Approved _____ Mayor
Veto _____
Override _____

Agenda Item No. 12(A)(5)
04-24-07

OFFICIAL FILE COPY
CLERK OF THE BOARD
OF COUNTY COMMISSIONERS
MIAMI-DADE COUNTY, FLORIDA

RESOLUTION NO. R-488-07

RESOLUTION APPROVING SETTLEMENT AGREEMENT WITH F.R. ALEMAN AND ASSOCIATES, INC. AND MID-STATE SURETY CORP. REGARDING LITIGATION OVER A PROFESSIONAL SERVICES CONTRACT FOR DEVELOPMENT OF AN ADVANCED TRAFFIC MANAGEMENT SYSTEM FOR THE COUNTY; AND AUTHORIZING EXECUTION OF THE AGREEMENT

WHEREAS, F.R. Aleman & Associates, Inc. filed suit against the County on March 5, 2004, in the Circuit Court in the case styled *F. R. Aleman & Associates, Inc. v. Miami-Dade County v. Mid-State Surety Corp.*, Miami-Dade County Circuit Court Case No. 04-05318-CA-21, alleging various claims against Miami-Dade County for breach of a Professional Services Contract for the Development of the Advanced Traffic Management System for the County, County Project No. 610113, State Project No. 87099-3502; and

WHEREAS, Miami-Dade County has filed a counter-claim against F.R. Aleman & Associates, Inc. and its surety, Mid-State Surety Corp.; and

WHEREAS, settlement of all claims by and between F.R. Aleman & Associates, Mid-State Surety Corp., and Miami-Dade County is advantageous to the County as outlined in the accompanying memorandum, a copy of which is incorporated by reference; and

WHEREAS, the Settlement Agreement attached to the Manager's memorandum is a fair and equitable resolution of the above lawsuit,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that this Board hereby approves the Settlement Agreement with F.R. Aleman & Associates, Inc., and its surety Mid-State Surety Corp. to the pending litigation, in substantially the form attached hereto and made a

MEMORANDUM

(Revised)

TO: Honorable Chairman Bruno A. Barreiro and Members, Board of County Commissioners

DATE: April 24, 2007

FROM: Murray A. Greenberg
County Attorney

SUBJECT: Agenda Item No. 12(A)(5)

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 Manager'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**

part hereof; and further authorizes the Mayor, or his designee, to execute the agreement for and on behalf of Miami-Dade County, and take other actions as may be necessary to complete resolution of this matter.

The foregoing resolution was offered by Commissioner Carlos A. Gimenez, who moved its adoption. The motion was seconded by Commissioner Dennis C. Moss and upon being put to a vote, the vote was as follows:

Bruno A. Barreiro, Chairman	aye		
Barbara J. Jordan, Vice-Chairwoman	aye		
Jose "Pepe" Diaz	aye	Audrey M. Edmonson	absent
Carlos A. Gimenez	aye	Sally A. Heyman	absent
Joe A. Martinez	aye	Dennis C. Moss	aye
Dorrin D. Rolle	aye	Natacha Seijas	absent
Katy Sorenson	aye	Rebeca Sosa	aye
Sen. Javier D. Souto	aye		

The Chairperson thereupon declared the resolution duly passed and adopted this 24th day of April, 2007. 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: KAY SULLIVAN
Deputy Clerk

Approved by County Attorney as
to form and legal sufficiency.

Oren Rosenthal

SETTLEMENT AGREEMENT, MUTUAL RELEASE AND NON-DISCLOSURE AGREEMENT

Miami-Dade County, by and through its Public Works Department (the "County"), F.R. Aleman & Associates, Inc. ("FRA") and Mid-State Surety Corp. ("Mid-State") hereby enter into this Settlement Agreement, Mutual Release and Non-Disclosure Agreement ("Agreement"), binding each to the other in accordance with the term of this Agreement on this _____ day of _____, ~~2006~~ 2007 as follows:

WHEREAS, the parties entered into a Professional Services Contract ("Professional Services Contract") for the Development of the Advanced Traffic Management System for the County, County Project No. 610113, State Project No. 87099-3502, (the "ATMS Project");

WHEREAS, FRA obtained a payment and performance bond from Mid-State Surety for the ATMS Project;

WHEREAS, FRA was in the process of developing the AToMS software and source code for use in the Advanced Traffic Management System for the County;

WHEREAS, the Professional Services Contract for the ATMS Project was terminated by the County;

WHEREAS, the County has hired Kimley-Horn to continue the work begun by FRA on the ATMS Project;

WHEREAS, FRA and the County desire to resolve all issues between them relating to the ATMS Project;

WHEREAS, the County desires a copy of the AToMS source code to the extent developed by FRA for the Advance Traffic Management System; and

FRA
County
Mid-State

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Memorandum

MIAMI-DADE COUNTY

Date: April 24, 2007

Agenda Item No. 12(A)(5)

To: Honorable Chairman Bruno A. Barreiro
and Members, Board of County Commissioners

From: George M. Burgess
County Manager

Murray A. Greenberg
County Attorney

Subject: Settlement Agreement among Miami-Dade County, Mid-State Surety Corp. and F.R. Aleman & Associates, Inc.

Recommendation
It is recommended that the Board of County Commissioners (BCC) approve the attached resolution accepting a settlement agreement among Miami-Dade County (MDC), Mid-State Surety Corp., and F.R. Aleman & Associates, Inc. (FRA). A lawsuit was filed by FRA, the original system management consultant for the Advanced Traffic Management System (ATMS), against Miami-Dade County for breach of contract. MDC had refused to authorize additional funds above and beyond the original contract amount because FRA had failed to perform. As a result of extensive negotiations, a settlement agreement has been accorded between all involved parties and is now before the BCC for approval.

Scope
Not Applicable.

Fiscal Impact/Funding Source
No funds will change hands as a result of this settlement agreement.

Track Record/Monitor
Not Applicable.

Background
In the early 1990's, the Miami-Dade County Public Works Department and the Florida Department of Transportation (FDOT) recognized a growing need to replace our Traffic Control System (TCS) which had been monitoring and controlling 2000 of our traffic signals throughout the County since 1975. A new ATMS would accommodate all existing and future traffic signals and provide improved services to the traveling public.

In 1995, MDC and FDOT jointly selected FRA as the system management consultant for the project. MDC signed a Joint Project Agreement (JPA) with FDOT calling for MDC to administer the project and for FDOT to reimburse MDC for up to $8.63 million for the project's first phase. MDC then signed a Professional Services Agreement (PSA) with FRA and the design effort commenced.

The structure of the contract was designed to be work order based, which signifies payment against deliverables, in order for MDC to maintain accountability of the work performed. Therefore, the tasks that were paid to FRA were authorized by staff administering the contract and a good portion of this work is currently being used and has proven to be beneficial for the last several years. However, due to a series of impediments, the project did not proceed as expected, and FRA was unable to deliver the product required by MDC

in the allotted time and within the original budget. As a result, in mid 2004 the Contract was terminated by MDC.

To quantify the value of work performed by FRA, staff performed an analysis which revealed that approximately 33% of the product resulted in significant and valuable upgrades to the existing Traffic Control System (TCS) which improved its functionality and extended its life ten to fifteen years, a major concern after it crashed twice in the early 1990's. To date, it remains the system currently being used by MDC, along with the needed improvements. Staff's evaluation also determined that roughly 33% of the work completed by FRA cannot be utilized because it was performed when the project was proceeding in a direction that later had to be abandoned to take advantage of new advancements in technology which would ultimately be of greater benefit to MDC. The remaining 33% of the work's value will be determined upon receipt of the source code by MDC. The source code is the actual computer programming language that was written by FRA's programmers for the AToMS program, which was designed to manage the database of MDC's large signalization inventory. County staff has been using it extensively for the past five years with much success, despite some imperfections in the program. However, without the source code, the AToMS program cannot be modified nor merged into the new ATMS software known as KITS developed by the new System Management Consultant. In order to maximize the efficiency of the ATMS, the AToMS program needs to communicate with the real-time software that actually monitors and controls the signals. If the AToMS source code is acquired and is found to be of industry-standard quality, the new system management consultant will be able to create an optimum ATMS package for MDC by writing appropriate additional code to combine the best features of the existing KITS and AToMS programs. If not, the new consultant will have to re-develop many aspects of the database management software and MDC will end up paying for such development twice and will require an additional 10-12 months to complete. Re-writing the software instead of re-using the software for which we have already paid would be an inefficient use of resources. Incorporating the AToMS database into the ATMS software will enable many current signal system management activities to continue without disruption and to be automated for greater efficiency including the following:

a. signal maintenance dispatching;
b. signal construction project monitoring;
c. monthly updating of power consumption for billing purposes;
d. signal equipment inventory management;
e. communication subsystem management.

It must be noted that, prior to the termination of the contract, an independent consultant was hired by MDC to resolve a disagreement over the project payments. The independent consultant performed an audit and recommended payment to FRA that in their professional opinion represented the true value of the completed tasks. In their evaluation, it was determined that MDC should pay FRA an additional $400,000 to properly compensate them for work performed. In an effort to settle this dispute, MDC paid said amount to FRA as had been previously agreed among both parties.

In early 2004, FRA initiated a lawsuit against MDC for breach of contract seeking additional funds and MDC responded by filing a counter-lawsuit against FRA. In subsequent negotiations between MDC, the County Attorney's Office, FRA, and FRA's legal counsel, all

parties realized the cost of pursuing the litigation would be tremendous. The costs to the County of pursuing the litigation with the previous System Management Consultant can be summarized as follows:

1) A lawsuit of this magnitude and complexity could take years to conclude.

2) Due to the technical nature of this project, the costs for the use of expert witnesses would be great.

3) Due to the technical nature of the project, the costs of using in-house technical expertise would also be great, pulling them away from their other substantial responsibilities. The most important of such responsibilities is the deployment of the ATMS that is currently underway with the replacement System Management Consultant. For the past eighteen months, MDC has been devoting all available in-house resources toward that deployment. The new System Management Consultant's Alpha Test was installed in late 2005, and fine-tuned and approved in 2006. In recent months, 7% of the County's signalizations have been transferred to the new system. The remaining 93% are scheduled for transference within the next twenty-four months. This project, which is so critical to the long-term management of traffic on MDC arterials, is now proceeding forward smoothly. Pulling staff away to concentrate on the pursuit of this lawsuit would be very detrimental to this important project.

4) The cost of not obtaining immediate access to the previously developed source code would also be great. The new system manager would have to pursue the task of re-writing much software from scratch, for which MDC would pay a second time.

A settlement was therefore sought and reached, the highlights of which are the following:

FRA will provide the source code and documentation of the ATMS software developed under the contract to MDC for future use in MDC by MDC and its replacement system management consultant. MDC will strictly control who has future access to that source code.

FRA will grant MDC a perpetual, no-cost, license to continue to use the ATMS software developed under the contract in MDC.

MDC rescinds its termination of the PSA on the basis of default and declares it terminated on the basis of convenience.

No funds will change hands and all parties will be responsible for their own legal fees incurred to-date.

No parties admit liability and all parties release all other parties of any and all responsibilities.

MDC relinquishes any claim to the ownership of the ATMS software developed by FRA under the contract.

All parties acknowledge that FDOT is not a party to this settlement and may still exert a claim of software ownership. (FDOT has in fact assured us they reserve the right to claim ownership of this software in the future should the need ever arise.)

For reasons cited above, this settlement agreement is being submitted to the BCC for consideration and is strongly being recommended by the County Attorney's Office that it be approved.

Assistant County Manager

WHEREAS, FRA desires to provide a copy of the AToMS source code to the County pursuant to the terms of this Agreement;

THEREFORE, for sufficient and good consideration acknowledged by the parties, the parties hereto agree as follows.

1. The above recitations are true and correct.

2. In consideration of the foregoing, the mutual covenants and agreements contained herein, and for other good and valuable consideration, FRA and the County agree as follows:

A. FRA, the County and Mid-State desire to compromise and settle all claims relating to the ATMS Project and the case styled *F. R. Aleman & Associates, Inc. v. Miami-Dade County v. Mid-State Surety Corp.*, Miami-Dade County Circuit Court Case No. 04-05318-Ca-21 (the "Litigation"), rather than incur the expense and uncertainty of further litigation. It is understood that the terms of this Settlement Agreement in no way constitute an admission of liability by either FRA, the County or Mid-State, but rather are made by way of compromise.

B. The parties agree that each party will release the other, with no further payments due or to be made by any party, as full and final settlement of all claims and disputes existing between FRA, the County and Mid-State with respect to the ATMS Project and the Litigation.

C. For the consideration and promises made herein, receipt and sufficiency of which are hereby acknowledged, FRA hereby releases and forever discharges the County from any and all claims, causes of action, demands, disputes and rights of whatever nature and kind, known or unknown, that FRA now has or claims to have against the County, or its employees, officers, agents, sureties, shareholders, successors and assigns, attorneys, or otherwise, from the beginning of the world to the date of this Settlement Agreement, arising out of any occurrence, event, fact, or matter relating to the

FRA _____
County _____
Mid-State _____

ATMS Project or the Litigation, with the exception of claims and obligations arising out of this Settlement Agreement. Such release and discharge is made by FRA in its respective right and for its successors, executors, agents, employees, assigns, subcontractors, sureties, suppliers, and any and all other persons, firms, corporations, or other entities who may claim by or through FRA. FRA hereby agrees that it will not, and that its legal representatives and assigns shall not, hereafter file in any court any action relating to the ATMS Project or the Litigation, with the exception of an action to enforce this Settlement Agreement, and that to any such action which nevertheless may hereafter be brought, this Settlement Agreement shall be a complete and conclusive defense.

D. For the consideration and promises made herein, receipt and sufficiency of which are hereby acknowledged, the County hereby releases and forever discharges FRA from any and all claims, causes of action, demands, disputes and rights of whatever nature and kind, known or unknown, that the County now has or claims to have against FRA, or its employees, officers, agents, sureties, shareholders, successors and assigns, attorneys, or otherwise, from the beginning of the world to the date of this Settlement Agreement, arising out of any occurrence, event, fact, or matter relating to the ATMS Project or the Litigation, with the exception of claims and obligations arising out of this Settlement Agreement. Such release and discharge is made by the County in its respective right and for its successors, executors, agents, employees, assigns, subcontractors, sureties, suppliers, and any and all other persons, firms, corporations, or other entities who may claim by or through the County. The County hereby agrees that it will not, and that its legal representatives and assigns shall not, hereafter file in any court any action relating to the ATMS Project or the Litigation, with the exception of an action to enforce this Settlement Agreement, and that to any such action which nevertheless may hereafter be brought, this Settlement Agreement shall be a complete and conclusive defense.

FRA _____
County _____
Mid-State _____

E. For the consideration and promises made herein, receipt and sufficiency of which are hereby acknowledged, the County hereby releases and forever discharges Mid-State from any and all claims, causes of action, demands, disputes and rights of whatever nature and kind, known or unknown, that the County now has or claims to have against Mid-State, or its employees, officers, agents, sureties, shareholders, successors and assigns, attorneys, or otherwise, from the beginning of the world to the date of this Settlement Agreement, arising out of any occurrence, event, fact, or matter relating to the ATMS Project or the Litigation, with the exception of claims and obligations arising out of this Settlement Agreement. Such release and discharge is made by the County in its respective right and for its successors, executors, agents, employees, assigns, subcontractors, sureties, suppliers, and any and all other persons, firms, corporations, or other entities who may claim by or through the County. The County hereby agrees that it will not, and that its legal representatives and assigns shall not, hereafter file in any court any action relating to the ATMS Project or the Litigation, with the exception of an action to enforce this Settlement Agreement, and that to any such action which nevertheless may hereafter be brought, this Settlement Agreement shall be a complete and conclusive defense.

3. <u>AToMS Source Code.</u>

A. Within thirty (30) days of the execution of this Agreement, FRA shall deliver to the County the AToMS source code for the Advanced Traffic Management System, as it existed on May 24, 2004, the date of the termination by the County for the County's review and use in accordance with the terms hereunder and with the Professional Services Contract. FRA shall provide the County three compact disks with each disk containing a copy of the AToMS source code. The parties recognize that the AToMS source code is unfinished and incomplete.

B. Within thirty (30) days of the execution of this Agreement, FRA shall deliver to

FRA
County
Mid-State

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the County any and all manuals, notes, operator instructions or other documentation (the "AToMS Records") regarding, explaining or otherwise related to the Advanced Traffic Management Systems, in whatever form of the AToMS Records existed on May 24, 2004.

C. The County agrees to prevent the disclosure of the source code to any person, except as provided by this Agreement.

D. The County and FRA agree that the County is permitted to disclose the AToMS source code only to (1) County employees who have a verifiable reason to review and work with the AToMS source code and who are qualified to do so, and to (2) Kimley-Horn. The County may propose a change to Kimley-Horn, subject to the reasonable approval of FRA. The disclosure of the AToMS source code as provided herein shall be only for the purpose of allowing the evaluation, testing, modification and use of the AToMS source code for the County's Advanced Management Traffic System, and the County and Kimley-Horn shall not use the AToMS source code to enable competition with FRA or its subconsultants. The County's use of the AToMS source code will be limited to Miami-Dade County. The County acknowledges that FRA maintains all other ownership and marketing rights to the AToMS source code outside of Miami-Dade County, and the County relinquishes any claim of ownership to the AToMS source code. FRA grants to the County an irrevocable, perpetual license to use the AToMS software subject to the limitations set forth herein. The County and FRA acknowledge that third-parties, such as the State of Florida, are not parties to, and are not bound by this Agreement and may seek to assert ownership rights to the AToMS software and source code.

E. Prior to the disclosure of the AToMS source code to any persons pursuant to this Agreement, the County shall provide this Agreement to those persons to whom the County wishes to disclose the AToMS source code. The County shall not disclose the AToMS source code to any

FRA
County
Mid-State

person, as allowed pursuant to this Agreement, without first obtaining that person's written acceptance of the terms of this Agreement.

F. The County shall prepare and maintain a log of all persons who have been provided with access to the AToMS source code and maintain a copy of all written acceptance signed by those authorized persons pursuant to paragraph 5 above. The County will immediately make the log and all written acceptance available to FRA for review upon request of FRA.

G. The County further agrees that FRA is not liable for any misuse of the AToMS source code by the County or by any authorized persons pursuant to paragraphs 3 through 6 above. The County further agrees that FRA is not liable for any modifications made to the AToMS source code or any damages resulting from modifications to the AToMS source code by the County or any authorized persons pursuant to paragraphs 3B-E above.

H. The County agrees not to distribute or remove the AToMS source code, any portions of the AToMS source code, or any information from the compact disks provided by FRA and agrees not to reproduce the AToMS source code for any reason whatsoever except as may reasonably be necessary for evaluation, testing, modification and use of the AToMS source code for the County's Advanced Traffic Management System. FRA and the County agree that the only source code to be provided to the County is the AToMS source code maintained on the three compact disks provided by FRA pursuant to paragraph 3A above.

I. The County shall be responsible for the proper safe keeping of the AToMS source code and the compact disks provided by FRA to prevent any unauthorized access to the AToMS source code. The County shall be responsible for any loss, theft, or damage to the AToMS source code or the compact disks provided by FRA and any damages resulting therefrom.

FRA FM
County ____
Mid-State

J. This Paragraph 3 does not relate to the source codes for any other software or off-the-shelf products, including but not limited to the Apogee or Streetwise software. The County must obtain those source codes directly from the vendors of those products.

K. FRA represents and warrants that it either owns or has the AToMS source code provided herein, or has all necessary licenses and authority to provide the County with the AToMS source code for the use and purposes described herein.

4. The County rescinds its termination of the Professional Services Contract on the basis of default and declares that the termination of the Professional Services Contract was for the County's convenience.

5. The parties agree that each party shall bear its own attorneys' fees and costs.

6. The terms and conditions of this Agreement are fully set forth in this document and no other material terms exist outside this document. This Agreement supersedes all prior and contemporaneous agreements and understandings.

7. No supplement, modification, or amendment of this Agreement shall be binding unless it is executed in writing by the undersigned.

8. The parties, through counsel, shall file a stipulation for dismissal of the Lawsuit with prejudice upon execution of the Agreement and FRA's compliance with Paragraph 3A herein.

9. By their signatures, the undersigned warrant and represent that they are authorized to enter into this Settlement Agreement and empowered to bind their respective parties to its terms.

10. The signatories below represent that they have full authority to bind their respective parties to the terms of this Agreement.

FRA
County
Mid-State

IN WITNESS WHEREOF, we have hereunto set our hands and seals this ____ day of MARCH 2007 ~~February 2006~~. FRA

F.R. ALEMAN & ASSOCIATES, INC.

By: F. R. Aleman
Frank R. Aleman, President

Dated: 3/7/2007

Witnesses:

Name: Floridelia Calderon

Name: Sandra Miller

MIAMI-DADE COUNTY

By: _____
Esther Calas, P.E.
Director, Public Works Department

Dated: _____

Name: _____

Name: _____

MID-STATE SURETY CORP.

By: G. O'Mahoney
~~Gail Latham~~, Claims Counsel

Gregory O'Mahoney
Dated: 3/9/07

Name: Ann L. Henkel

Cynthia A. Takai
Name: Cynthia A. Takai

FRA FRA
County ____
Mid-State Sec

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