

PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM SUMMARY

Meeting Date: June 29, 2010

Consent Regular
 Workshop Public Hearing

Department:

Submitted By: Department of Airports

Submitted For:

I. EXECUTIVE BRIEF

Motion and Title: Staff recommends motion to approve:

(A) A Settlement Agreement with AFCO Constructors, Inc. to settle Case #50-2008-CA-020624-MB filed in the Circuit Court of the 15th Judicial Circuit authorizing the release of retainage in the amount of \$1,678,288; and

(B) A Mutual General Release authorizing payment in the amount of \$500,000 to Post, Buckley, Schuh and Jemigan, Inc. (PBS&J).

Summary: On February 28, 2006 Palm Beach County contracted with AFCO Constructors, Inc. in the amount of \$17,433,942 to construct three gates on Concourse C at Palm Beach International Airport (R-2006-0338). On March 11, 2008 Palm Beach County declared AFCO Constructors, Inc. in default of its contract to construct the gates for failure to perform work in accordance with the contract and authorized the County Administrator to terminate AFCO Constructors, Inc.'s right to complete the work under the contract (R-2008-0467): if subsequent negotiations did not result in an agreement that would result in successful completion of the project. On July 14, 2008, AFCO's right to complete the project was terminated. In response to the termination, AFCO Constructors, Inc. filed suit against Palm Beach County in the Circuit Court of the 15th Judicial Circuit claiming that Palm Beach County had wrongfully terminated AFCO Constructors, Inc. and that they were entitled to damages. The County filed its own claims in response asserting its right to damages. On June 10th and 11th, 2010 the parties to the suit conducted mediation, which resulted in the settlement of all claims arising out of the contract to construct three additional gates on Concourse C and any and all other claims of whatever nature by AFCO Constructors, Inc. against Palm Beach County. As a provision of the Settlement Agreement, Palm Beach County agreed to pay AFCO Constructors, Inc. \$1,678,288 which is the amount Palm Beach County held in contract retainage at the time of contract termination. The mediation also resolved disputes between the County and its consultant PBS&J regarding the services rendered by PBS&J on the project. The settlement allowed the Department of Airports to withhold a portion of the fees that PBS&J was claiming for work on the project in exchange for a Mutual Release. Countywide (JCM)

Background and Justification: Palm Beach County had issued 24 notices of Non-Compliance with the contract at the time of termination and did not believe the work would be completed in a good and workmanlike manner. Since David Brooks Enterprises, Inc. (DBE) had been previously selected as a Construction Manager at Risk by Palm Beach County, DBE was hired to complete the contract and the work has been completed to Palm Beach County's satisfaction. The three gates were opened to the public July 1, 2009. Completion of the contract allowed the Department of Airports to relocate JetBlue to Concourse C giving them the opportunity to operate on additional gates as well as permitting Airport tenants to open two new revenue generating concessions, CNN News and Chilies Too, which could not have occurred without completion of the project. Palm Beach County incurred approximately \$777,000 to correct the work performed by AFCO Constructors, Inc. that failed to comply with contract requirements. AFCO Constructors, Inc.'s claim was for \$6,333,977. The claim included outstanding payment request, contract work performed, outstanding construction cost proposals, retainage, termination cost and interest. Given the high cost of litigation and the uncertainty of the outcome, the Department of Airports and the County Attorney's Office recommend acceptance of the Settlement Agreement which provides for the release of retainage. As a part of the settlement agreements the Department of Airports withheld over \$170,000 of monies that PBS&J was claiming.

Attachments:

- 1. Settlement Agreement with AFCO Constructors, Inc.
- 2. Mutual General Release

Recommended By: [Signature] 6/24/10
Department Director Date

Approved By: [Signature] 6/27/10
County Administrator Date

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	2010	2011	2012	2013	2014
Capital Expenditures	\$500,000				
Operating Costs					
External Revenues (Grants)					
Program Income (County)					
In-Kind Match (County)					
NET FISCAL IMPACT	\$500,000				
# ADDITIONAL FTE POSITIONS (Cumulative)					

Is Item Included in Current Budget? Yes X No _____
 Budget Account No: Fund 4111 Department 121 Unit A239 Object 6502
 Reporting Category _____

B. Recommended Sources of Funds/Summary of Fiscal Impact:

AFCO: \$1,678,288 has been withheld in the Department's construction retainage account and is available for payment. This amount has been set aside in balance sheet account 2060 in the Department of Airport's Improvement and Development Fund 4111; therefore, it is not necessary to be included in the current budget.

PBS&J: Approval of the Mutual Release authorizes payment of \$500,000 to PBS&J and cancels any further obligations the County has to PBS&J. Funds are available in Account 4111-121-A239-6502. The Department will pursue reimbursement of this cost by Passenger Facility Charge Revenues.

C. Departmental Fiscal Review: C. M. Sumner

III. REVIEW COMMENTS

A. OFMB Fiscal and/or Contract Development and Control Comments:

[Signature] 6/24/10
 OFMB
 6/24/10
 6/24/10

[Signature] 6/25/10
 Contract Dev. and Control
 The Settlement Agreements and Release comply with our review requirements. The original Post Buckley contract was R2001-0194.

B. Legal Sufficiency:

[Signature] 6/28/10
 Assistant County Attorney

C. Other Department Review:

 Department Director


Settlement Agreement


June 11, 2010

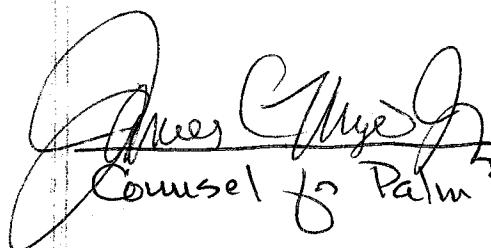
AFCO Constructors, Inc. ("AFCO") and Palm Beach County ("PBC") agree as follows;


- (1) This Agreement is contingent upon approval by the Palm Beach County Board of County Commissioners (PBCC). The undersigned representatives of PBC agree to place the matter of this approval before the PBCC at its meeting of June 29, 2010 and will recommend its approval.
- (2) PBC shall pay AFCO the total sum of \$1,678,288.00 in full satisfaction of all claims asserted in Case # 50-2008-CA-020624-MB in the Circuit Court of the 15th Judicial Circuit for Palm Beach County, Florida, all claims arising under that certain contract for construction of the PBC Airport Concourse "C" Project, and for ~~the~~ any and all other claims of whatever nature by AFCO against PBC.
- (3) In exchange for such payment, AFCO ~~and~~ ^a ~~shall~~ shall execute and deliver ~~an~~ General Release to PBC in a form acceptable to counsel for PBC.

- (4) Each party shall execute and exchange a Final Stipulation of Dismissal with Prejudice to be filed in the action described in TP (2) above.
- (5) The parties agree this payment shall be considered in accordance with a final reconciliation under the terms of GC-26 "Optimal Termination" of the General Conditions of that certain Contract for Construction PBC Project No PB-05-6 described in TP (2) above.
- (6) Each party shall bear their own fees and costs.
- (7) PBC shall execute and deliver AFCD a Limited Release as to all claims except normal construction warranties arising by contract or operation of law, and latent defects.


Palm Beach County


AFCD Constructors, Inc


Counsel for Palm Beach County


Counsel for AFCD

MUTUAL GENERAL RELEASE

This Mutual General Release (the "Agreement") is made and entered into as of this ____ day of _____, 2010, by and among POST, BUCKLEY, SCHUH & JERNIGAN, INC, ("PBS&J"), PIERCE, GOODWIN, ALEXANDER & LINVILLE, INC. ("PGAL"), R.C.T. Engineering, Inc. ("RCT"), hereinafter collectively referred to as "Design team", and PALM BEACH COUNTY, a political subdivision of the State of Florida as follows:

WITNESSETH:

WHEREAS, the parties to this Agreement have agreed upon a compromise and settlement of the claims arising out of the design and construction of the expansion of Concourse "C" at Palm Beach International Airport, referred to as PBC Project #PB-05-6 ("the Project"), as well as the claims asserted in connection with certain litigation filed in the Fifteenth Judicial Circuit Court, Case No.: 50 2008 CA 020624XXXXMB, Division AB, styled AFCO Constructors, Inc., Plaintiff v. Palm Beach County, a political subdivision of the State of Florida, Defendant (the "County Litigation"); and

WHEREAS, the parties to this Mutual General Release specifically intend and desire that the above-captioned matter be fully and finally settled and resolved with no other claims asserted, suggested, implied, threatened or stated therein proceeding further except as may be necessary to enforce the settlement agreement reached at mediation by the parties in connection with the above-referenced matters or to enforce the terms of this Mutual General Release; and

NOW, THEREFORE, in consideration of the mutual agreements, provisions and covenants contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

Section 1. Mutual Release of Claims.

Excepting only latent design defects, Palm Beach County hereby releases and forever discharges PBS&J, PGAL, RCT, Gartek Engineering Corporation, and their respective agents, servants, employees, trustees, insurers (including but not limited to Certain Underwriters at Lloyd's, London and Continental Casualty Company), third party administrators, beneficiaries, affiliates, subsidiaries, successors (whether as owners, manufacturers or operators of property or otherwise), predecessors (whether as owners, manufacturers or operators of property or otherwise), parent companies, and assignees from any and all manner of actions, causes of action, suits, debts, dues, sums of money, accounts, covenants, contracts, controversies, agreements, promises, judgments, claims, and demands whatsoever, of whatever kind, whether absolute or contingent, known or unknown, matured or unmatured, in law, in equity, in arbitration or other proceeding which such party(s) ever had, now has, or hereafter can, shall or may have against any of the Released Parties (collectively all parties released herein will be referred to as the "Released Parties"). for, upon or by reason of any matter, cause or information, arising on or before the date hereof, arising out of or in connection with or in any way related to the County Litigation or the Project.

In the same manner, PBS&J, PGAL and RCT hereby release Palm Beach County and its officers, elected officials, agents, servants, employees, trustees, insurers, third party administrators, beneficiaries, affiliates, subsidiaries, successors (whether as owners, manufacturers or operators of property or otherwise), predecessors (whether as owners, manufacturers or operators of property or otherwise), parent companies, and assignees from any and all manner of actions, causes of action, suits, debts, dues, sums of money, accounts, covenants, contracts, controversies, agreements, promises, judgments, claims, and demands whatsoever, of whatever kind, whether absolute or contingent, known or unknown, matured or unmatured, in law, in equity, in arbitration or other proceeding which such party(s) ever had, now has, or hereafter can, shall or may have against Palm Beach County for, upon or by reason of any matter, cause or information, arising on or before the date hereof, arising out of or in connection with or in any way related to the County Litigation or the Project.

The claims mutually released herein expressly include, but are not limited to, all claims sounding in tort and contract, Common Law Indemnity, Contractual Indemnity, and Contribution arising out of or which may have or could have arisen out of the County Litigation, the Project and the litigation filed in the Fifteenth Judicial Circuit Court, Case No.: 50 2008 CA 018997XXXX MB, DIVISION AB, styled AFCO Constructors, Inc., Plaintiff v. Post, Buckley, Schuh & Jernigan, Inc., Pierce, Goodwin, Alexander & Linville, Inc., and R.C.T. Engineering, Inc. Defendants (the " Design Litigation").

Neither Palm Beach County nor PBS&J will hereafter in any action in law, equity arbitration or other proceeding, attempt to make or prosecute any claim, demand or

cause of action on any matter released herein against any of the Released Parties.

Each party agrees that if this covenant is breached, the damage resulting from any such breach shall include not only the amount of any judgment recovered against a Released Party, but also attorneys' fees and expenses incurred by the Released Party(s), (including, but not limited to pre-trial, trial, post-trial, appellate, collection and bankruptcy proceedings), whether or not such cost and expenses are taxable. No action or inaction by any party hereto, except as an expressed written amendment or waiver of this Agreement, shall be construed as the basis for setting aside this Agreement or diminishing the extent or subject matter of this Agreement.

Section 2. Further Action.

The parties hereto shall make, execute, acknowledge and deliver such other instruments and documents, and take all such other actions as may be reasonably required in order to effectuate the purposes of this Agreement.

Section 3. Contingent Effect.

This Agreement becomes effective as a release only upon all parties' full compliance with the terms of that certain mediation settlement agreement between Palm Beach County and PBS&J dated June 11, 2010, a copy of which is attached hereto as Exhibit A, which is expressly understood to be further contingent upon approval of the Palm Beach County Commissioners as it relates to said mediation settlement agreement as well as the related mediation settlement agreements entered into between Palm Beach County and AFCO and the Design Team respectively.

Section 4. Disclaimer of Liability

The parties herein declare that the terms of this agreement have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise adjustment and settlement of any and all claims released herein for the express purpose of precluding forever any further or additional claims arising out of the County Litigation, the Project and the Design Litigation referenced above, except as to latent design defects, and shall not be considered an admission of liability by any party.

Section 5. Counterparts.

This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

**PALM BEACH COUNTY FLORIDA, a
political Subdivision of the State of
Florida**

BOARD OF COUNTY COMMISSIONERS

**ATTEST:
SHARON R. BOCK, Clerk and Comptroller**

BY: _____
Deputy Clerk

By: _____
Burt Aaronson, Chair

**APPROVED AS TO TERMS AND
AND CONDITIONS**

By: _____
Director – Department of Airports

Post, Buckley, Schuh & Jernigan, Inc.
By: _____
Title: _____

PGAL
By: _____
Title: _____

RCT Engineering, Inc.
By: _____
Title: _____

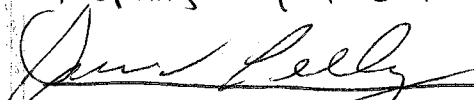
Exhibit A


Settlement Agreement

June 11, 2010

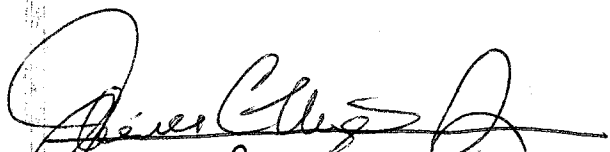
(1) Palm Beach County agrees to pay Post Buckley Shuh, and Jernigan ("PBSJ") the total sum of \$500,000.00 and agrees to accept responsibility for all fees due Nedarse & Associates, Inc for all services performed by Nedarse on PBC Project # PB-05-6.

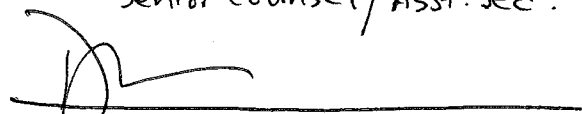
(2) PBSJ, in consideration for the undertaking by ~~PBSJ~~ Palm Beach as described in # (1) above shall release Palm Beach of all claims for any and all services rendered by it or its subconsultants on Project # PB-05-6. Palm Beach County shall release PBSJ and its consultants of all claims arising under PB-05-6 excepting only latent defects.


Palm Beach County


Post Buckley Shuh & Jernigan

by: Rene de los Rios
Senior Counsel / Asst. Sec.


Counsel for PBC


Counsel for PBS&J