

RESOLUTION NO. _____

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AUTHORIZING THE ADMINISTRATION TO ENGAGE IN NEGOTIATIONS WITH RIC-MAN CONSTRUCTION FLORIDA, INC. TO DEFINE THE PARAMETERS OF AN ARBITRATION PROCESS TO BE USED BY THE PARTIES TO RESOLVE DISPUTES RELATED TO THE WEST AVENUE PHASE II IMPROVEMENTS NORTH OF 14TH STREET PROJECT IN AN EXPEDITED MANNER, WITH THE FINAL TERMS AND CONDITIONS FOR SUCH PROCESS TO BE SUBJECT TO THE APPROVAL OF THE MAYOR AND CITY COMMISSION.

WHEREAS, the West Avenue neighborhood is one of the lowest lying areas in the City with elevations as low as 1.7' NAVD, with certain areas of West Avenue having experienced flooding from high tides 58 times (NOAA Virginia Key tidal gauges) since 2017; and

WHEREAS, flooding is expected to worsen, as the City faces 14-30 inches of sea level rise over the next thirty years (Southeast Florida Regional Climate Change Compact, 2019);

WHEREAS, a high groundwater table and intense rain events result in additional compound flooding concerns and without the deployment of temporary pumps, segments of the neighborhood flood regularly during intense rain events and king tides; and

WHEREAS, Miami-Dade County is planning for 2 feet of sea level rise by 2060, and the United States Army Corps of Engineers is planning for 3 feet of sea level rise by 2070; and

WHEREAS, concurrent to the Florida Department of Transportation's renovation of Alton Road, in 2014 the City executed a design-build agreement for Phase I of the West Avenue Project, making utility and roadway improvements along West Avenue, north of Lincoln Road and south of 8th Street; and

WHEREAS, the West Avenue Phase II Improvements Project – North of 14th Street (the "Project") represents a comprehensively defined neighborhood improvement program, focused on resolving challenges associated with climate impacts and aged infrastructure; and

WHEREAS, the scope of this neighborhood improvement project includes replacement of the existing water distribution/transmission systems and gravity sanitary sewers, installation of a new robust storm water drainage collection and pumping system including new bi-fuel axillary generators, raising of the paved roadway and harmonization to the adjacent properties, installation of new street lighting, pedestrian lighting, replacement of existing and installation of new traffic and pedestrian signals at intersections, new landscaping, irrigation and construction of a new segment of the Bay Walk; and

WHEREAS, the limits of the improvements are West Avenue and Bay Road between 14th Street and Collins Canal, including side streets; and

WHEREAS, on March 22, 2017, the Mayor and City Commission adopted Resolution No. 2017-29800, awarding design/build services (the "Design/Build Agreements" or "Agreements") to Ric-Man Construction Florida, Inc ("Ric-Man" or "Contractor"), for the West Avenue Phase II Improvements North of 14th Street with the guaranteed maximum price of \$29,669,344, including a 10% contingency; and

WHEREAS, on January 11, 2018, Change Order No. 1 was executed for a 30-day non-compensatory time extension due to the impact of Hurricane Irma; and

WHEREAS, on March 16, 2018, Change Order No. 2 was executed in the amount of \$3,270,932 for funding of the above-ground improvements to the project, with no additional time extension, increasing the cost of the Agreements to \$32,940,276; and

WHEREAS, on December 12, 2018, the City Commission adopted Resolution No. 2018-30652 authorizing the City Manager to negotiate Change Order No. 3 for additional design and construction changes associated with the recommendations made by the Columbia University Resiliency Accelerator Program, the Urban Land Institute (ULI) and for additional scope for a total of \$17,763,900, including contingency; and

WHEREAS, on April 30, 2019, Change Order No. 3A was executed in the amount of \$579,752 as the first partial request from Ric-Man of the approved Change Order No. 3 for the costs incurred in support of the Columbia University Resiliency Accelerator Workshop, re-start impacts after a 1 year delay and 10-year storm drainage modeling to allow for further design in order to be able to negotiate the price of the remaining change order scope; and

WHEREAS, on June 16, 2019, Change Order No. 3B was executed in the amount of \$17,171,211 as the second partial request from Ric-Man of the previously approved Change Order No. 3 and includes emergency generator sets, street end enhancements, additional pumps, additional street improvements; and

WHEREAS, on September 17, 2019, Change Order No. 4 was executed in the amount of \$327,093 to account for the 10% contingency for the above-ground improvements, which were previously added to the Agreement as Change Order No. 2; and

WHEREAS, on April 4, 2020, the City Commission adopted Resolution No. 2020-31243 authorizing the City Manager to negotiate Change Order No. 5 for design services associated with additional water quality treatment, as required by the Miami-Dade County Regulatory and Economic Resources Department (RER) for a total not-to-exceed of \$1,147,037, including contingency and the City negotiated a final change order of \$1,101,959; and

WHEREAS, on June 23, 2021, the City Commission adopted Resolution No. 2021- 31752 approving and authorizing the City Manager to negotiate and execute Change Order No. 6 with Ric-Man Construction Florida, Inc., for the West Avenue Phase II Improvements North of 14th Street, for construction of additional water quality treatment, revised storm water criteria, relocation of the pump station, cost escalation, and a reduction in previously authorized owner's contingency in the net change amount of \$17,568,384, as well as an increase in contract time of 1,961 calendar days; and

WHEREAS, on April 27, 2022, the Administration received a letter from Ric-Man indicating that it had instructed its legal counsel to prepare a declaratory relief action seeking termination of both Design-Build Agreements and inviting the City to negotiate a "Termination for Convenience" of the Design-Build Agreements; and

WHEREAS, the City has the right to terminate the design-build agreements for its convenience in addition to the right to terminate in the event of a breach by Ric-Man; and

WHEREAS, the City had not elected to exercise either of these options and per the terms of the Agreements, Ric-Man can terminate the Design/Build Agreements only upon the occurrence of one of two conditions (i. e., the issuance of a stop work order by a court or other public authority for a period of more than 90 days due to no act or fault of Ric-Man or the City' s nonpayment of an undisputed amount owed), neither of which has occurred; and

WHEREAS, in a subsequent letter dated May 6, 2022, Ric-Man reiterated its request that the City "should issue a Termination for Convenience," claiming "continuing project support costs, and escalation" and

WHEREAS, on May 11, 2022, Ric-Man filed suit against the City (the "Lawsuit"); and

WHEREAS, on October 26, 2022, the City Commission adopted Resolution No. 2022-32384, approving and authorizing the administration to finalize, consistent with the conditions set forth in the resolution, a settlement agreement relating to the Lawsuit ("Settlement Agreement"), Amendment No. 1 to the Design/Build Agreement (Amendment No. 1) and a corresponding Change Order No. 7; and

WHEREAS, Amendment No. 1 and additive Change Order No. 7 modified the terms and conditions to the Design/Build Agreement between the City and Ric- Man Construction Florida, Inc. for the Project, for additional design and engineering services, cost escalation of construction commodities and labor, extended pre-construction services, escalation of general conditions as a result of a seventeen (17) month delay, addition of three micro-pump stations at certain low lying properties, other miscellaneous scope, extension to the contract time of 521 calendar and for a total value of \$12,726,291 plus a 10% owner' s contingency in the amount of \$1,272,629, resulting in an increase of the total contract amount to \$83,687,596; and

WHEREAS, Amendment No. 1 also included a deductive Change Order No. 7 modifying the terms and conditions to the Design/Build Agreement between the City and Ric- Man Construction Florida, Inc for the West Avenue Phase II Improvements South of 14th street project (the "South Project"), for a credit for work not performed in the amount of \$13,998,920; and

WHEREAS, the Settlement Agreement, Amendment No. 1 and Change Order No, 7 were executed in December 2022; and

WHEREAS, by October of 2023, Ric-Man again began seeking termination or rescission of the Design/Build Agreements, based on further alleged delays and added costs and again retained counsel, threatening to file a lawsuit to seek such relief; and

WHEREAS, the notice to proceed to start the construction of the pump station at the City's parking lot on West Avenue was issued and the construction began on January 2, 2024, and; and

WHEREAS, the Project is in final design and permitting phase and coordination with the community continues as the private property harmonization designs are being prepared and presented to the individual property representatives; and

WHEREAS, the West Avenue Phase II Improvements Project is a large multi-year construction project with a complicated scope of work; and

WHEREAS, with any project of this nature and complexity, it is expected that numerous challenges will arise during the planning, design and construction phases; and

WHEREAS, during the life of the project, due to unexpected events, there are complicated issues that result in complex disputes and claims, which cannot be resolved by negotiation between the Contractor and City staff; and

WHEREAS, while the City's project team has worked diligently to address those challenges as they arose, it is undeniable that certain challenges became nearly insurmountable; and

WHEREAS, Ric-Man claims, among other things, that due to the need to apply for new permits for some of the disciplines for the project due to the revision to the design drawings and/or expiration of the old permit(s), and changes as a result of the community request for parking modifications, the project construction start date has been delayed; and

WHEREAS, Ric-Man has been submitting delay claims requesting additional time and cost associated with staff and equipment; and

WHEREAS, the City disagrees with many of Ric-Man's claims, including claims for compensable time which are not permitted pursuant to the terms of the Design-Build Agreement absent a showing of fraud, bad faith or intentional interference; and

WHEREAS, these disputes have not been resolved; and

WHEREAS, Ric-Man has refused to execute Contingency Draws which are the means to compensate the design/build team, within the contract amount, for necessary scope changes and provide the necessary construction documents to start the roadway portion of the Project; and

WHEREAS, these types of claims normally remain unresolved until the end of the project; and

WHEREAS, in a typical project, this timing fosters efficiency because any claims—which are usually relatively minor—can all be resolved on the back-end of the project, and the contractor will continue working in the interim; and

WHEREAS, with respect to this Project, waiting to resolve all disputes until the end of the Project could result in undue delays and costs, as well as a very large claim amount, as the Project will not be completed for several years; and

WHEREAS, under the existing terms of the Design-Build Agreement, mediation of unresolved claims occurs following Substantial Completion, however, the City may determine, in its sole and absolute discretion, to require mediation of claims prior to Substantial Completion, but mediation is a non-binding, non-adjudicative proceeding; and

WHEREAS, both Ric-Man and the City's Office of Capital Improvement Projects Department, with the advice and counsel of the City Attorney's Office, have agreed that it could be beneficial to explore a modification to the Agreements that would provide for arbitration (which is a binding, adjudicative proceeding), if such arbitration proceedings could be accomplished on an expedited basis and without inordinate cost or delay; and

WHEREAS, it is anticipated that the City and Ric-Man would agree on hiring an arbitrator (or an arbitration panel for claims exceeding a threshold to be determined), who has appropriate experience and expertise, to review the disputed issues with both parties and provide a conclusive decision; and

WHEREAS, the expedited arbitration as an alternative dispute resolution process would help resolve disputes in a “real-time” manner so as to avoid project delays that frequently arise in complex projects such as West Avenue, when the parties do not agree on cost and time impacts of scope changes; and

WHEREAS, for the foregoing reasons, the Administration recommends the adoption of this Resolution by the Mayor and City Commission.

NOW, THEREFORE, BE IT DULY RESOLVED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, that the Mayor and City Commission of the City of Miami Beach, Florida, authorize the Administration to engage in negotiations with Ric-Man Construction Florida, Inc. to define the parameters of an arbitration process to be used by the parties to resolve disputes related to the West Avenue Phase II Improvements North of 14th Street Project (the “Project”) in an expedited manner, with the final terms and conditions for such process to be subject to the approval by the Mayor and City Commission.

PASSED and ADOPTED this ____ day of _____, 2024.

Steven Meiner, Mayor

ATTEST:

Rafael E. Granado, City Clerk

APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION



City Attorney

3-27-24
Date