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OF COUNTY COMMISSIONERS
MIAMI-DADE COUNTY, FLORIDA

MEMORANDUM

Agenda Item No. 8(L)(1)

TO: Honorable Chairwoman Rebeca Sosa
and Members, Board of County Commissioners

DATE: April 16, 2013

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

SUBJECT: Resolution approving a settlement agreement between Miami-Dade County and F.A. Johnson, Inc., in the maximum amount of $83,000 and the retainage held in FEMA contract 20070579, Hurricane Wilma Storm Drain Cleaning Program STDC7

Resolution No. R-296-13

The accompanying resolution was prepared by the Public Works & Waste Management Department and placed on the agenda at the request of Prime Sponsor Commissioner Dennis C. Moss.

R. A. Cuevas, Jr.
County Attorney

RAC/jls

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Memorandum

MIAMI-DADE COUNTY

Date: April 16, 2013

To: Honorable Chairwoman Rebeca Sosa
and Members, Board of County Commissioners

From: Carlos A. Gimenez
Mayor

Subject: Resolution Approving a Mediation Settlement Agreement between Miami-Dade County and F.A. Johnson, Inc.

Recommendation
It is recommended that the Board of County Commissioners adopt the attached resolution approving a Mediation Settlement Agreement between Miami-Dade County (County) and F.A. Johnson, Inc. in the maximum amount of $83,000.00 and the retainage held in Federal Emergency Management Agency (FEMA) Contract 20070579, Hurricane Wilma Storm Drain Cleaning Program STDC7.

Scope
The impact of this agreement is Countywide.

Fiscal Impact/Funding Source
The fiscal impact to the County is $83,000.00, and the retainage will be paid from Stormwater Utility funds through index code CPE316PE9769.

Track Record/Monitor
The Project Manager responsible for the project was Mercedes Barreras, Construction Manager, Public Works and Waste Management Department (PWWM).

Background
As a result of Hurricane Wilma, in fiscal year 2006 the County advertised for bid four (4) FEMA Hurricane Wilma Storm Drain Cleaning contracts. These were countywide maintenance contracts involving the clean out of existing drainage structures and associated culverts. The scope of work included hydraulic cleaning and vacuum removal of all foreign material, obstructions, debris, silt, litter, and all other associated work, as ordered by PWWM. Each Unit Price Work Order Contract was awarded for an aggregate amount of $1.7 million to the lowest, responsive, and responsible bidder, for a period of 365 calendar days, with the option to extend the contract time for an additional 180 calendar days, upon mutual agreement between the contractor and PWWM's director, and approval of the County Manager.

F.A. Johnson, Inc. was awarded one (1) of the contracts and performed countywide drain cleaning work in the total amount of $1,001,665.00 during the contract period of February 26, 2007, to February 26, 2008. One of the other awarded contractors, Envirowaste Performance Systems, Inc. (Envirowaste), received work orders totaling $1,630,547.00. All of the FEMA storm drain cleaning work was completed satisfactorily under the four (4) contracts.

F.A. Johnson, Inc. (F.A. Johnson), filed suit against Miami-Dade County alleging that the County breached the contract by interfering with F.A. Johnson's performance of the contract and by wrongfully assigning work to Envirowaste; and for wrongfully holding the outstanding contract balance from F.A. Johnson. It also alleged that the County breached the implied duty of good faith and fair dealing by requesting an unreasonable increase in equipment and crew from F.A. Johnson; failing to cooperate when F.A. Johnson attempted to mitigate its damages, and impeding the timely performance under the contract; and awarding work orders to Envirowaste beyond the scope of their contract at the expense of F.A. Johnson. It further alleged damages due to their securing work crews and equipment with the expectation of approximately $1.7 million in assigned work, instead receiving $700,000.00 less.

F.A. Johnson alleged that in order to fulfill the $1.7 million contract requirements, it had to: (a) purchase two (2) vacuum trucks at a combined cost of $550,000.00, (b) dedicate two (2) other vacuum trucks to the project, at a combined value of $400,000.00, and (c) hire six (6) additional employees to fulfill the work crew requirements. F.A. Johnson alleges that it was damaged because Envirowaste commenced work significantly before they did, and Envirowaste was given the majority of the work due to their increase in the number of trucks on their project and F.A. Johnson's inability to invest in additional trucks. F.A. Johnson's position is that it would not have bid on the project if it had been clear that it would have to increase the amount of trucks to compete with the other contractors to be assigned the remaining work. In short, F.A. Johnson stated that a portion of its work was reassigned to other contractors on a basis that was not stated in the bid documents. They also alleged that because the County changed the contract's inspection services consultant, the required inspections were not performed timely, causing delays.

Consequently, F.A. Johnson alleges that its work crews and equipment sat idly in its yard, at a loss of $7,000.00 per diem. F.A. Johnson expected to receive the full contract value and instead received approximately $700,000.00 less. The County also retained approximately $13,000.00 of contract value that was earned by F.A. Johnson because F.A. Johnson would not sign a release of all claims. This retainage amount was earned by F.A. Johnson and will be paid as part of this resolution.

The parties attended mediation where the County and F.A. Johnson negotiated and signed a Mediation Settlement Agreement which is being submitted as a recommendation from PWWM. In order to avoid the cost expense and potential liability of litigation, under the Mediation Settlement Agreement, the County and F.A. Johnson have agreed to resolve all claims between them in the maximum amount of $83,000 plus the earned retainage amount held in FEMA Contract 20070579, Hurricane Wilma Storm Drain Cleaning Program STDC7. Under the terms of the settlement agreement, F.A. Johnson will dismiss the lawsuit and grant the County a full release and waiver of all claims. The County believes that this agreement is fair and equitable and in its best interest.

Alina T. Hudak
Deputy Mayor

MEMORANDUM

(Revised)

TO: Honorable Chairwoman Rebeca Sosa
and Members, Board of County Commissioners

DATE: April 16, 2013

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

SUBJECT: Agenda Item No. 8(L)(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 Mayor'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. 8(L)(1)
4-16-13

RESOLUTION NO. R-296-13

RESOLUTION APPROVING A SETTLEMENT AGREEMENT BETWEEN MIAMI-DADE COUNTY AND F.A. JOHNSON, INC., A FLORIDA CORPORATION, IN THE MAXIMUM AMOUNT OF $83,000 AND THE RETAINAGE HELD IN FEMA CONTRACT 20070579, HURRICANE WILMA STORM DRAIN CLEANING PROGRAM STDC7

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 County Mayor or County Mayor's designee to execute the attached mediation settlement agreement between Miami-Dade County and F.A. Johnson, Inc. in the maximum amount of $83,000 and the retainage held in FEMA Contract 20070579, Hurricane Wilma Storm Drain Cleaning Program STDC7, in substantially the form attached hereto and incorporated herein.

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

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

The Chairperson thereupon declared the resolution duly passed and adopted this 16th day of April, 2013. 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.

Eric A. Rodriguez

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

CASE NO: 09-62171 CA 24

F.A. JOHNSON, INC., a Florida corporation,

Plaintiff,

vs.

MIAMI-DADE COUNTY, a political
subdivision of the State of Florida,

Defendant.
_____/

MEDIATION SETTLEMENT AGREEMENT

1. Mediation in this matter was held on Monday October 29, 2012 before Mediator Joel Levine, Esq. in the above-referenced case in which Plaintiff sued Miami-Dade County arising out of a contract attached to the Complaint for storm water drainage (STDC7).

2. Settlement was reached between:

A: Miami-Dade County

and

B: F.A. Johnson, Inc.

3. The Parties to this settlement agree as follows:

The County will pay F.A. Johnson, Inc. the amount of $83,000 plus the amount of retainage in contract STDC7, provided that this agreement is duly approved by the Board of County Commissioners ("BCC"). The County agrees to present this agreement for approval to the BCC expeditiously. Prior to presenting this agreement for BCC approval, F.A Johnson, Inc . shall promptly execute the necessary documents for release of the retainage amount and provide to the County an executed stipulation of dismissal with prejudice of this case. This settlement agreement, the retainage release documents and the stipulation of dismissal with prejudice shall be of no force and effect if this agreement is not duly approved by the BCC.

If this agreement is finally and duly approved by the BCC in accordance with the County Charter and BCC procedures, the County shall pay the amounts set forth above within 30 days of final approval at which point the County shall file the stipulation of dismissal with prejudice of this case.

4. Save and except for the obligations of this Settlement Agreement, this Settlement Agreement shall constitute a mutual general release of all matters, matured or not matured, known or unknown, foreseeable or unforeseeable, related to or arising out of this dispute/lawsuit or that could have been raised or asserted in this dispute/lawsuit or otherwise between or among, by or against, the parties or any of them, save and except for the obligations of this Settlement Agreement. The parties do hereby settle, remise, release, acquit, satisfy and forgive each other, and each others' representatives, predecessors, heirs, successors, subsidiaries, affiliates, insurers, assigns, employees, officers, directors, attorneys, agents, and all other entities and persons acting by, through, under, or in concert with any of them or any of the parties, of and from any and all, actions, causes of action, suits, debts, sums of money, accounts, bills, covenants, controversies, agreements, contracts, promises, damages (including, but not limited to, consequential, incidental, punitive, special or other damages), judgments, executions, claims, liabilities and demands, whatsoever, at law and in equity (including, but not limited to, claims founded in tort, contract, specific performance or any other legal theory whatsoever), and, including without limitation, any and all claims, counterclaims, and causes of action, matured or not matured, known or unknown, foreseeable or unforeseeable, which have been brought or could have been brought, asserted or maintained in this litigation or otherwise and which any party ever had or now has against any other party for, upon, arising from, related or connected to, or by reason of, any matter, cause or thing, whatsoever, from the beginning of the world to the date of this Settlement Agreement, whether known or unknown, and whether matured or not matured, foreseeable or unforeseeable.

5. Upon receipt of the settlement amount in clear U.S. funds, the parties shall jointly file with the Court a Stipulation of Dismissal With Prejudice of all claims, counterclaims and third party claims, with each party to bear its own attorneys' fees and costs.

6. Unless finally approved by the BCC, or as required by court order, by law or as necessary to prepare required documents such as tax returns, financial statements or other legally mandated reports or to enforce the terms of this Settlement Agreement, F.A. Johnson, shall not disclose any of its terms to any person or entity.

7. In the event of a breach of this Settlement Agreement or the failure of any party to perform hereunder or any action or proceeding to enforce the terms hereof, the parties agree to bear their own attorneys fees and costs.

8. Any failure by any party to exercise any right hereunder shall not be construed as a waiver of its right to exercise the same, or any other right, at any time, or from any time to time hereafter.

9. The parties agree to execute any additional documents reasonably necessary or desirable to effectuate and implement the provisions of this Settlement Agreement. All documents shall be reviewed and agreed to by all parties, approval thereof not to be unreasonably withheld.

10. In the event that any part, term or provision of this Settlement Agreement is declared or determined by any court or arbitrator to be invalid or unenforceable, the validity of the remaining portions of this Settlement Agreement shall not be affected and the term or provision declared or determined to be invalid shall be severed and shall no longer be a part of this Settlement Agreement.

R.Y.P.
JML

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11. The parties acknowledge that in entering into this Settlement Agreement, they have not relied upon any representations, warranties, promises, or conditions made by the parties or the parties' agents that are not specifically set forth in this Settlement Agreement. The parties acknowledge that the mediator has advised each participant in this mediation that any settlement agreement, including this Settlement Agreement, should be independently reviewed by their own counsel before executing the Settlement Agreement. The parties acknowledge that each of them has freely executed this Settlement Agreement after independent investigation, with the advice of independent counsel and without fraud, duress, or undue influence, and that each understands the content of this Settlement Agreement. The parties agree that this Settlement Agreement is the product of joint authorship, and in the event of any ambiguity, the Settlement Agreement shall not be construed against any party.

12. Any notice required in this Settlement Agreement shall be to counsel of record.

13. This Settlement Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective officers, employees, directors, agents, personal representatives, administrators, successors and assigns, whether or not the parties execute a more detailed agreement at a later date.

14. No alterations, modifications, supplements, changes, amendments, waivers, or termination of this Settlement Agreement shall be valid unless in writing and executed by all of the Parties. No waiver of any provision of this Settlement Agreement shall constitute waiver of any other provision of this Settlement Agreement.

15. This Settlement Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute but one instrument.

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AGREED TO ON OCTOBER 29, 2012 BY:

F.A. JOHNSON

by: _____

JEFFREY CAMERON
Print Name

Position: CFO, VP

R. T. Fitch
Counsel FBN 567248

MIAMI-DADE COUNTY

by: _____

ANTONIO J. COTARELO
Print Name

Position: ASSISTANT DIRECTOR PWWM

_____
Counsel
Eric Rodriguez, ACA