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CLERK OF THE BOARD
OF COUNTY COMMISSIONERS
MIAMI-DADE COUNTY, FLORIDA

Amended

MEMORANDUM

Agenda Item No. 8(A)(1)

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

DATE: May 15, 2012

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

SUBJECT: Resolution approving Settlement Agreement between Miami-Dade County and Mike Gomez Construction Corp. in the maximum amount of $500,000

Resolution No. R-433-12

The accompanying resolution was prepared by the Aviation Department and placed on the agenda at the request of Prime Sponsor Commissioner Bruno A. Barreiro.

R. A. Cuevas, Jr.
County Attorney

RAC/up

Memorandum

MIAMI-DADE COUNTY

Date: May 15, 2012

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

From: Carlos A. Gimenez
Mayor

Subject: Resolution Approving a Settlement Agreement between Miami-Dade County and Mike Gomez Construction Corp. in the amount of $500,000.00

This item was amended at the May 15, 2012 Board of County Commissioners meeting to insert the word "reasonable" before the phrase "...attorneys fees and litigation expenses" throughout the resolution, related memorandum and settlement agreement.

RECOMMENDATION

It is recommended that the Board of County Commissioners adopt the attached resolution approving the settlement agreement between Miami-Dade County and Mike Gomez Construction Corp. The proposed settlement: 1) resolves and releases all claims between and among the parties; 2) requires the County to pay Mike Gomez Construction Corp. a maximum amount of $500,000.00; 3) stipulates that Mike Gomez Construction Corp. may only use these funds to cover reasonable litigation expenses and attorney's fees; and 4) requires any unspent monies be returned to the County.

SCOPE

The Settlement with Mike Gomez Construction regards work performed at Miami International Airport (MIA), which is located primarily within Commissioner Rebeca Sosa's District Six; however, the impact of this item is countywide in nature as the Airport is a regional asset.

BACKGROUND

Mike Gomez Construction, as the prime contractor on the Aviation Department's (MDAD) MCC-07 (Miscellaneous Construction Contract 2007), managed and put out for bid miscellaneous construction work at MIA. When the Terminal building's roof began leaking in 2006, the Department's roofing consultant designed a plan in which the roof leaks would be repaired using spray-on foam rather than built-up roofing, and this plan was provided to the contractor to put out for bid.

The request for bids required bidders to supply a "full system maintenance warranty," the terms of which were not defined. However, a full system maintenance warranty is meant to provide services that are normally the owner's responsibility under a standard warranty; the manufacturer warrantees the product, but not the labor.

The project was bid and the low bidder was Insulated Roofing Contractor. The second lowest bid from TarHeel Roofing was $918,771.00 higher than that of Insulated Roofing; the remaining two bids were higher still. After reviewing the bids, Mike Gomez Construction recommended award to Insulated Roofing.

TarHeel protested the recommendation to award the contract to Insulated Roofing and requested a protest hearing. Under the MCC program, Mike Gomez Construction's protest procedure allows other bidders to protest after Mike Gomez Construction makes an award recommendation. In that case, MDAD selects a committee to evaluate the protest and either agrees with the recommendation, requests the project be re-bid, or decides to award to the second-ranked bidder.

During the bid protest, Insulated Roofing provided representations from GE Exterior Systems that Insulated Roofing was entitled to all commercially available warranties on its product and submitted a modified warranty that was accepted as an "or-equal" under the contract. Based on the ruling of the committee, Mike Gomez Construction was instructed to award the project to Insulated Roofing.

But after the hearing and the authorization of award to Insulated Roofing, the manufacturer, GE Exterior Systems, wrote a letter stating that the full system maintenance warranty was only available through Servcor, who would not supply the warranty to Insulated Roofing; Servcor would, however, supply the warranty to TarHeel Roofing, the second-ranked bidder. The inter-relationships among the companies complicated the situation: The president of Servcor International, David Looney, was also the representative of GE Exterior Systems, the manufacturer of the product. Further, Servcor was part of the TarHeel Bidding team which was headed by Looney's brother John Looney, and they shared the same office space.

At this time Mike Gomez Construction wrote a letter to MDAD saying that it did not want to award until this issue was resolved. Mike Gomez Construction was told that due to Insulated Roofing's low bid, equivalent warranty, and the urgency of the roof condition, the project should be awarded to Insulated Roofing.

TarHeel filed an action against both the County and Mike Gomez Construction in 2007. The Court dismissed this action with prejudice in 2009 because Tarheel could not state a cause of action after three attempts. Next, Servcor filed litigation against Mike Gomez Construction alleging that it engaged in a conspiracy with GE Exterior Systems and Insulated Roofing to steer work away from Servcor. Litigation among the parties is ongoing and is not expected to be settled before the summer of 2013. In the meantime, the roofing work was completed by Insulated Roofing in 2009.

At substantial cost, Mike Gomez Construction has been defending this action for the past two years. It could provide sufficient facts to take action against the County for breach of contract related to the Servcor complaint, based on directions given to Mike Gomez Construction from MDAD during the bidding process. Although the County would have strong defenses against any such claim, in order to avoid litigation and any future County liability, the County and Mike Gomez Construction have agreed to resolve all claims between them in the maximum amount of $500,000. Under the terms of the settlement, Mike Gomez Construction will assume full liability going forward, and may only use these funds to cover reasonable litigation expenses and attorney's fees; any unspent monies would be returned to the County. The County believes that this agreement is fair and equitable.

Jack Osterholt, Deputy Mayor

MEMORANDUM

(Revised)

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

DATE: May 15, 2012

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

SUBJECT: Amended
Agenda Item No. 8(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 _____

Amended
Agenda Item No. 8(A)(1)
5-15-12

RESOLUTION NO. R-433-12

RESOLUTION APPROVING SETTLEMENT AGREEMENT BETWEEN MIAMI-DADE COUNTY AND MIKE GOMEZ CONSTRUCTION CORP. IN THE MAXIMUM AMOUNT OF $500,000

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 authorizes the Mayor or Mayor's designee to execute the attached settlement agreement between Miami-Dade County and Mike Gomez Construction Corp. in the maximum amount of $500,000 and in substantially the form attached hereto and incorporated herein.

The foregoing resolution was offered by Commissioner **Bruno A. Barreiro**, who moved its adoption. The motion was seconded by Commissioner **José "Pepe" Diaz** and upon being put to a vote, the vote was as follows:

Joe A. Martinez, Chairman			**aye**
Audrey M. Edmonson, Vice Chairwoman			**aye**
Bruno A. Barreiro	**aye**	Lynda Bell	**aye**
Esteban L. Bovo, Jr.	**aye**	Jose "Pepe" Diaz	**aye**
Sally A. Heyman	**aye**	Barbara J. Jordan	**aye**
Jean Monestime	**aye**	Dennis C. Moss	**aye**
Rebeca Sosa	**aye**	Sen. Javier D. Souto	**aye**
Xavier L. Suarez	**aye**		

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The Chairperson thereupon declared the resolution duly passed and adopted this 15th day of May, 2012. 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: Christopher Agrippa
Deputy Clerk

Approved by County Attorney as
to form and legal sufficiency. Rte for DMM

David M. Murray

SETTLEMENT AGREEMENT

This Settlement Agreement and Release is entered into between Mike Gomez Construction Company ("MGCC") and Miami-Dade County ("the County"), on _____, 2012.

WHEREAS, the County has retained MGCC as the County's contractor for Miami International Airport's Miscellaneous Construction Contract ("the Contract"), pursuant to which MGCC bids out, manages, and is responsible for minor construction and repair projects at Miami International Airport; and

WHEREAS, in December 2009 a company known as Servcor International Inc. ("Servcor") filed the first of its several lawsuits against MGCC, which case is now pending in Miami-Dade County Circuit Court, Case No.: 10-56342 CA 40, for, among other things, allegedly conspiring to interfere with Servcor's sale of a "Full System Maintenance Warranty" at Miami International Airport.

WHEREAS, MGCC contends that the actions it has allegedly taken that form the basis of Servcor's complaint were done with the knowledge of and at the behest of the County; and

WHEREAS, the County does not believe that Servcor has a valid claim against MGCC and does not believe that the County bears any responsibility for such claim; and

WHEREAS, MGCC is expending significant sums to defend itself against Servcor's claim; and

WHEREAS, MGCC and the County, in recognition of years of collaborative work, do not wish to litigate against each other, but instead desire to respectively hedge their risk by entering in this agreement settling all claims between MGCC and the County as may be related to the Servcor litigation,

NOW THEREFORE, in consideration of the mutual promises contained herein, MGCC and the County jointly agree as follows:

1) The County shall fund MGCC's defense of all claims raised in *Servcor International Inc. v. Bayer Material Science LLC, et al.*, Case No. 10-56342CA 40, Miami-Dade County, Florida ("Case"), to a maximum amount of $500,000. MGCC has incurred and paid $_____ to date in these cases and said amount shall be included in MGCC's next regular Application for Payment and included in the next payment by the County. MGCC shall present the amount of its ongoing legal fees and expenses on a monthly basis to the County for payment with its regular Application for Payment. The County shall pay for the hourly costs of attorneys and paralegals, and related litigation costs and expenses. The County shall have no obligation or right to direct or otherwise participate in the defense of this matter. The County

rea
reasonable

shall have no obligation with respect to any jury award or other settlement as may be reached in this case.

2) MGCC does hereby release, acquit and forever discharge MIAMI-DADE COUNTY including all of Miami-Dade County's past and present employees, agents, officers, commissioners, attorneys, officials, administrators, departments, and agencies (all of which are collectively referred to as "County Employees and Departments"), from any and all claims, actions, causes of action, demands, rights, damages, costs, claims for attorneys' fees, loss of service, expenses, and compensation whatsoever ("Claims or Potential Claims"), which the undersigned now possesses, or which may hereafter accrue, on account of any known or unknown past events or occurrences, including but not limited to any Claims or Potential Claims related to the events described in the case styled *Servcor International Inc. v. Bayer Material Science LLC, et al.*, Case No. 10-56342CA 40, Miami-Dade County, Florida, or in the previously litigated and related case of *Tarheel Roofing v. Maimi-Dade County Aviation Department, et al*

3) The County hereby assigns and sets over unto MGCC any and all rights, claims and actions or causes of action it may have against the Project Architect, APEC, on the project that is the subject of the portion of the Case filed by Servcor against MGCC. MGCC shall have the right, but not the obligation, at is sole discretion, to assert any such claims or causes of action that either it or the County may have against APEC in relation to said project, whether same arises out of the claims asseted by Servcor or are independent of same.

In the event that MGCC asserts any such rights, claims, or causes of action against APEC, and APEC asserts any right, claim, counterclaim, or third party action against Miami-Dade County, its employees, or agents, MGCC shall defend and indemnify the County against same. MGCC shall be solely liable for the costs of such defense and any judgment issuing as a result. The County affirmatively represents that it has no knowledge, nor is it aware, of any right, claim, counterclaim, or third party claim that APEC may have against the County arising out of the contract between the County and APEC for the subject project or any other aspect of the project. Notwithstanding, in the event that APEC files any action in any state or federal court challenging the constitutionality or validity of any County ordinance, rule, regulation, or lawfully enacted order, the County shall have the obligation to assume the defense of such action upon ten days notice by MGCC. MGCC shall retain the right to pursue all claims assigned, set over, or otherwise conveyed to MGCC pursuant to this Section 3 and/or to receive the benefits thereof.

4) It is understood and agreed that this settlement is the compromise of a disputed claim, and that Miami-Dade County denies liability therefore and intends merely to avoid litigation.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date set

forth above.

Executed in the presence of:

Mike Gomez Construction Company

Printed Name: JESUS H. GOMEZ
Title: PRESIDENT
Date: 2-8-12

STATE OF FLORIDA
COUNTY OF MIAMI-DADE

I HEREBY CERTIFY that on this day, before me, a Notary Public, duly authorized in the State and County aforesaid to take acknowledgements, personally appeared Jesus M. Gomez, as President of Mike Gomez Construction Company, and who executed the foregoing instrument, and acknowledged before me that he/she executed it in the name of and for that company, and he/she (X) is personally known to me or (_) has produced _____ as identification.

WITNESS my hand and official seal in the County and State named above, this 8 day of February, 2014.

Notary Public

VIRGINIA MIRABAL
MY COMMISSION # DD 750595
EXPIRES: March 29, 2012
Bonded Thru Notary Public Underwriters

Executed in the presence of:

Miami-Dade County

Printed Name: Jose Abreu
Title: Director
Date: 7/20/12

STATE OF FLORIDA
COUNTY OF MIAMI-DADE

I HEREBY CERTIFY that on this day, before me, a Notary Public, duly authorized in the State and County aforesaid to take acknowledgements, personally appeared _____, as _____ of Miami-Dade County, and who executed the foregoing instrument, and acknowledged before me that he/she executed it in the name of and for that company, and he/she (_) is personally known to me or (_) has produced _____ as identification.

WITNESS my hand and official seal in the County and State named above, this ___ day of _____, 2011.