreement relates only to claims arising out of or relating to the Bonds Great American issued on the Projects. It does not relate to projects on which Great American has issued bonds for entities other than Pino.

10. **Cooperation.** The Parties agree to execute all such further instruments, and to take all such further actions as may be reasonably required by any Party to fully effectuate the terms and provisions of this Agreement and the transactions contemplated herein. This obligation includes, but is not limited to, the execution and filing of a joint stipulation for dismissal with prejudice of the District Court Action within ten (10) days after: (1) approval of this agreement by the Board of County Commissioners and expiration of the County Mayor's ten (10) day veto period; and (2) receipt and clearance of the Settlement Proceeds.

11. **Survival of Representations.** All covenants, warranties and representations contained in this Agreement, shall survive the execution of this Agreement.

12. **Reservation of Great American's Rights Against Pino.** Nothing in this Agreement is intended to nor shall be construed to be a release, waiver, estoppel or modification of any of the claims, rights and/or defenses, at law or in equity, available to Great American against Pino, Ernesto Pino or Patricia Pino under any contract, statute, or law.

13. **Payment Bond.** Nothing in this Agreement is intended to nor shall it affect any of Great American's obligations under the Payment Bonds issued for the Projects.

14. **The County will use reasonable efforts to place this item on the next available Board of County Commissioners meeting for approval.**

15. **General Provisions.**

(a) This Agreement contains contractual obligations and not mere recitals.

(b) This Agreement may be executed in counterparts, each of which shall be fully effective as an original and all of which together shall constitute one and the same instrument.

(c) Facsimile signatures may be treated as originals for all purposes.

(d) This Agreement shall only extend to and be binding upon the Parties hereto and their respective successors and assigns. Nothing contained in this Agreement shall create any third party beneficiaries, nor confer any benefit or enforceable rights under this Agreement other than to the Parties hereto and their respective successors, assigns, and reinsurers.

(e) This Agreement may not be modified unless in writing and executed by both Parties. The provisions of this Agreement shall be applied and interpreted in a manner consistent with each other so as to carry out the purposes and intent of the Parties.

(f) The remedies of the parties hereto provided herein are cumulative and concurrent, and may be pursued singly, successively or together, at the sole discretion of the aggrieved party, and may be exercised as often as occasion therefor shall arise.

(g) This Agreement shall be construed and enforced in accordance with the laws of the State of Florida. The prevailing party in any arbitration, mediation arising out of this Agreement, shall be entitled to recover from the non-prevailing party its attorneys' fees incurred therein and on appeal therefrom.

(h) This Agreement constitutes the complete and final expression of the agreement of the parties relating to the subject matter contained herein and supersedes all previous contracts, agreements, and understandings of the parties, whether oral or written.

(i) If any provision or term of this Agreement is deemed to be illegal or unenforceable in any respect, such provision or term shall not affect any other provision or term hereof, and this Agreement shall be construed as if the provision or term had never been contained herein.

(k) The parties agree to bear their own attorneys' fees and costs incurred in all matters that led to the entry of this Agreement.

(l) The parties represent and warrant that they have not sold, assigned, granted, conveyed or transferred to any other person, firm, corporation or entity any of the claims, demands or causes of action referred to in this Agreement which they now own or hold, or have owned or held or may own or hold against any one or all of the parties to this Agreement.

(m) The parties acknowledge that they are and have been represented by counsel in connection with the negotiation of this Agreement, that the

provisions of this Agreement and the legal effect thereof have been fully explained to them and they have entered into this Agreement freely and voluntarily and without coercion or undue influence.

THE SIGNATORIES TO THIS AGREEMENT ACKNOWLEDGE THAT THEY HAVE READ THE FOREGOING AGREEMENT, FULLY UNDERSTAND ITS TERMS AND CONDITIONS, AND AGREE TO BE BOUND BY ALL OF ITS TERMS AND CONDITIONS.

IN WITNESS WHEREOF, the parties hereto have affixed their hands and seals to this Agreement the day and year first set forth above, and the individuals who execute this Agreement personally represent and warrant that they have full authority to execute this Agreement on behalf of the respective Parties.

MIAMI-DADE COUNTY, FLORIDA

By: _____
County Mayor or Designee

Date: _____

GREAT AMERICAN INSURANCE COMPANY

By: _____

Name: Jeffrey S. Woodard

Title: Senior Bond Claim Attorney