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

MEMORANDUM

Agenda Item No. 8(F)(2)

TO: Honorable Chairman Jean Monestime
and Members, Board of County Commissioners

DATE: October 20, 2015

FROM: Abigail Price-Williams
County Attorney

SUBJECT: Resolution approving a final settlement and close-out agreement with Western Surety Company in the amount of $184,910.71 for completion of work resulting from a Takeover Agreement executed under ISD Contract No. Z00044 GOB ESP

Resolution No. R-941-15

The accompanying resolution was prepared by the Internal Services Department and placed on the agenda at the request of Prime Sponsor Chairman Jean Monestime.

Abigail Price-Williams
County Attorney

APW/smm

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Memorandum

MIAMI-DADE COUNTY

Date: October 20, 2015

To: Honorable Chairman Jean Monestime
and Members, Board of County Commissioners

From: Carlos A. Gimenez
Mayor

Subject: Resolution Approving a Final Settlement and Close-Out Agreement with Western Surety Company for Completion of Work Resulting from a Takeover Agreement Executed Under ISD Contract No. Z00044 GOB ESP, Northside Police Station at Arcola Lakes

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Recommendation
It is recommended that the Board of County Commissioners (Board) authorize the County Mayor or County Mayor's designee to execute the attached Final Settlement and Close-Out Agreement between Miami-Dade County and Western Surety Company.

Scope
The project is located within the boundaries of District 2, which is represented by Chairman Jean Monestime.

Fiscal Impact/Funding Source
The total fiscal impact from this Final Settlement and Close-Out Agreement is a payment of $184,910.71 by the County to Western Surety Company. This settlement will be paid from the project budget, through retainage held from the defaulted contractor. This project was funded with Building Better Communities-General Obligation Bond (BCC-GOB) Program proceeds and Police Impact Fees.

Track Record/Monitor
This Final Settlement and Close-Out Agreement will be monitored by Humberto J. Contreras, Project Manager, Internal Services Department.

Background
On March 10, 2010, the County entered into a contract with Miami Skyline Construction Corp. (Contractor) in the amount of $6,322,012.00 for the construction of the Northside Police Station at Arcola Lakes. As a condition of award, the Contractor obtained a Performance and Payment Bond with Western Surety Company. The Performance and Payment Bond protects the County for 100 percent of the contract amount, securing job completion in accordance with the contract and assuring payment for third party claims by subcontractors and suppliers in the event of the Contractor's failure to pay.

On January 28, 2013, the County defaulted the Contractor for failure to perform and terminated the contract, which was approximately 75 percent complete. Subsequently, the County and Western Surety Company entered into a Takeover Agreement for completion of the unfinished work. The facility was awarded a Temporary Certificate of Occupancy on April 11, 2014. The Miami-Dade Police Department has been operating from the Northside Police Station at Arcola Lakes since May 2014.

During the process of closing out this project, certain controversies and disputes arose between Western Surety Company and the County relating to responsibilities of the involved parties. These disputes were negotiated at length to include completion of punch list work required to obtain a Certificate of Occupancy, additional monies Western Surety Company claimed it was owed due to work allegedly performed outside the scope of the contract, and project credits and liquidated damages assessed by the County. At the time of issuance of the Temporary Certificate of Occupancy, Western Surety Company claimed to be owed an unpaid balance of $533,080.00, which the County disputed. The County and

Western Surety Company, through negotiations, determined that Western Surety Company should be paid $184,910.71 and that Western Surety Company would transfer to the County all warranties for major equipment at the facility. The County will utilize the remaining balance in the project budget to self-perform remaining punch list items.

The execution of this Final Settlement and Close-Out Agreement resolves and releases all contested and disputed claims, allegations, and assertions between the parties involved that may result in prolonged and costly litigation. The County is waiving and releasing a potential claim for liquidated damages in the amount of $329,000.00. The recommendation to waive the County's potential claim for liquidated damages arises from the allegation that Western Surety performed work outside the scope of the original contract documents.

The County expressly reserves all rights relating to latent defects in the work performed by Western Surety Company and enforcement of the payment terms of the Performance and Payment Bond in the event that timely claims are made by any covered third parties.

Attachment

Edward Marquez
Deputy Mayor

MEMORANDUM

(Revised)

TO: Honorable Chairman Jean Monestime
and Members, Board of County Commissioners

DATE: October 20, 2015

FROM: Abigail Price-Williams
County Attorney

SUBJECT: Agenda Item No. 8(F)(2)

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(F)(2)
10-20-15

RESOLUTION NO. R-941-15

RESOLUTION APPROVING A FINAL SETTLEMENT AND CLOSE-OUT AGREEMENT WITH WESTERN SURETY COMPANY IN THE AMOUNT OF $184,910.71 FOR COMPLETION OF WORK RESULTING FROM A TAKEOVER AGREEMENT EXECUTED UNDER ISD CONTRACT NO. Z00044 GOB ESP; AND AUTHORIZING THE COUNTY MAYOR OR COUNTY MAYOR'S DESIGNEE TO EXECUTE SAME AND TO EXERCISE THE PROVISIONS CONTAINED THEREIN

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 Final Settlement and Close-Out Agreement by and between Miami-Dade County and Western Surety Company in the amount of $184,910.71 for completion of work resulting from a Takeover Agreement executed under ISD Contract No. Z00044 GOB ESP, substantially in the form attached hereto and made a part hereof, and authorizes the County Mayor or the County Mayor's designee to execute same and to exercise the provisions contained therein.

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

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

The Chairperson thereupon declared the resolution duly passed and adopted this 20th day of October, 2015. This resolution shall become effective upon the earlier of (1) 10 days after the date of its adoption unless vetoed by the County Mayor, and if vetoed, shall become effective only upon an override by this Board, or (2) approval by the County Mayor of this Resolution and the filing of this approval with the Clerk of the 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.

Eduardo W. Gonzalez

SETTLEMENT & CLOSE-OUT AGREEMENT

THIS AGREEMENT is made and entered into by and between Western Surety Company ("Western Surety" or "Surety") and Miami-Dade County, a political subdivision of the State of Florida (the "County").

RECITALS:

WHEREAS, Miami Skyline Construction Corp. ("Miami Skyline" or "Original Contractor") entered into a contract with the County, dated March 10, 2010 for $6,322,012.00 (the "Contract") for the construction of the Northside Police Station at Arcola Lakes, GSA Contract No. Z00044 (the "Project"); and

WHEREAS, as a condition precedent to commencing work under the Contract, Miami Skyline was required to obtain a Performance and Payment Bond; and

WHEREAS, Miami Skyline, as principal, and Western Surety, as surety, provided Performance and Payment Bond No. 929489658 (the "Bond") to the County in the penal sum of $6,322,012.00; and

WHEREAS, on or about January 28, 2013, the County defaulted Miami Skyline and terminated the Contract; and

WHEREAS, Miami Skyline contends that it was wrongfully terminated and has incurred significant damages as a result of the County's actions; and

WHEREAS, upon the termination of the Original Contractor, the County demanded that Western Surety perform pursuant to the Performance Bond including, but not limited to, completing the unfinished work under the Contract in accordance with its terms and conditions; and

WHEREAS, on or about May 28, 2013, Western Surety and the County entered into a Takeover Agreement where Western Surety agreed to arrange for completion of the work required under the Contract including the correction and repair of any defective work through a duly licensed contractor or by other appropriate means (the "Takeover Agreement"); and

WHEREAS, the Project was provided a Temporary Certificate of Occupancy ("TCO") on April 11, 2014, allowing the Miami-Dade Police Department to use and operate out of the Northside Police Station at Arcola Lakes; and

WHEREAS, certain controversies and potential disputes have arisen between Western Surety and the County relating to the Project including the parties' respective responsibilities for Project delays, completion of punch list work to obtain a Certificate of Occupancy ("CO"), additional monies Western Surety alleges it is due for work allegedly performed outside the

scope of the Contract, the allocations of Project credits and the assessment of liquidated damages; and

WHEREAS, the County and Western Surety desire to amicably close out and settle all potential controversies, claims and disputes between them relating to the Project, the Contract, the Bond and the Takeover Agreement and to release each other from any and all liability with respect to same, and to set forth their mutual understanding and agreements with respect thereto

NOW, THEREFORE, in consideration of the premises, and based on the recitals set forth above which form a part of this Agreement, the parties agree as follows:

1. Payment. Within ten (10) days from the date that this Agreement becomes effective, the County shall pay Western Surety $184,910.71. Such payment shall be mailed to:

McRae & Metcalf, P.A.
2612 Centennial Place
Tallahassee, Florida 32308

This Agreement shall become effective ("Effective Date") upon approval of this Agreement by the Board of County Commissioners of Miami-Dade County, Florida (the "BCC") and (1) the expiration of the requisite veto period, or (2) the BCC's override of any veto, whichever occurs first.

2. Acceptance of Payment as Full Accord and Satisfaction. Western Surety agrees to accept the payment listed in Paragraph 1 above as full accord and satisfaction of all monies currently due it under or relating to the Project, the Contract, the Bond or the Takeover Agreement and the work performed on the Project by Western Surety and by any subcontractors, materialmen or suppliers, and as full accord and satisfaction of any and all payment claims by any subcontractors, materialmen or suppliers that have been or could have been asserted relating to the Project, the Contract, the Bond or the Takeover Agreement.

3. Release of the County by Western Surety. In consideration of the Payment listed in Paragraph 1 above, Western Surety releases and waives the County, and its officers, employees and agents, from any and all claims, controversies, damages, disputes or causes of action it has or may have, whether known or unknown, against the County, and its officers, employees and agents arising out of or in connection with the Project, the Contract, the Bond or the Takeover Agreement or the work performed under the Project, the Contract, the Bond or the Takeover Agreement. Western Surety will defend, indemnify and hold the County, its officers, employees, and agents harmless, from any claims from subcontractors, materialmen or suppliers arising out of or in connection with the Project, the Contract, the Bond or the Takeover Agreement.

4. Release of Western Surety by the County. Except as reserved below, the County agrees that as of the TCO, it: (1) the Project is accepted as having been completed

according to the terms and conditions of the Contract and the Takeover Agreement; (2) releases and waives Western Surety and its officers, employees and agents from any further work arising out of or in connection with the Project, the Contract, the Bond or the Takeover Agreement; and (3) releases and waives all claims, controversies, damages, disputes or causes of actions it has or may have, whether known or unknown, against Western Surety arising out of or in connection with the Project, the Contract, the Bond or the Takeover Agreement, including any claims for liquidated damages and for warranty work, which the parties agree expired as of one year from the issuance of the TCO (i.e., April 11, 2015).

Except, the County expressly reserves all rights:

a. relating to latent defects in the work performed by Western Surety; and

b. to enforce the terms of the payment portions of the Bond in the event that timely claims may be made by any covered third parties.

The County represents to Western Surety that as of the Effective Date of this Agreement it is not aware of any latent defects and understands that such representation is a material inducement to Western Surety entering into this Agreement.

5. No Third-Party Rights. Nothing in this Agreement shall be deemed to create any rights in favor of, or to inure to the benefit of, any third party or parties, or to waive or release any defense or limitation against third party claims. Further, nothing in this Agreement shall be deemed to waive or release any claims, causes of actions, rights or defenses the County or Western Surety has or may have against the Original Contractor.

6. Miscellaneous. This Agreement is a contractual settlement, not a mere recital, and is executed for the purpose of compromising disputed claims and avoiding future litigation. Nothing contained in this Agreement shall ever be construed as an admission of liability or responsibility by any Party in connection with any claim, lien, defense, demand, charge, complaint, action, or cause of action asserted against by any party under this Agreement against any other party under this Agreement. This Agreement is binding upon the parties hereto and their successors and assigns, provided, however, that no rights shall accrue hereunder to or for the use or benefit of any person or entity other than the parties hereto, their respective successors or assigns. This Agreement represents the entire integrated agreement between the parties hereto and supersedes all prior negotiations, representations or agreements, and may be amended only by written instrument signed by both the County and Western Surety. The parties hereto have voluntarily executed this Agreement based upon their independent investigation without relying upon any representations of the other party or its agents, attorneys, or representatives. 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, but if for any reason any provision is unenforceable or invalid, such provision shall be deemed severed from this Agreement and the remaining provisions shall be carried out with the same force and effect as if the severed provision had not been a part of this Agreement. The headings of the Paragraphs are included

solely for convenience of reference, and if there is any conflict between such headings and the text of the Agreement, the Agreement shall control. This Agreement may be executed in any number of separate counterparts, each of which shall together be deemed an original, but the several counterparts shall together constitute but one and the same Agreement. This Agreement shall be governed by, and constructed in accordance with the laws of the State of Florida, without regard to such State's conflict of law decisions and law, and jurisdiction and venue to enforce the same shall exist only in the Circuit of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida.

7. Notwithstanding. Anything herein to the contrary, both parties reserve any and all rights necessary to enforce the provisions of this Agreement.

IN WITNESS WHEREOF, this Agreement has been executed on the day and year first above written.

Western Surety Company

By: Theodore J. Grzybowski

Its: Authorized Representative

The foregoing instrument was sworn to and subscribed before me this 20 day of August, 2015, by Theodore Grzybowski who executed the foregoing and produced _____ as identification or as personally known to me.

"OFFICIAL SEAL"
LINDA C. DEMPSEY
Notary Public, State of Illinois
My Commission Expires 10/19/18

Linda C. Dempsey
Signature of Notary Public

(SEAL)

Linda C. Dempsey
Print, Type or Stamp Commissioned Name of Notary Public

Miami-Dade County

By: _____

Its: _____

The foregoing instrument was sworn to and subscribed before me this _____ day of _____, 2015, by _____ who executed the foregoing and produced _____ as identification or is personally known to me.

_____
Signature of Notary Public

(SEAL)

_____
Print, Type or Stamp Commissioned
Name of Notary Public

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