

COMMISSION MEMORANDUM

TO: Honorable Mayor Dan Gelber and Members of the City Commission

FROM: Alina T. Hudak, City Manager
Rafael Paz, Acting City Attorney

DATE: September 30, 2021

SUBJECT: **A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING THE SETTLEMENT AGREEMENT BETWEEN CLARK CONSTRUCTION GROUP, LLC ("CLARK"), HILL INTERNATIONAL INC. ("HILL"), AND THE CITY OF MIAMI BEACH, FLORIDA ("SETTLEMENT AGREEMENT"), AS ATTACHED TO THE COMMISSION MEMORANDUM ACCOMPANYING THIS RESOLUTION, TO SETTLE THE LITIGATION STYLED AS CLARK CONSTRUCTION GROUP, LLC, VS. THE CITY OF MIAMI BEACH AND HILL INTERNATIONAL INC., ELEVENTH JUDICIAL CIRCUIT, CASE NO. 2020-002129 CA 01, IN CONNECTION WITH THE MIAMI BEACH CONVENTION CENTER RENOVATION AND EXPANSION PROJECT ("PROJECT"), AND AUTHORIZING THE CITY TO (1) RELEASE \$6,400,000 IN RETAINAGE WITHHELD, IN PAYMENT FOR WORK PERFORMED ON THE PROJECT; (2) APPROVE PAYMENT OF \$9,090,000 WITHHELD AS LIQUIDATED DAMAGES FROM CLARK ON THE PROJECT PAY APPLICATIONS TO ACCOUNT FOR PROJECT-RELATED SCHEDULE DELAYS, IN PAYMENT FOR WORK PERFORMED ON THE PROJECT; AND (3) APPROVE PAYMENT OF AN ADDITIONAL TOTAL AMOUNT OF \$18,010,000, IN FULL SATISFACTION OF ALL PROJECT-RELATED CLAIMS ASSERTED BY CLARK AGAINST THE CITY, INCLUDING, WITHOUT LIMITATION, EXTRA WORK AND CHANGE ORDERS, CLARK'S CLAIM FOR GENERAL CONDITIONS, AND SUBCONTRACTOR IMPACT CLAIMS; WITH THE TOTAL SETTLEMENT AMOUNTS TO BE PAID BY THE CITY IN THE FOLLOWING INSTALLMENT PAYMENTS TO CLARK: \$9,000,000 ON OR BEFORE OCTOBER 15, 2021; \$9,900,000 ON OR BEFORE DECEMBER 31, 2021; \$6,500,000 ON OR BEFORE THE OUTSIDE DATE OF MAY 15, 2022; \$6,500,000 ON OR BEFORE DECEMBER 31, 2022; AND \$1,600,000 IN PERFORMANCE BASED PAYMENTS TIED TO THE COMPLETION OF THE REMAINING WORK MILESTONES AS SET FORTH IN THE SETTLEMENT AGREEMENT; AND FURTHER, AUTHORIZING THE CITY MANAGER AND ACTING CITY ATTORNEY TO TAKE THE NECESSARY AND APPROPRIATE STEPS FOR THE IMPLEMENTATION OF THE SETTLEMENT AGREEMENT, AND AUTHORIZING THE CITY MANAGER AND CITY CLERK TO EXECUTE THOSE DOCUMENTS AND/OR AGREEMENTS NECESSARY TO EFFECTUATE THE SETTLEMENT AGREEMENT CONSISTENT WITH THIS RESOLUTION.**

PROJECT BACKGROUND

On April 19, 2014, the Mayor and City Commission adopted Resolution No. 2014-28538, approving the execution of an Agreement with Fentress Architects in connection with the development of the Miami Beach Convention Center Renovation Project ("Project"). The scope for the 1,435,000-square-foot convention center Project included the expansion and renovation of the convention center to provide upgraded show needs and enable the center to keep up with the demands of the competitive national and international convention community. The Project includes a new 60,000 square-foot ballroom, new 10,000 square foot kitchen, 127,000 square feet of new meeting spaces, 500,000 square feet of renovated exhibit space, and a 796 space rooftop parking deck.

On November 19, 2014, the Mayor and City Commission adopted Resolution No. 2014-28849, approving the execution of an Agreement with Hill International ("Hill") for Owners Representative Services.

On May 20, 2015, the Mayor and City Commission adopted Resolution No. 2015-29028, approving the Construction Manager at Risk Agreement ("CMaR Agreement") between the City and Clark Construction Group, LLC ("Clark"), authorizing pre-construction services Project and specifying the terms and conditions for the development and negotiation of a Guaranteed Maximum Price ("GMP") for the construction phase services for the Project.

On October 21, 2015, the Mayor and City Commission adopted Resolution No. 2015-29188 authorizing the City to enter into a Construction Manager at Risk Agreement with Clark for the renovation and expansion of the Miami Beach Convention Center Project, with a Guaranteed Maximum Price ("GMP") in the amount of \$515,458,058. The Resolution also established a Project owner's contingency in the amount of Thirty Five Million Dollars (\$35,000,000), to pay for unforeseen conditions and other work for which the City would be responsible, including for additional architectural / engineering work, permitting and other matters. **The Project Contingency, while significant in dollar amount, represented a contingency of only six percent (6%) over the overall Project budget, significantly less than the standard ten percent (10%) contingency applicable to nearly all other City capital projects.** The Resolution further delegated to the City Manager, the authority to use the contingency to execute any project-related agreements or contract amendments as may be necessary for the successful delivery of the Project.

Pursuant to the CMaR Agreement, Clark was to build the Project for the GMP amount based on 65% construction documents prepared by Fentress, including scopes of work that are "reasonably inferable" from the construction documents. Under those terms, the City assumed certain risks, such as those relating to concealed conditions on the site, as well as changes driven by the Authorities having Jurisdiction (AHJ) (i.e., Building and Fire Departments, franchise utilities such as FP&L and AT&T, and Miami-Dade County Departments such as DERM, DEP, and Miami-Dade-County Traffic, among others).

In December 2015, construction began under a phased permit concurrently with permit reviews and processing of final plans to expedite the permitting process. This was necessary in order to allow Art Basel to have a 4-hall event in December of 2016 and December of 2017 while construction of the project was on-going. In addition to making the building available for Art Basel each year, the CMaR Agreement also required Clark to maintain one half of the building available for events at all times, as directed by the City Commission via Resolution No.2015-28995. The phasing and scheduling of the work was among the most complex in the construction industry, as it required continued operations in and around an active construction site, similar to the complex construction undertaken with large airport projects.

The contractual Substantial Completion date (including approved time extensions) was August 23, 2018.

As of August 24, 2018, the City began assessing Liquidated Damages from payments due to Clark at a rate of \$15,000 per day as stipulated in the Agreement.

On February 26, 2019, the City and Clark convened a two-day mediation to discuss outstanding claims. The mediation resulted in a mutual impasse with the parties agreeing to continue to progress with the work on the Project and keep the lines of communication open in order to achieve the common goal of finishing the work as soon as possible.

On July 9, 2019, the City issued a Notice of Default and Opportunity to Cure to Clark. On July 12, 2019 Clark and the City met to discuss possible cure paths, the Project schedule, and outstanding work remaining at the Project. On July 19th, the City proposed a cure plan that itemized the scope of work required to cure and outlined a completion schedule for the Project to achieve a temporary certificate of occupancy (TCO) by September 15th, substantial completion by November 15th, and final completion by January 17, 2020. These milestones were not achieved and the City and Clark continued to disagree on the responsibility of unanticipated costs, i.e what was to be covered by the GMP versus what was beyond the GMP as defined in the contract.

A TCO was issued on April 13, 2020. By this time the City and Clark were in litigation as described and detailed in the following section. **Importantly, the final Certificate of Occupancy for the Project has, to date, not been achieved.**

LITIGATION HISTORY

On January 31, 2020, Clark filed a \$100 million+ lawsuit against the City and Hill International Inc. ("Hill"), the City's owner's representative for the Project. Clark's complaint against the City seeks (i) a declaration by the Court that it is entitled to significant time extensions, release of retainage and payment for work allegedly completed and within the scope of the contract; (ii) damages for breach of contract; and (iii) damages for Breach of Covenant of Good faith and Fair Dealing.

On February 20, 2020, the City filed its Answer, Counterclaim and Third Party Complaint. The City's Counterclaim against Clark alleges: (1) Breach of Contract due to, among other things, Clark's failure to timely complete the work and (2) Breach of the Covenant of Good Faith and Fair dealing. Additionally, the City filed a Third Party Complaint against the Clark's sureties for Breach of Performance Bond. The performance bond guarantees Clark's performance of its contractual obligations to the City under the construction contract, and secures the City by causing the sureties to assume liability for any and all damages, including, but not limited to, liquidated damages arising from Clark's default of its contractual obligations under the agreement.

The scope of this litigation has been extensive. Given the magnitude of the Project and the enormous amount of Clark's initial claim (\$100 million), the litigation has been hard fought and required exhaustive discovery on an expedited timeframe. There were over six million pages of documents produced during the litigation. The parties conducted in excess of sixty depositions, and collectively engaged in excess of twenty experts in multiple fields of expertise, including construction scheduling, delays, design, and construction management standard of care. The parties collectively filed over forty substantive motions in advance of trial, and countless other motions directed to procedural matters.

Despite the protracted litigation, the parties made repeated efforts to resolve the dispute, including two pretrial mediations and, as will be discussed below, a third mediation conducted during the trial.

On August 27, 2021, the City conducted a private closed Attorney-Client Session, pursuant to §286.011 of the Florida Statutes, during the City Commission meeting to discuss settlement negotiations and strategy related to litigation expenditures prior to the scheduled trial date of August 30, 2021. Following the private closed session, the City again pursued settlement discussions with Clark. The parties were unable to reach an amicable resolution at that time, and trial of the case commenced on August 30, 2021.

Following opening statements and several days of testimony by fact witnesses, the Court ordered the parties back to mediation with a stern direction that they should make a concerted effort to resolve the dispute. Despite some meaningful progress, the parties were not able to agree on a final settlement during the mediation session, but the Court agreed to a brief recess of the trial so that the parties could resume negotiations. On September 13, 2021, the parties announced to the Court that a tentative agreement had been reached, pending drafting of the settlement documents and approval by the Mayor and City Commission. Based on that announcement, the Court extended the recess until September 30, 2021.

On September 17, 2021, the City reconvened a private Attorney-Client Session, pursuant to §286.011 of the Florida Statutes, during the City Commission meeting, to discuss the progress of the settlement negotiations including a discussion regarding the settlement sum and including settlement terms that would provide for the completion of the Project.

SETTLEMENT

The proposed Settlement Agreement is attached to this Memorandum as Exhibit "A". The proposed Settlement Agreement includes provisions to provide for the completion of the Project and authorizes the City to (1) release the retainage the City has held from Clark for work previously performed in the amount of \$6,400,000; (2) approve payment to Clark in the amount of \$9,090,000 that the City withheld from Clark as Liquidated Damages to account for project related scheduling delays, in payment for work performed on the Project; and (3) approve an additional total amount of \$18,010,000 in full satisfaction of all Project related claims asserted by Clark in the litigation, including, without limitation, extra work and change orders, Clark's claims for additional general conditions, and subcontractor impact claims.

Settlement Summary:	
Total Settlement	\$35,000,000
Less Amount Paid by Hill Directly to Clark	-\$1,500,000
Less Amount Paid by Retainage Held by the City	-\$6,400,000
Total Amount Paid by Other City Funding Sources	\$27,100,000**

****Equates to 4% of the original project budget, which, along with the six percent (6%) contingency originally established for the Project via Resolution 2015-29188, would bring all Project-related contingencies to ten percent (10%), the industry standard for construction-related contingencies and the City's long-established budgeting standard for contingencies on capital projects.**

The payment of the settlement sums are separated into Guaranteed Payments and Performance Based Payments, as set forth below:

Guaranteed Payments:

Payment No.	Amount	Payment Deadline
Payment 1	Ten Million Five Hundred Thousand Dollars (\$10,500,000), comprised as follows: (a) One Million Five Hundred Thousand Dollars (\$1,500,000) from Hill International; (b) Three Million Dollars (\$3,000,000) from the City; and (c) Six Million Dollars (\$6,000,000) from Clark's Retainage	No later than October 15, 2021
Payment 2	Nine Million Nine Hundred Thousand Dollars (\$9,900,000) from the City	No later than December 31, 2021
Payment 3	Six Million Five Hundred Thousand Dollars (\$6,500,000) from the City	No later than April 15, 2022, subject to 30 day extension.
Payment 4	Six Million Five Hundred Thousand Dollars (\$6,500,000) from the City	No later than December 31, 2022

Performance-Based Payments:

Performance Obligation	Amount
Cooling Tower Completion	One Million Two Hundred Thousand Dollars (\$1,200,000) from the City
Stormwater Skimmers/Baffles	One Hundred Thousand Dollars (\$100,000) from Clark's Retainage
Grand Ballroom Flex Ducts	One Hundred Thousand Dollars (\$100,000) from Clark's Retainage
Lighting Completion	One Hundred Thousand Dollars (\$100,000) from Clark's Retainage
Identified Building Leaks	One Hundred Thousand Dollars (\$100,000) from Clark's Retainage

Pursuant to the Settlement Agreement, in order to receive the Performance Based Payments, Clark is required to complete the work identified above, which scopes of work the City anticipates will allow the Project to achieve a Certification of Occupancy. Additionally, Clark has agreed to use its best efforts to complete the Cooling Tower scope on or before January 31, 2022. To this end, the parties have agreed that a neutral third party will make the final determination for completeness and correctness with respect to the remaining scopes of work to be performed. Importantly, Clark has consented to the City's entitlement to seek a judgment for specific performance if Clark fails to complete the work based on the neutral's ultimate determinations. Traditionally, only money damages are an available remedy in these cases. The remedy of specific performance is critical for the City, considering the importance to the City of completing the Project.

In addition to the performance and payment obligations as set forth above, the Settlement Agreement incorporates the following non-monetary considerations: (1) dismissal of the litigation, with prejudice; (2) appointment of a neutral to oversee and approve remaining work; (3) consent to obtain specific performance judgment for Clark to finish work; (4) a retraction of the City's Notice of Default to Clark; (5) joint letter regarding the Project; (6) Clark and the City agreeing to a substantial completion date of April 13, 2020, Clark agreeing to vacate an adverse Order entered against the City regarding the Propt Payment Act; (7) mutual releases; and (8) mutual non-disparagement.

ANALYSIS

If this settlement is not approved, trial will resume on October 1, 2021. It is anticipated that the trial will last at least ten weeks. Further, and irrespective of the outcome, it is anticipated that an appeal will follow the conclusion of the trial. The appellate process can be expected to last 12 to 18 months. In short, if this litigation continues, it will not be concluded until 2023, at substantial additional costs, and without achieving the City's desired goal of the final completion of the Project.

The monetary terms of this settlement are fair and reasonable, and consistent with the reasonable range of possible outcomes at trial should the litigation proceed. In addition to resolving the dispute over the amounts to be paid, the Settlement Agreement also requires Clark to complete certain work necessary to obtain the final certificate of occupancy, and affords the City the remedy of specific performance. This is an important provision because, without it, the Court would not have the power to force Clark to complete the work (the Court would only have the power to award a money judgment).

Project Challenges

From inception the project was met with a unique set of challenges which increased both the owner's and the construction manager's risk. The catalyst of that risk was the decision by the City Commission in 2014 to keep the building operational by hosting events during the entire construction period. This included hosting half-hall events at all times, and full-hall Art Basel events every year, regardless of the condition of the building. To accomplish that goal, the public had to be protected by the construction of two-hour separation walls that had to be installed and demolished twice during the construction period. Over ninety events took place during construction including the NFL experience (LIV) and the "Fanfest" for major league baseball. These events brought tens of thousands of visitors to the facility and required a substantial and unforeseen amount of life-safety requirements, including fire watch and additional show support, which were grossly underestimated.

In addition, two hurricanes occurred during construction; Hurricane Matthew in 2016 and Hurricane Irma in 2017. Both hurricanes were declared states of emergency which required the entire site and labor force to demobilize. Also, a "rain bomb" event in 2017 caused damaged to the east side pre-function space which was partially completed and needed to be repaired before re-opening. Ten separate Builder's Risk Insurance claims had to be filed during construction due to damages caused, not only by these storms, but also accidental fires and other issues.

Other unknown challenges involved the existing facility itself. Sixty nine percent (69%) of the facility was re-used and those remaining portions were built between 1959 and 1986. Lead-based paint was discovered in a portion of that area which had to be properly removed. City record drawings also showed one-hour rated walls to remain, which did not exist. The walls had to be completely reconstructed to meet current code.

Another unforeseen encounter involved the existing kitchen facility on the east side of the building. It was originally anticipated that this kitchen would remain operational until the new 10,000 square foot kitchen was completed, however life safety concerns required that the east kitchen be closed, and a temporary kitchen be set up within the south loading dock to continue to provide food service to scheduled events.

Other challenges, although known at the time, were much more difficult to manage due to the constant event schedule. This included asbestos removal, different building floor levels ranging by as much as four inches which needed to be shimmed during events, and a high number of construction crews from different contractors that had to work alongside with Clark and their subs. These included contractors from Florida Power & Light which installed three new electrical vaults within the building, separate city contractors which installed two storm water pump stations while Clark was raising and completing roadways, separate contractors for five unique public art

installations built in between scheduled events, and separate city contractors for the Carl Fisher Clubhouse and Pride Park construction projects.

Finally, and as everyone is aware, a COVID-19 acute care temporary hospital was built by the Army Corp. of Engineers for the Florida Department of Emergency Management with their own contractor soon after the project received its temporary certificate of occupancy (TCO). The possession of the building by the Army Corp. lasted for six months and stalled the final completion of the building.

During the entire time the project was under construction, the City committed to its neighbors that they would remain operational, and resident's quality of life would not be impacted by the enormity of the project. This included all the neighboring condominiums, Miami Beach High School, the Botanical Garden, The Fillmore Theater, and City Hall including the parking garage structure being used 24 hours a day.

Owner's Contingency:

The City addressed unknown conditions and project challenges through the creation of a 6% owner's contingency. While projects of this size, and nearly all City capital projects, carry a 10% contingency, at the Project's inception, it was believed the Project could be completed with a lower level of contingency. Ultimately, with the approval of this settlement, an Owner's contingency of 10% was actually required. After considering the challenges noted above, it is fair and reasonable to assume the customary contingencies that other projects are normally provided to apply.

Original Project Budget	\$ 615,722,930	
Original Contingency	\$ 35,000,000	6%
Settlement	\$ 27,100,000	4%
Total Amount for Project Contingencies		10%

Fentress Architects Indemnity Obligation

A substantial portion of Clark's claim is based on allegations that portions of the design were either deficient, incomplete or uncoordinated. The design for the project was provided by Fentress Architects and a number of consulting engineers that were hired by Fentress. The agreement between the City and Fentress includes an indemnity provision which requires Fentress to indemnify the City against any losses it sustains as a result of deficient work by Fentress or its consulting engineers. The City will look to Fentress to indemnify it for losses it sustained, and intends to pursue its claims to recover the portions of the settlement payments, plus fees and costs of defense, resulting from design issues.

FUNDING SOURCES

The Miami Beach Convention Center is Miami-Dade County's largest convention center and an important regional asset for supporting the local economy. The MBCC Renovation and Expansion Project was largely funded with Miami Beach Redevelopment Agency (RDA) bonds approved by Miami-Dade County pursuant to an RDA Interlocal Agreement. The City's portion of the settlement is \$27.1 million and is anticipated to ultimately be covered by the excess funds in the City Center RDA of approximately \$28.1 million. Of the \$28.1 million, the City portion is estimated at \$15.5 million and the County portion is estimated at \$12.6 million. Under the Interlocal Agreement, the excess Miami Beach RDA Trust Fund revenues can only be used for the early prepayment of RDA bonds or, with Miami-Dade County and City approval, to defray the costs of an RDA capital project like the MBCC Renovation and Expansion Project.

The Administration has initiated discussions with Miami-Dade County with regard to the possibility of amending the City's RDA Interlocal Agreement to utilize existing excess Miami Beach RDA Trust

Fund revenues to fund all or a portion of the settlement. Although discussions with the County have been initiated, it would likely take several months to negotiate the necessary amendment to the RDA Interlocal Agreement. In order to cover the first two payments in the Settlement that are due on October 15 and December 31, 2021, the Administration is recommending realigning existing funds from the Transportation Initiatives capital project. This realignment is recommended as a change to the Proposed FY 2022 Capital Budget so the funds would be in place as of the new fiscal year on October 1st, in time for the first payment on October 15th. If the City Center RDA interlocal agreement is successfully amended over the next several months, these funds would be replaced by the City Center RDA funds.

JOINT RECOMMENDATION OF THE CITY MANAGER AND ACTING CITY ATTORNEY

This settlement (i) eliminates the risk of a potentially adverse judgment in an amount far in excess of the settlement sum; (ii) resolves the payment dispute for an amount that we believe is consistent with, and within the reasonable range of possibility for, what the Court may award should the trial proceed; (iii) eliminates the substantial costs, risk and uncertainty associated with a ten week trial and what is expected to be an eighteen month appellate process; (iv) requires that Clark complete work that is necessary for obtaining a certificate of occupancy, the best and most efficient way to achieve the City's goal of final completion of the Project; (v) provides for a neutral to make quick and binding decisions in the event a dispute arises about whether Clark's obligations to complete the work are satisfied; and (vi) affords the City the remedy of specific performance which enables the Court to issue an order requiring Clark to complete the required work.

Accordingly, for the reasons set forth in this Commission Memorandum, the City Manager and the Acting City Attorney jointly recommend that the Mayor and City Commission adopt the Resolution and approve the Settlement Agreement, as being in the best interests of the City.

ATTACHMENTS:

Settlement Agreement

ATH / RP / MH 