Memorandum

MIAMI-DADE COUNTY

Date: February 15, 2011

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

From:

Agenda Item No. 12(A)(1)

George M. Burgess
County Manager

Robert A. Cuevas
County Attorney

Subject: Resolution approving the settlement of the lawsuit: Underground Construction Co., Inc. (UCCO) v. Marks Brothers, Inc. (MBI) and Travelers Casualty and Surety Company of America v. Miami-Dade County (MDC), Case No. 09-80275 CA 13 ("Lawsuit") in the amount of $237,500

Recommendation

It is recommended that the Board approve the attached Settlement Agreement ("Settlement") of the above referenced lawsuit between Underground Construction Co., Inc. (UCCO), Marks Brothers, Inc. (MBI), and Miami-Dade County in the amount of $237,500.

Scope

Miami International Airport (MIA) is located primarily within Commissioner Rebeca Sosa's District Six. However, the impact of this agenda item is countywide in nature as Miami International Airport is a regional asset.

Fiscal Impact/Funding Source

The fiscal impact to the County is $237,500 and shall be paid from Aviation Revenue bonds/Construction Funds.

Background

On November 8, 2007, the County entered into a contract (the "Contract") with MBI to construct the MIA South Terminal Dual Taxiway Project (the "Project"). The scope of the Project consisted of: (1) the construction of dual Taxiways "P" and "Q" providing bi-directional access to the South Terminal Complex serving Concourse "H" and new Concourse "J", (2) relocation of the primary jet-fuel hydrant system control/isolation valve pit and installation/removal of associated jet fuel piping adjacent to the existing Concourse "H" Headhouse, (3) removal and storage of passenger loading bridges from the Concourse "H" Headhouse and repair of the building to close the openings for the removed loading bridges, (4) removal of high-mast apron lighting, (5) construction of a new 9W6 electric ductbank to Concourse "H", and (6) installation of taxiway centerline lights. The work also included airfield pavement, drainage, and other airfield infrastructure necessary to provide a functional taxiway system.

The original Contract amount was for $11,060,426.63. On January 22, 2009 the first and only change order to the Contract was approved in the amount $627,655 which brought the Contract amount to $11,688,081.63. The Project was substantially completed on October 2, 2010 and the County has paid

MBI a total of $10,876,358.84 for the completed work, leaving a total of $811,722.79 in unspent contract funds.

The Contract provided for the Project to be completed within 454 days from issuance of the Notice to Proceed. However, the Project was completed 146 days late. MBI filed claims in which it alleges that the County delayed the Project's total duration by preventing the contractor from having access to the construction site during the beginning of the work, making design changes to the layout of the double wall fuel pipe, requiring additional waterproofing for a control valve vault, and redesigning the locations of tie-ins for electric duct-banks due to conflicts with existing utilities that were not shown on the original plans. MBI also claims that it is owed direct costs as a result of these delays and as a result of other work that it claims it was not fully compensated for. Included in MBI's claim is a pass through claim from UCCO, its subcontractor on the Project, in the amount of $369,428.80. MBI's certified claims against the County total $1,837,795.71.

Although the County has denied these claims, it does not dispute that it did cause some delays to the Project by preventing MBI from accessing the construction site at the outset of the Project. The County also does not dispute that certain County initiated changes may have impacted the duration of certain Project tasks although the County disputes the impact of these changes on the overall contract duration. The County also does not dispute that MBI performed work, such as dewatering/treatment work, for which it has not been fully compensated.

After two mediations and considerable negotiations between the parties, the attached settlement of this lawsuit was reached and its approval is recommended as being in the best interest of the County. The County's scheduling consultant on this project and MDAD's bond engineer, HNTB, believe the proposed settlement to be a reasonable resolution of these claims.

Assistant County Manager

MEMORANDUM

(Revised)

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

DATE: February 15, 2011

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

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

Please note any items checked.

_____ **"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**

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

✓ **No committee review**

_____ **Applicable legislation requires more than a majority vote (i.e., 2/3's ____, 3/5's ____, unanimous _____) to approve**

_____ **Current information regarding funding source, index code and available balance, and available capacity (if debt is contemplated) required**

Approved _____ Mayor

Veto _____

Override _____

Agenda Item No. 12(A)(1)

2-15-11

RESOLUTION NO. _____

RESOLUTION APPROVING THE SETTLEMENT AGREEMENT OF THE LAWSUIT BETWEEN UNDERGROUND CONSTRUCTION CORPORATION INC., MARKS BROTHERS INC., AND MIAMI-DADE COUNTY

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 authorizes the Mayor or designee to execute the attached settlement agreement between Underground Construction Corporation Inc., Marks Brothers Inc., and Miami-Dade County, in substantially the form attached hereto and incorporated herein.

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:

Joe A. Martinez, Chairman
Audrey M. Edmonson, Vice Chairwoman

Bruno A. Barreiro	Lynda Bell
Jose "Pepe" Diaz	Carlos A. Gimenez
Sally A. Heyman	Barbara J. Jordan
Jean Monestime	Dennis C. Moss
Natacha Seijas	Rebeca Sosa
Sen. Javier D. Souto	

The Chairperson thereupon declared the resolution duly passed and adopted this 15th day of February, 2011. 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

By:_____
Deputy Clerk

Approved by County Attorney as
to form and legal sufficiency. DM/FOR

Daniel Frastai

IN THE CIRCUIT COUT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CASE NO.: 09-80275 CA 13

UNDERGROUND CONSTRUCTON CO., INC.,

Plaintiff,

v.

MARKS BROTHERS, INC. and TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendants,

_____/

MARKS BROTHERS, INC.

Third Party Plaintiff,

v.

MIAMI-DADE COUNTY, FLORIDA,

Third-Party Defendant.

_____/

SETTLEMENT AGREEMENT

Underground Construction Co., Inc. ("Underground"), Marks Brothers, Inc. ("Marks") and Travelers Casualty and Surety Company of America ("Travelers") and Miami-Dade County ("County") hereby agree to settle in full the action as setforth below.

In exchange for the mutual consideration described below, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Marks and the County agree to pay the total sum of $475,000 to Underground with payment to

6

be made in the amount of $237,500.00 from Marks and $237,500 from the County in full and final settlement of any and all claims by, between or against Underground, Marks and the County asserted in the case styled *Underground Construction Co., Inc. v. Marks Brothers, Inc., et al.*, Miami-Dade County Circuit Case No.: 09-80275 CA 13 (the "Lawsuit").

2. This settlement is subject to approval by the County's Board of County Commissioners and the Mayor's veto. The County Manager shall endeavor to schedule the consideration of this Settlement Agreement at the very latest on the Board of County Commissioners' second February, 2011 meeting setting. Within ten (10) days after the approval of the settlement by the Board of County Commissioners and the expiration of the ten day veto period of the Mayor of Miami-Dade County, the County shall pay the sum of $237,500 and Marks shall pay the sum of $237,500 to the trust account of Vezina, Lawrence & Piscitelli, P.A. The parties agree to file a Stipulation for Continuance of the trial in the Lawsuit if the County Manager schedules the consideration of this Settlement Agreement by the second February, 2011 meeting setting. The County shall provide written notice to Marks and Underground that the Settlement Agreement has been approved and that no mayoral veto has occurred.

3. Should the County fail to schedule the consideration of this Settlement Agreement by the first Board of County Commission meeting setting in March, 2011, this Settlement Agreement shall be voidable at the option of Underground with written notice given to counsel for Marks and Travelers and counsel for the County. Additionally, if the County's Board of County Commissioners fails to approve the settlement or the settlement is vetoed by the Mayor of Miami-Dade County as stated above, this Settlement Agreement shall be null and void and the Lawsuit shall continue.

4. Except as otherwise provided in this Settlement Agreement and excepting the terms of the Settlement Agreement itself, upon full and complete compliance with the terms of this Settlement Agreement, Underground, Marks and the County, and each of them, for themselves and their successors and assigns, do hereby release and forever discharge each other, and their respective officers, agents, sureties, insurance

7

carriers, principles, partners, employees, directors, affiliates, franchisees, subsidiaries, successors and assigns from any and all claims, demands, causes of action, suits, debts, dues, duties, sums of money, accounts, reckonings, covenants, contracts, agreements, promises, damages, judgments, extents, executions, liabilities and obligations, both contingent and fixed, known and unknown, of every kind and nature whatsoever, which any of them asserted or might have asserted against each of them from the beginning of the world to the date of these presents arising out of the Lawsuit and the MIA South Terminal Dual Taxiway Project (Project No.K-150-A) ("Project"). This release does not include any latent defects and the parties know of no latent defects at this time.

5. Upon the completion of the payment in this Settlement Agreement, Underground agrees to provide a separate release to Travelers for the claims arising out of the Lawsuit and the Project.

6. Furthermore, within five (5) days after the completion of the payment to Vezina, Lawrence & Piscitelli, P.A.'s trust account as set forth in this Settlement Agreement, the parties shall cause to be executed a Stipulation for Dismissal with Prejudice.

7. This Settlement Agreement does not impact the provisions of the Contract Documents between Marks and the County and the provisions of the Contract Documents shall remain in full force and effect. Moreover, this Settlement Agreement does not impact the efficacy of the Travelers' Payment Bond for the Project in the event third parties make timely claims.

8. This Settlement Agreement shall become a public record in accordance with Florida law.

9. The parties have not assigned, subrogated or otherwise transferred any claim, demand, cause of action, suit, debt, due, duty, sum of money, account, reckoning, covenant, contract, agreement, promise, damage, judgment, extent, execution, liability and obligation, both contingent or fixed, known or unknown, of any kind or nature whatsoever, which either have been or could have been asserted by any of them related to or arising out of the litigation referenced above.

10. This Settlement Agreement and releases shall be governed by and construed in accordance

with the laws of the State of Florida.

11. Each party to the above-styled litigation shall bear its own attorney's fees and costs

12. In the event that an action is brought to enforce the terms of the Settlement Agreement in this matter, the prevailing party in that action shall be entitled to reasonable attorneys' fees and costs. Venue in any proceeding brought to enforce the Settlement Agreement shall be Miami-Dade County, Florida.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement and releases to be executed as set forth below.

Underground Construction Co., Inc.

By: _____ 1.6.11

Its: PRESIDENT

Marks Brothers, Inc.

By: _____ 1/6/11

Its: PRESIDENT

Miami-Dade County

Recommended By: _____ FOR PEDRO HERNANDEZ

Its: CIVIL/ENVIRONMENTAL DIRECTOR

1-6-11

9