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

Memorandum

MIAMI-DADE COUNTY

Date: June 3, 2010

To: Honorable Chairman Dennis C. Moss
and Members, Board of County Commissioner

Agenda Item No. 12(A)(6)

From:

George M. Burgess
County Manager

Resolution No. R-654-10

R. A. Cuevas, Jr.
County Attorney

Subject: Resolution approving the settlement of the lawsuit: The De Moya Group, Inc. v. Miami-Dade County, Case No. 09-63189 CA 08 ("Lawsuit") in the amount of $296,990.77

Recommendation

It is recommended that the Board (1) approve the attached Settlement Agreement ("Settlement") between The De Moya Group, Inc. and Miami-Dade County, (2) authorize an increase in the contract amount by $296,990.77 to a revised contract amount of $6.5 million, and (3) authorize all unspent contract balances to be paid to The De Moya Group, to resolve all claims that were made or that could have been made by The De Moya Group, Inc. against Miami-Dade County.

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 County will increase the contract amount by $296,990.77 to a new total contract amount of $6.5 million dollars, which is fully funded within the project budget, and pay The De Moya Group, Inc. the unpaid revised contract balance of $2,378,585.72. The funding source is Aviation Revenue Bonds/Construction Funds.

Background

On June 19, 2001, the County entered into a contract with The De Moya Group, Inc. (the Contract) to construct the MIA Perimeter Road Modifications - Canal Relocation & Utility Modifications (the Project) in the amount of $6,203,009.23 for work to be completed in 488 calendar days. The work was substantially complete on September 2, 2004, 580 calendar days after the contract completion date. To date, the County has paid The De Moya Group $4,121,414.28 dollars for its work, $6,052.19 of which was paid directly to employees of a subcontractor to The De Moya Group as a result of wage underpayments determined by the Office of Small Business Development.

The completed work was performed satisfactorily, but there were unresolved disputes about responsibility for the delay, and about the additional scope claimed by The De Moya Group. The Miami-Dade Aviation Department (MDAD) and The De Moya Group were unable to agree on the terms of a final pay application, resulting in The De Moya Group filing a lawsuit against the County and claiming it was owed in excess of $1.9 million for increased scope of work and delay, plus interest, in addition to the contract balance. The County disputed these claims.

In the lawsuit, The De Moya Group contends that the County is responsible for all of the delay in the completion of the project and that it is entitled to 602 days of compensable delay; it requested payment of $1,420,720 in delay damages based on the contract liquidated indirect cost rate of $2,360 per day of delay. It also seeks compensation for additional and new scopes of work it performed. Additionally, it seeks interest on the unpaid balance of its contract amount as well as on the unpaid additional work it claims.

The County contends that the County, The De Moya Group, and a third party (CSX Transportation) all shared the responsibility for the delay in the completion of the project, and that inclement weather that was unusually frequent and unusually severe during the course of the work also contributed to the delay. The County's consultants assessed the project progress and determined that The De Moya Group was due 70 days of excusable compensable delay, for which The De Moya Group would be compensated $165,200 calculated at the contract liquidated indirect cost rate of $2,360.00 per day of delay and 224 days of excusable non-compensable delay. However, the County assessed 286 days of non-excusable non-compensable delay against The De Moya Group; the value of that delay, measured using liquidated damages at the contract liquidated damages rate of $3,130.00 per day of delay, equals $895,180. Off-setting the $895,180 in liquidated damages by the $165,200 due to De Moya for 70 days of compensable delay would leave $729,980 due to the County from The De Moya Group for delay impacts; this conclusion is challenged by The De Moya Group.

The recommended settlement is based on a re-assessment of an event that delayed the project completion, ambiguous project specifications defining the scope of certain pay items, and the treatment of a prior invoice for work performed. The contract sequenced work, so that certain work would be performed by the contractor, then CSX would relocate its tracks, and then the contractor would finish its work. However, CSX took longer than anticipated to relocate its track, delaying the completion of the contractor's work by 149 days; that delay has a value to the contractor of $351,460. An ambiguity between the description of the applicable unit prices and a note on the plans is valued at approximately $340,000 based on the amount of asphalt installed. An ambiguity in the description of the scope of work covered by specific unit prices for curb replacement is valued at approximately $30,000. The method of calculating the final amounts to be paid under the contract for electrical conduit and for excavating and stockpiling suspect soils are also disputed; the disputed value of these two items are approximately $70,000. Further, the contractor submitted a final pay requisition in 2004 after substantial completion for $4.6 million which included claims for delay and other increased costs; that pay application included over $1 million in undisputed earned work. MDAD did not pay the undisputed portion because the accompanying consent of surety was for the full amount of the final pay requisition; the County's potential liability for interest on the undisputed portion of this pay application currently exceeds $450,000 (6 years' interest at the statutory rate for each year equals 45%).

After considerable negotiations among MDAD, the County Attorney's Office, The De Moya Group and its attorney, and attended by HNTB (MDAD's Bond Engineer), the attached settlement was reached. Approval of the proposed settlement is recommended as being in the best interest of the County, because it resolves the disputes for a fair and equitable amount of compensation for work satisfactorily performed.

Assistant County Manager

MEMORANDUM

(Revised)

TO: Honorable Chairman Dennis C. Moss and Members, Board of County Commissioners

DATE: June 3, 2010

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

SUBJECT: Agenda Item No. 12(A)(6)

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)(6)

6-3-10

RESOLUTION NO. **R-654-10**

RESOLUTION APPROVING THE SETTLEMENT AGREEMENT OF THE LAWSUIT STYLED THE DE MOYA GROUP INC. v. MIAMI-DADE COUNTY, CIRCUIT COURT CASE NO. 09-63189 CA 08, RELATING TO MIA PERIMETER ROAD MODIFICATIONS, CANAL RELOCATION & UTILITY MODIFICATIONS AT MIAMI INTERNATIONAL AIRPORT; AUTHORIZING AN INCREASE IN THE CONTRACT AMOUNT BY $296,990.77; AUTHORIZING PAYMENT OF UNSPENT CONTRACT BALANCES TO THE DEMOYA GROUP; AUTHORIZING THE COUNTY MAYOR OR MAYOR'S DESIGNEE TO EXECUTE THE AGREEMENT AND ALL OTHER DOCUMENTS NECESSARY TO IMPLEMENT THE AGREEMENT, SUBJECT TO APPROVAL OF THE COUNTY ATTORNEY AS TO LEGAL SUFFICIENCY

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 (1) approves the attached Settlement Agreement ("the Agreement") between The deMoya Group, Inc. and Miami-Dade County, which resolves the lawsuit styled The deMoya Group v. Miami-Dade County, Circuit Court Case No. 09-63189 CA 08, relating to MIA Perimeter Road Modifications, Canal Relocation & Utility Modifications, in substantially the form attached hereto and incorporated herein; (2) authorizes an increase in the contract amount by $296,990.77 to a revised contract amount of $6.5 million dollars; (3) authorizes all unspent contract balances to be paid to The deMoya Group; and (4) authorizes the County Mayor or Mayor's Designee to execute the Agreement, and to execute all other documents necessary to implement the Agreement, subject to approval of the County Attorney as to legal sufficiency.

The foregoing resolution was offered by Commissioner Jose "Pepe" Diaz, who moved its adoption. The motion was seconded by Commissioner Audrey M. Edmonson and upon being put to a vote, the vote was as follows:

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

The Chairperson thereupon declared the resolution duly passed and adopted this 3rd day of June, 2010. 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: **DIANE COLLINS**
Deputy Clerk

Approved by County Attorney as to form and legal sufficiency. DBM

Deborah Bovarnick Mastin

AGREEMENT for FINAL SETTLEMENT, GENERAL RELEASE, and WAIVER OF CLAIMS BETWEEN MIAMI-DADE COUNTY and THE DE MOYA GROUP, INC. in connection with County Project No. MDAD B382B-1, MIA Perimeter Road Modifications: Canal Relocation & Utility Modifications and *The De Moya Group, Inc. v. Miami-Dade County,* Case No. 09-63189 CA 08, 11th Judicial Circuit in and for Miami-Dade County, Florida

This Agreement is entered into this _____ day of _____, 2010 between Miami-Dade County, a political subdivision of the State of Florida ("County") and The De Moya Group, Inc., ("Contractor") as follows:

Whereas, the County contracted with Contractor for the construction of County Project No. MDAD B382B-1 ("Project") on June 19, 2001, in the amount of $6,203,009.23 for work to be completed in 488 days; and

Whereas, work was substantially completed on the Project on September 9, 2004, 580 days after the contract completion date; and

Whereas, County asserted various claims against Contractor; and

Whereas, Contractor has asserted several claims against the County on this Project in excess of $1.9 million and has filed an action in the Circuit Court in and for Miami-Dade County, Florida, Case No. 09-63189 CA 08 styled *The De Moya Group, Inc. v. Miami-Dade County* (the "Lawsuit"), in order to pursue its claims; and

Whereas, the County and the Contractor have determined to settle all disputes arising out of the Project pursuant to the terms of this Agreement. Accordingly, the parties agree as follows:

The County has previously paid Contractor and its subcontractors $4,121,414.28. County agrees it will pay to Contractor for its work on the Project the additional amount of $2,378,585.72, to a final adjusted contract amount of $6.5 million, and Contractor agrees to accept this adjusted contract amount as full accord and satisfaction of all monies due it under or in connection with the Contract Documents and the work performed on the Project, including but not limited to work performed by Contractor, by its Surety, and by their subcontractors, materialmen and suppliers. Contractor's surety consents to these terms.

County agrees to make payment within 30 days after approval of this Agreement by the Board of County Commissioners and execution by the Mayor;

In consideration of the payment by County to Contractor of the final adjusted contract amount of $6.5 million, Contractor releases County, and its officers, employees and agents, from and waives and relinquishes any and all claims, disputes or causes of action it has or may have, whether known or unknown, against County, and their officers, employees and agents arising out of or in connection with the Project or the work performed or to be performed under the Project, including, but not limited to, those claims previously asserted in connection with this Project, and those claims that could have been asserted in connection with this Project. Contractor will indemnify and hold harmless the County, its officers and employees, from liabilities, damages, losses and costs, to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of the Contractor and persons employed or utilized by the Contractor in the performance of the Contract.

By accepting the work, County waives all claims against Contractor, except that County expressly reserves all rights:

(1) to require the repair or replacement of defective work under the warranty and guaranty provisions of the Contract Documents;

(2) to require the repair or replacement of latent defects in the work to the extent provided by Florida law;

(3) to enforce those provisions of the Contract Documents which specifically provide that they survive the completion of the work; and

(4) to enforce the terms of the Payment Bond against Surety in the event that timely claims may be made by any covered third parties.

Contractor will file a voluntary dismissal of its pending claims against the County in the Lawsuit. Each party will bear its own costs in connection with the Lawsuit.

Contractor acknowledges that it has read this Agreement, understands it, and has consulted with its attorney before executing this document.

The parties accept the terms of this Agreement, and have agreed to its terms solely for their own convenience, without admitting liability.

[[Note: Need consent of surety attached]]

The De Moya Group, Inc.

By _____
President

MIAMI-DADE COUNTY
BOARD OF COUNTY
COMMISSIONERS

BY:_____
Mayor

ATTEST:

_____
Assistant Clerk

METRO-DADE

CONSTRUCTION MANAGEMENT DIVISION

SECTION 00847 - CONSENT OF SURETY COMPANY TO REQUISITION PAYMENT

Project No. B-382B-1

Project Title: MIA Perimeter Road Modifications - Canal Relocation & Utility Modifications

Project Location: MIA Perimeter Road Modifications - Canal Relocation & Utility Modifications

To: Miami-Dade Aviation Department

Re: Project Requisition No.: Final Settlement Dated:

In the amount of $2,378,585.72

Contractor: THE DE MOYA GROUP, INC. 14600 SW 136th St Miami, Fl 33186

Contract No. B-382B-1

The Surety Company: Travelers Casualty and Surety Company of America

Address: 8000 Governors Square Blvd, #101 Miami Lakes, Fl 33016

on bond of the Contractor listed above, hereby approves this payment to the Contractor and agrees that the payment to the Contractor shall not relieve the Surety Company of any of its obligations to Dade County, including the Security from any and all liens, claims, or demands whatsoever that may now exist or be made in the future by any sub-contractor or material suppliers against this project and contract.

This Consent of Surety recognizes that claims have been made by the following subcontractors and material suppliers against the contract in the amounts listed below:

	$ 0.00
	$ 0.00
	$ 0.00

WARNING: THIS POWER OF ATTORNEY IS INVALID WITHOUT THE RED BORDER

TRAVELERS

POWER OF ATTORNEY

Farmington Casualty Company
Fidelity and Guaranty Insurance Company
Fidelity and Guaranty Insurance Underwriters, Inc.
St. Paul Fire and Marine Insurance Company
St. Paul Guardian Insurance Company

St. Paul Mercury Insurance Company
Travelers Casualty and Surety Company
Travelers Casualty and Surety Company of America
United States Fidelity and Guaranty Company

Attorney-In Fact No. 222181 **Certificate No.** 003512798

KNOW ALL MEN BY THESE PRESENTS: That St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company and St. Paul Mercury Insurance Company are corporations duly organized under the laws of the State of Minnesota, that Farmington Casualty Company, Travelers Casualty and Surety Company, and Travelers Casualty and Surety Company of America are corporations duly organized under the laws of the State of Connecticut, that United States Fidelity and Guaranty Company is a corporation duly organized under the laws of the State of Maryland, that Fidelity and Guaranty Insurance Company is a corporation duly organized under the laws of the State of Iowa, and that Fidelity and Guaranty Insurance Underwriters, Inc., is a corporation duly organized under the laws of the State of Wisconsin (herein collectively called the "Companies"), and that the Companies do hereby make, constitute and appoint

Charles D. Nielson, Charles J. Nielson, Mary C. Aceves, David R. Hoover, Gicelle Pajon, Olga Iglesias, Gloria McClure, and Arthur Colley

of the City of Miami Lakes, State of Florida, their true and lawful Attorney(s)-in-Fact, each in their separate capacity if more than one is named above, to sign, execute, seal and acknowledge any and all bonds, recognizances, conditional undertakings and other writings obligatory in the nature thereof on behalf of the Companies in their business of guaranteeing the fidelity of persons, guaranteeing the performance of contracts and executing or guaranteeing bonds and undertakings required or permitted in any actions or proceedings allowed by law.

IN WITNESS WHEREOF, the Companies have caused this instrument to be signed and their corporate seals to be hereto affixed, this 26th day of February, 2010.

Farmington Casualty Company
Fidelity and Guaranty Insurance Company
Fidelity and Guaranty Insurance Underwriters, Inc.
St. Paul Fire and Marine Insurance Company
St. Paul Guardian Insurance Company

St. Paul Mercury Insurance Company
Travelers Casualty and Surety Company
Travelers Casualty and Surety Company of America
United States Fidelity and Guaranty Company

State of Connecticut
City of Hartford ss.

By: George W. Thompson
George W. Thompson, Senior Vice President

On this the 26th day of February, 2010, before me personally appeared George W. Thompson, who acknowledged himself to be the Senior Vice President of Farmington Casualty Company, Fidelity and Guaranty Insurance Company, Fidelity and Guaranty Insurance Underwriters, Inc., St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Mercury Insurance Company, Travelers Casualty and Surety Company, Travelers Casualty and Surety Company of America, and United States Fidelity and Guaranty Company, and that he, as such, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing on behalf of the corporations by himself as a duly authorized officer.

In Witness Whereof, I hereunto set my hand and official seal.
My Commission expires the 30th day of June, 2011.

MARIE C. TETREAULT NOTARY PUBLIC CONNECTICUT

Marie C. Tetreault
Marie C. Tetreault, Notary Public

58440-4-09 Printed in U.S.A.

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WARNING: THIS POWER OF ATTORNEY IS INVALID WITHOUT THE RED BORDER

WARNING: THIS POWER OF ATTORNEY IS INVALID WITHOUT THE RED BORDER

This Power of Attorney is granted under and by the authority of the following resolutions adopted by the Boards of Directors of Farmington Casualty Company, Fidelity and Guaranty Insurance Company, Fidelity and Guaranty Insurance Underwriters, Inc., St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Mercury Insurance Company, Travelers Casualty and Surety Company, Travelers Casualty and Surety Company of America, and United States Fidelity and Guaranty Company, which resolutions are now in full force and effect, reading as follows:

RESOLVED, that the Chairman, the President, any Vice Chairman, any Executive Vice President, any Senior Vice President, any Vice President, any Second Vice President, the Treasurer, any Assistant Treasurer, the Corporate Secretary or any Assistant Secretary may appoint Attorneys-in-Fact and Agents to act for and on behalf of the Company and may give such appointee such authority as his or her certificate of authority may prescribe to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any of said officers or the Board of Directors at any time may remove any such appointee and revoke the power given him or her; and it is

FURTHER RESOLVED, that the Chairman, the President, any Vice Chairman, any Executive Vice President, any Senior Vice President or any Vice President may delegate all or any part of the foregoing authority to one or more officers or employees of this Company, provided that each such delegation is in writing and a copy thereof is filed in the office of the Secretary; and it is

FURTHER RESOLVED, that any bond, recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking shall be valid and binding upon the Company when (a) signed by the President, any Vice Chairman, any Executive Vice President, any Senior Vice President or any Vice President, any Second Vice President, the Treasurer, any Assistant Treasurer, the Corporate Secretary or any Assistant Secretary and duly attested and sealed with the Company's seal by a Secretary or Assistant Secretary; or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact and Agents pursuant to the power prescribed in his or her certificate or their certificates of authority or by one or more Company officers pursuant to a written delegation of authority; and it is

FURTHER RESOLVED, that the signature of each of the following officers: President, any Executive Vice President, any Senior Vice President, any Vice President, any Assistant Vice President, any Secretary, any Assistant Secretary, and the seal of the Company may be affixed by facsimile to any Power of Attorney or to any certificate relating thereto appointing Resident Vice Presidents, Resident Assistant Secretaries or Attorneys-in-Fact for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, and any such Power of Attorney or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by such facsimile signature and facsimile seal shall be valid and binding on the Company in the future with respect to any bond or understanding to which it is attached.

I, Kori M. Johanson, the undersigned, Assistant Secretary, of Farmington Casualty Company, Fidelity and Guaranty Insurance Company, Fidelity and Guaranty Insurance Underwriters, Inc., St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Mercury Insurance Company, Travelers Casualty and Surety Company, Travelers Casualty and Surety Company of America, and United States Fidelity and Guaranty Company do hereby certify that the above and foregoing is a true and correct copy of the Power of Attorney executed by said Companies, which is in full force and effect and has not been revoked.

WARNING: THIS POWER OF ATTORNEY IS INVALID WITHOUT THE RED BORDER

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seals of said Companies this 12th day of March, 20 10.

Kori M. Johanson, Assistant Secretary

To verify the authenticity of this Power of Attorney, call 1-800-421-3880 or contact us at www.travelersbond.com. Please refer to the Attorney-In-Fact number, the above-named individuals and the details of the bond to which the power is attached.

WARNING: THIS POWER OF ATTORNEY IS INVALID WITHOUT THE RED BORDER