

City of Coral Gables City Commission Meeting
Agenda Item I-1
April 13, 2010
City Commission Chambers
405 Biltmore Way, Coral Gables, FL

City Commission

Mayor Donald D. Slesnick, II
Vice Mayor William H. Kerdyk, Jr.
Commissioner Maria Anderson
Commissioner Rafael “Ralph” Cabrera, Jr.
Commissioner Wayne “Chip” Withers

City Staff

City Manager, Patrick Salerno
City Attorney, Elizabeth Hernandez
City Clerk, Walter J. Foeman
Deputy City Clerk, Billy Urquia
Assistant City Manager, Maria Menendez

Public Speaker(s)

I-1 [Start: 10:21:27 a.m.]

Resolution authorizing the City Attorney to proceed with filing an action for breach of contract against ArcoArt Plus, L.L.C. d/b/a/ Trolinet for failing to comply with the terms of the agreement with the City; and further authorizing the City Attorney to take all action necessary to represent the interests of the City. (Deferred from the March 23, 2010 City Commission Meeting).

Mayor Slesnick: Madam City Attorney I-1.

City Attorney Hernandez: This again is on the ArcoArt Plus L.L.C. d/b/a/ Trolinet, we did have both e-mail discussions and in-person discussions with the attorney and Mr. Hidalgo. Basically what I asked them at the time of our meeting was to do two things, to submit a legitimate offer to the city and to request a deferral from the city so that we can continue with additional negotiation. At that time what we received was a request for deferral, a continuation of discussion regarding the issues that had prevented them from moving forward on the project, but not really an offer as to the issue of back payments; and then we did receive on Friday, I told them please provide me by Friday a reasonable proposal so that I can see if the Manager’s office, the city administration would be agreeable and my office would be agreeable to deferring the matter. We did receive a proposal which I did not feel was a proposal that was appropriate under the circumstances and discussed it with the City Manager, who concurred with my position, and at this time again I’m asking the City Commission to authorize our office to proceed with a filing of breach – an action for breach of contract, and we can continue our discussions with ArcoArt.

As you know, in my past practices over the last fifteen years, I always give the parties an additional thirty days after I receive authority by the City Commission in order to attempt to come forward with a settlement, but I just don't see that happening unless we move forward with litigation, and I don't know if the Manager wants to weigh in, but that's all I have to say on it.

Commissioner Cabrera: Well before anybody weighs in, can I ask a question? Madam City Attorney when you met with the vendor did they in fact ask for, how should I say, additional time?- a deferral, so they could have some additional time to come back to the city with a suitable counter proposal?

City Attorney Hernandez: What they asked for was an opportunity to speak, and then I explained to them the process. I said you have to put in writing a request for deferral and I would suggest that you give us an appropriate written proposal.

Commissioner Cabrera: OK – did they do that?

City Attorney Hernandez: What they did was they first sent a request for deferral with no proposal, and then I spoke with Mr. Calvo and I said, please send me some reasonable proposal that I can then say, OK, there is a basis to defer, to move forward, and I received an offer, but I did not consider it a significant offer.

Commissioner Withers: Liz, let me ask you a question. Do we have, I mean, will they voluntarily give us their revenue that they've received on this?

City Attorney Hernandez: Commissioner, that would be the subject of discussions and negotiations.

Commissioner Withers: We've asked them for any disclosures as far as....I mean we have asked them or no?

City Attorney Hernandez: No, I haven't asked them to disclose how much revenue they've made on the project; I have not asked them that. I've asked them to put forth an appropriate proposal consistent with the terms of the agreement, you know, to give us something reasonable to bring back to you, so that we can continue in a process of negotiation, but I have not received that. I've received an offer....

Mayor Slesnick: I'm not sure it would be appropriate for the City Attorney to ask that question...

Commissioner Cabrera: Neither do I.

Mayor Slesnick:....while she is preparing for litigation.

Commissioner Withers: No, no, I'm talking about in finding out why...

Commissioner Cabrera: In finding out why...?

Mayor Slesnick: It may be appropriate for the Manager to answer that, but...

Commissioner Withers: That's what I mean I was just saying in her discussions I think at this point the only people that have had discussions, correct me if I'm wrong, was prior to October, was it October when we re-amended this contract...

City Attorney Hernandez: I think it was in July.

Commissioner Withers: July – OK – then it was discussion between the City Manager's office and the vendor.

City Attorney Hernandez: Yes sir.

Commissioner Withers: From the failure to sign that amendment to now it's all been discussions with the City Attorney's office.

City Attorney Hernandez: No, that's not true.

Commissioner Withers: Has there been discussions with the City Manager?

City Attorney Hernandez: There's been demand letters from Public Works, there's been discussions with Mr. Cox, there was an update a status e-mail from Troline to Mr. Delgado in December of 2009; by the way discussions that haven't produced money but you know, communications.

Commissioner Withers: And I'm saying, were those discussions based on why aren't you paying us? or were those discussions relative to the cabling doesn't work, the monitor doesn't work, there is graffiti on the screens.

City Attorney Hernandez: Everything.

Commissioner Cabrera: Well you don't know that part, you don't deal, I know you read e-mails but he's asking you specifically and you don't have anything to do with the wiring, you have nothing to do with the monitors.

Commissioner Withers: I was asking her if the discussions that took place between October and February or March, and she said that the city, they had been in contact with our city, and I was curious when she said Ed Cox, and she said, you know I'm assuming that those weren't collection actions, those were issues having to do with the product, the serviceability, the trolleys and things like that.

City Attorney Hernandez: Well some of the communications for example, there was communications from Trolinet back to Public Works in October with a new idea for a new proposal. Then the memo from the Manager's office with the information to our office in October, I mean, there is communications on everything with everybody. I'm not trying to be vague; I'm just trying to answer your question completely.

Commissioner Withers: No, no, you did. I understand. So three weeks ago we kind of said, they were in the audience and they heard how we felt, and what's happened in the past three weeks.

City Attorney Hernandez: We met with both parties and there were at that time....

Commissioner Withers: Both parties being?

City Attorney Hernandez: The attorney and his client and Ms. Menendez and myself met with them in order to discuss how we can avoid litigation, you know, can you pay?- and then some of the discussion was based on some of the problems with the trolleys, that's information that I don't have a handle on, OK; and basically we brought up the issue that we have on three separate occasions extended – we had the original agreement, then we had an extension of when they had to pay, then we had an amendment to the agreement on payment, and we want payment, you know. So at that time they indicated that they would like to discuss negotiations with the city, and we said look, you know, we cannot violate the pure intent of the Procurement Code. If you're now looking to go back to do what a prior proposer had proposed on a percentage basis, we are, I apologize for the word, we are bastardizing the Procurement Code.

Commissioner Withers: Right.

City Attorney Hernandez: You need to give us a legitimate proposal that we can then evaluate and discuss whether or not it's appropriate to bring it back to the City Commission. We received a letter and then I said, you need to also put in writing your request for deferral; we received a letter for request for deferral, I understand that the Manager's office denied the request for deferral. Mr. Calvo either e-mailed me or called me, I can't remember, and I said I need a legitimate proposal, and he sent in his proposal on Friday, and I met with the Manager, I did not feel it was a proposal of substance and I believe that he concurred in my opinion, and that's why we are both here today asking for the next step. So it's up to the City Commission.

Commissioner Withers: What was the proposal?

City Attorney Hernandez: I can make copies and give it to you.

Commissioner Cabrera: We never got a copy before.

City Attorney Hernandez: You did not get a copy of the proposal, no.

Commissioner Cabrera: I've never seen it.

City Attorney Hernandez: Because you know, the Commission has never been one to engage in negotiations during a public hearing process, but rather wanting the administration to bring back to them the best possible...

Commissioner Withers: Liz, I'm not looking for you know, point-counter point the proposal, I'm leaning right now to say, let's move forward; I was concerned last week or three weeks ago that, I wasn't sure of the timeline or the events and I said I wasn't ready to vote on this, but since that time I've found out that a lot of the issues the city supposedly had with the working of the advertising system within the trolley was addressed and concessions were made when the... if I'm correct, when the revision was made in October that took into account a lot of the issues that the city was faced with as far as some of the complaints from the vendor; and so we fully expected that those concessions would lead to an executed agreement in October, which for some reason the vendor never executed the agreement. So here we are six months later and they want more concessions, so.

City Attorney Hernandez: And it's up to you all to do one of two things; one, authorize my office to proceed with litigation and continue to engage in negotiations together with the City Manager's office, or two, defer the item again.

Commissioner Withers: I guess what's irking me at this is, we've got a vendor that obviously this wasn't the business deal that they thought they were going to move into, and the money they were going to make, they thought they were going to walk away from this profitable, and obviously, that's not happening. I don't know why it's not happening, it could be blamed on a bunch of reasons, but I'm also a little disturbed that if they are collecting revenues, you know, why are we at least participating somewhat in that?- maybe not to the full extent....

City Attorney Hernandez: At least making good faith payments, instead we are getting minimal checks.

Commissioner Withers: Have we received any money at all?

City Attorney Hernandez: Yes.

Commissioner Withers: Minimal amount.

Assistant City Manager Menendez: Good morning, we received, I think, a total of \$2,180.40, something around there since the contract.

Commissioner Withers: And I'm sure it's probably well over \$100,000, by this point in time what's accrued, I would assume what they owe us.

Assistant City Manager Menendez: Oh yes, it's over \$100,000 from the original contract. A little bit over 70 with the arrangement that we approved in July, but again that was not executed by them, so we are sticking to the original contract.

Commissioner Withers: So if the revision would have shown about a \$70,000 deficit, but since that wasn't signed we went back in default with the original agreement, which is over \$100,000.

Assistant City Manager Menendez: That's correct sir, yes.

Commissioner Cabrera: In the meantime how much of an investment have we made on this vendor?

Assistant City Manager Menendez: We have made some investments as a result of the preparation of the trolleys, but that wasn't part of the agreement with the vendor; the vendor as other vendors, the agreement was that they would put in the capital, and then we would profit from the actual advertising.

Commissioner Cabrera: I can't help but seeing this as a classic case of mismanagement, that's the way I look at it. I know we are all focusing on the latest issues affecting this relationship specifically their inability to pay us, but I mean, since the early beginning this thing has been poorly managed from the standpoint of having equipment that could not sustain the trolleys, having monitors that were too heavy to be installed on walls, having the work stop because of vandalism, and having the vendor having to go out and purchase protectors for the monitors. I remember one time the vendor did a print job for the city, it got approved by the city, and then low and behold after they began to distribute the document we stopped them from doing it, because we were unhappy after we had given them the approvals. So the vendor was out \$4,000, and had it go through a reprint. I'll give you another example. The vendor had no idea that Mr. Delgado had retired from the city; went looking for Mr. Delgado, found out that Mr. Delgado was no longer the person responsible and had to go find Mr. Kinney to speak to him about the management of this process. I'll give you the best one of all, when it came time for the City Attorney to write a letter, the address that she was given was an old address, even though the vendor had given the city notification that they had moved their location. So the City Attorney's letter sat in the vendor's old address for twenty-two days before he saw the letter for the very first time. So, I mean there is just so many of these little isolated issues that cause you to say, oh yes, this is really well managed, this is a good job, this is one of those, this is almost as good as the Country Club. That's why I would prefer to see us continue discussions with the vendor, rather than to get into an adversarial relationship with them. Hey we never win these types of actions anyway, you know, these are not actions that we do well with, if you look at the scoreboard.

Mayor Slesnick: Well Ralph, I don't disagree that we should continue to try, but it seems to me that the way that you try the best is a systematic approach step by step, and I think giving the City Attorney authorization to move forward gives her the tools with which to work. I think – I

don't disagree with anything you've said; don't even take issue with anything you've said, I just think we need to send a message that we need to have serious....what?

Commissioner Cabrera: I'm glad you listened to what I have to say.

Mayor Slesnick: I thought that was a list of horrors that you gave, as a matter of fact, I just think that we need to be serious as we usually are, the other side of this issue needs to be serious, and needs to understand that we are proceeding forward, and that the discussions have to be very serious in nature, and I think this is a step to do that. I think this is just a pro forma step to moving forward, and the City Attorney has already assured us that there's plenty of time to continue discussions before she actually files, and as you know, once she files there is also time for mediation, so.

Commissioner Cabrera: I'm not going against what she has to say, but I've seen it time and time again, I mean, I remember Bill Kerdyk asking us to agree on an issue with the Venetian Pool website, and I think the majority of us disagreed with him, and it ended up costing us a boat load of money.

Mayor Slesnick: Well, sometimes there's principle, and in that case someone has actually taken something from the citizens of Coral Gables....

Commissioner Cabrera: Well it turned out that way, but....

Mayor Slesnick:...and needs to give it back, OK.

Commissioner Cabrera: But I can give you five or six different examples, I mean, come on, we don't well with these things; the scoreboard has us zero and the others...

Mayor Slesnick: But before you predetermine it, I just urge that we consider taking it step by step.

Commissioner Cabrera: Like I said, I feel bad, I did some research on this matter; as I told you all last time when I got emotional, this vendor came to me initially and said, help me, I'm really struggling with this. He didn't know that he wasn't supposed to go see a Commissioner, he was just looking for someone to help him; and when I came back and said, this guy needs help, I was given reassurances that we were going to pay attention to this contract, and we haven't paid any attention to this contract, that's why – we all wanted this contract to succeed; we all want to see the trolley have advertising, it's a way to help sustain the operations, and it just hasn't turned out that way.

Vice Mayor Kerdyk: Can I ask a question Mayor? Make some very good points about starting a process, I'm not quite sure though how the City Attorney would determine whether her negotiations were adequate or not....

Mayor Slesnick: Because she is representing the Manager and the Manager will make the decisions as the client as to whether or not the city has a deal that it can accept. She is the facilitator of that.

Vice Mayor Kerdyk: So then he would make the ultimate determination...

Mayor Slesnick: He would bring it back to us of course, we would make the ultimate.

Vice Mayor Kerdyk: How do you see it being worked?

City Manager Salerno: No.

City Attorney Hernandez: It's a combination of the two offices.

City Manager Salerno: I was going to say exactly that. It is not singularly the Manager's decision, it's not singularly the City Attorney's decision, it will be a joint decision as this matter is before you today, as a joint decision to bring forward at this time.

Vice Mayor Kerdyk: But just like everything, all settlements are approved by the City Commission...

City Attorney Hernandez: Right.

Vice Mayor Kerdyk:...the fact is would you bring this whatever arrangements may or may not be worked out back to us on a personal level to tell us, to update us on the situation, so you can get our appetite of whether we thought it was solvable or not at that point? What do you suggest?

City Manager Salerno: I'd suggest that this item is authority for the City Attorney to proceed to take the appropriate actions to protect the city's interest. As the City Attorney said, it is typical for her to give thirty days notice for any further discussions to take place between the City Attorney's office and the Manager's office. Following that time if it is not determined jointly that a serious proposal or serious effort to reconcile the issues on the part of the contractor have been offered or acceptable, then she would proceed. The City Attorney can certainly outline us individually and make you aware of those aspects, which she already said is, they've requested a delay and they need a time, when they were told it was going forward because the Commission anticipated this item coming back at this meeting, they then delivered a proposal on Friday, three weeks after the Commission had acted; the only thing that had been accomplished in that three week period initially was to ask for a delay until the point that we told them the item was coming back before the Commission, they anticipated it coming back. At that point Friday she received a response and we received it, I believe, yesterday, I'm not sure what time, I think it was yesterday, their proposal; it was discussed and as the City Attorney has already said she didn't consider it a serious proposal warranting even providing it to you as Commissioner's to consider.

City Attorney Hernandez: And I just wanted to correct, I'm sorry, I receive the proposal on Thursday not Friday, I'm sorry.

Vice Mayor Kerdyk: And just one last question. So I understand the process will get started so that you will have the opportunity before...and one final question is, the entity that you would sue is what? ArcoArt Plus?

City Attorney Hernandez: The entity that we contracted with.

Vice Mayor Kerdyk: Which is Arco?

City Attorney Hernandez: Um huh (Yes).

Vice Mayor Kerdyk: Is that entity just set up for the trolley itself and there is no other...?

City Attorney Hernandez: Um huh.

Vice Mayor Kerdyk: What I'm saying is...

City Attorney Hernandez: There is no personal guarantee of any type.

Vice Mayor Kerdyk: There are no personal guarantees – alright. So we are suing the company LLC. Well, I think what Mr. Cabrera is saying is, are we going to expend a lot of money....

City Attorney Hernandez: No, we are doing this matter in-house. We are at a crossroads; we either need to agree with the company that, you know, this isn't going to work and you need to go away, and you need to either pay us money or we are going to come after you; and then the city needs to be free to be able to either go out to RFP, re-evaluate, the management team can't do any of that until we have something definitive with the company that we have an agreement with, and that's the problem that we are having, that we are in a stalemate, but we are not getting paid.

Vice Mayor Kerdyk: Alright, I'll make a motion to go ahead and move forward.

Mayor Slesnick: I have a motion, I have a second?

Commissioner Withers: I'll second it.

Mayor Slesnick: It's been moved and seconded that we approve the City Attorney's request that is captured in item I-1 – any further discussion?

Commissioner Cabrera: I'm going to only support it, if I'm given reassurances that there is going to be a concerted effort to continue to have negotiations, discussions with the...

City Attorney Hernandez: Absolutely.

Commissioner Cabrera: Well, I need it from both sides since this is a joint issue here, I need to hear it from the City Attorney and I need to hear it from the City Manager.

City Attorney Hernandez: Commissioner Cabrera I have been meeting with Ms. Menendez from the Manager's office, and we have reached out and we've made ourselves available to Mr. Calvo and we will continue to make ourselves available and negotiate what is in the best interest of both parties, not just one, both.

Commissioner Cabrera: I understand. I'm not looking – I'm not on their side, I'm on the city's side.

City Attorney Hernandez: OK.

City Manager Salerno: I think that's a given, that would be the only way we would proceed.

Commissioner Cabrera: I just wanted assurances that's all, and I got them, so I can go back to the two people that gave me those assurances, if that's not the way it goes down.

Mayor Slesnick: Mr. Clerk

Commissioner Anderson: Yes

Commissioner Cabrera: Yes

Vice Mayor Kerdyk: Yes

Commissioner Withers: Yes

Mayor Slesnick: Yes

(Vote: 5-0)

[End: 10:44:46 a.m.]