



MIAMI BEACH

BUDGET AND PERFORMANCE IMPROVEMENT
Internal Audit Division

INTERNAL AUDIT REPORT

TO: Jorge M. Gonzalez, City Manager
VIA: Kathie G. Brooks, Budget and Performance Improvement Director
FROM: James J. Sutter, Internal Auditor

DATE: December 14, 2011
AUDIT: Boucher Brothers Miami Beach, LLC Beachfront Concession Agreement Audit
PERIOD: November 5, 2009 through November 4, 2010 (Concession Agreement Year 9) for Revenues but was extended through January 31, 2011 for Non-Revenue Items

This report is the result of a regularly scheduled audit of the amended and restated concession agreement in effect between the City and the Boucher Brothers Miami Beach, LLC for providing beachfront concessions between November 5, 2009 and November 4, 2010. Lummus Park and Ocean Terrace site visits were conducted during January 2011 so analysis performed on products, pricing, signage, etc. was completed as of that time thereby extending the corresponding audit period.

The concessionaire has properly employed an independent CPA firm to conduct annual reviews beginning with fiscal year four based on previously adopted agreed upon procedures. The primary focus of this audit is to test the concessionaire's compliance with topics not addressed by the external independent auditor.

INTRODUCTION

The adoption of City Resolution 2001-2646 authorized Boucher Brothers Miami Beach, LLC (concessionaire) to operate the beachfront food, beverage, sundry and equipment rental concessions at Lummus Park, Ocean Terrace and North Shore Open Space Park as of November 5, 2001 for five years. The City Administration has since allowed the suspension of operations in North Shore Open Space Park due to beach erosion and the corresponding positioning of life guard stations.

The concessionaire is required to remit to the City either a sliding percentage between 15% and 25% of its food and beverage gross receipts (based on volume) and 20% of its sundries and beach equipment gross receipts, or a first year minimum guaranteed amount of \$412,500 and adjusted annually by 5% per annum, whichever is greater. The initial minimum guarantee amount was due on March 5, 2002, with all subsequent annual minimum guarantee payments due on the anniversary date of the Commencement Date (November 5th), and shall be increased by 5% each year plus 7% state sales tax (concession agreement year nine equaled \$652,111.90). The fiscal year end settlement or true-up (if applicable as there was none owed in concession agreement year 9) is due on December 31st of each year during the term of the concession agreement.

The concessionaire also agreed to remit to the City 20% of its water sports rentals gross receipts, or a minimum guaranteed amount of \$30,000 and adjusted annually by 5% per annum,

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whichever is greater. Said initial minimum guarantee shall be paid on March 5, 2002, and on the anniversary date of the Commencement Date (November 5th) each year thereafter, and shall be increased by 5% each year plus 7% state sales tax (concession agreement year nine equaled \$47,426.32).

The initial five year concession agreement was due to expire on November 4, 2006 but a five year option period could be exercised pending the approval of both parties. After months of meetings to discuss and renegotiate certain contract provisions, the City Commission on May 18, 2005 approved changes to the concession agreement via Resolution 2005-25884 thereby effectuating the terms until November 4, 2011.

The concessionaire subcontracted with Monty's Miami Beach LLC to provide the food and beverage services on the beaches seaward of Lummus Park. In return, the concessionaire received each day's source documents (cash register tapes and inventory reports) shortly after the conclusion of each month. These revenues are included in the concessionaire's monthly gross receipts, as well as the year end true-up settlement calculations. Additionally, the City's Resort Tax Section receives a 2% monthly remittance of the subconcessionaire's food and beverage taxable sales. Monty's Miami Beach LLC's services were terminated in November 2010 as the concessionaire now operates the food and beverage beachfront concessions.

The administration and enforcement of the concession agreement is the responsibility of the Office of Asset Management. Meanwhile, the Finance Department is responsible for the processing and recording of any payments received, including remitting 25% to the State of Florida as a sand tax for monies received from the use of the beaches according to the State Beach Management Agreement.

Internal Audit reviewed the past three years of reported revenues under the concession agreement's and their corresponding distribution among the applicable City's general ledger accounts as reported below:

	Year 7 11/05/07- 11/04/08	Year 8 11/05/08- 11/04/09	Year 9 11/05/09- 11/04/10	Totals
Gross Receipts:				
Rentals	\$2,591,959	\$2,594,183	\$2,341,009	\$7,527,151
Food & Beverage	\$789,849	\$743,471	\$454,654	\$1,987,974
Water Sports	\$269,489	\$247,420	\$214,493	\$731,402
Sundries *	\$0	\$0	\$0	\$0
Total Receipts	\$3,651,297	\$3,585,074	\$3,010,156	\$10,246,527
Total Payments to City:				
Miami Beach Rent Portion	\$518,074	\$509,881	\$490,331	\$1,518,286
Florida Sand Tax Portion **	\$172,692	\$169,960	\$163,443	\$506,095
Total Rent	\$690,766	\$679,841	\$653,774	\$2,024,381
Florida Sales Tax	\$48,354	\$47,589	\$45,764	\$141,707
Total Paid	\$739,120	\$727,430	\$699,538	\$2,166,088

* Sundries were last sold by the concessionaire in year 5 of the agreement covering 11/05/05 – 11/04/06 due to their lack of demand and profitability. A 01/19/11 site visit found that they are currently being sold again at the food & beverage kiosks and concessionaire management said that they will be subsequently reported in concession agreement year 10.

** State Beachfront Management Agreement No. 3595 requires the City of Miami Beach to remit 25% ("sand tax") of any and all monies collected from private concessionaires or other private concerns for the use of State beachfront property to the Florida Department of Environmental Protection.

OVERALL OPINION

The Office of Asset Management stated that they are pleased with the Boucher Brothers overall performance in providing beachfront concessions at Lummus Park and Ocean Terrace. Although the inherent risks associated with this cash based business still exist, Internal Audit was able to achieve a higher comfort level with reported gross receipts due to the implementation of previous audit recommendations and the annual completion of reports by independent external companies in adherence with previously approved agreed upon procedures.

The concessionaire was found to be essentially in compliance with the terms tested in the amended and restated concession agreement. Reported gross receipts, rental calculations, and rental payments were timely paid and were essentially correct based on the documents provided. Also, the City's Finance Department correctly recorded all revenue, state sales tax and State Beach Management Agreement (sand tax) receipts. Finally, the concessionaire's business tax receipts and resort tax filings were current as of the completion of this audit and the required irrevocable letter of credit was maintained.

However, the following items were identified during testing which are in need of corrective action:

- The incorrect percentage was multiplied by contract year 7's food and beverage gross revenues resulting in \$426.38 (including \$27.89 in state sales tax) being owed to the City.
- A 01/19/11 site visit found that the concessionaire either added products or charged prices that exceeded those previously authorized by the City Manager in the amended and restated concession agreement's exhibits.
- The concessionaire has not provided monthly revenue reports in adherence with section 5 of the restated and amended concession agreement. Also, the agreement does not specify any time frame for which the independent CPA firm's report on agreed upon procedures is due.
- Miscellaneous shortcomings are addressed such as the 9th Street water sports kiosk displaying signage of offered products and their pricing without first obtaining City approval, signed customer water sports agreements did not contain the amount paid and minor formula errors existed in the concessionaire's Excel spreadsheet which did not affect the amount owed/paid to the City.
- The concessionaire incurred City Bills totaling \$1,113 for sanitation violations during the audit period that were not initially paid. Upon notification of the outstanding amounts by Internal Audit, the concessionaire promptly negotiated with the City's Code Compliance Division whereby they paid \$863 as the remaining monies were waived.

PURPOSE

The purpose of this audit was to determine whether the concessionaire and subconcessionaire paid the correct monies based upon their supporting records; was otherwise in compliance with the selected terms in the restated and amended concession agreement; and whether the City

received and correctly recorded all revenue, sales tax and State Beachfront Management Agreement (sand tax) monies.

SCOPE

1. Confirm by examination of the concessionaire's books, records and operation, that the concessionaire and subconcessionaire was using sufficient internal controls over revenues.
2. Confirm that the concessionaire properly calculated and timely paid the correct amounts to the City in accordance with the restated and amended concession agreement.
3. Confirm that the concessionaire has made the necessary payments and is current with tested taxes, business tax receipts and licenses.
4. Confirm that the concessionaire has complied with selected criteria outlined in the restated and amended concession agreement.
5. Confirm that the concessionaire has maintained the required insurance coverage and irrevocable letter of credit to sufficiently protect the City's interests.
6. Confirm that all beachfront rental revenues, State Beachfront Management Agreement monies, and sales taxes were correctly recorded in the City's Financial System.

FINDINGS, RECOMMENDATIONS AND MANAGEMENT RESPONSES

1. Finding – *Concession Agreement Year 7's True-up Covering 11/05/07 through 11/04/08 Was Miscalculated Resulting in the City Being Underpaid by \$426.38*
Section 4 of the amended and restated concession agreement discusses concession fee payments. In summary, the City is to receive a minimum guarantee payment annually on November 5th and a true-up payment (if applicable) by December 31st. The true-up payment is due when the defined percentage of actual gross revenues exceeds the amount previously paid in the minimum guarantee.

While outside the audit period, it was determined that an inadvertent calculation error occurred during year 7's true-up. The concessionaire is required to remit to the City a defined percentage of annual food and beverage gross revenues per Exhibit 4.3 of the amended and restated concession agreement that increases as revenues also increase past designated thresholds.

Food and beverage gross revenues for the concession agreement year ending 11/04/08 totaled \$789,848.50 but the incorrect percentage of 15% was applied to the entire amount when it should have increased to 16% for the \$39,848.50 in revenues that fell into the \$750,001 through \$1,000,000 range. As a result, the concessionaire owes the City a total of \$426.38 which includes \$27.89 in state sales tax.

Recommendation(s)

The concessionaire should remit the outstanding \$426.38 for concession agreement year 7 covering 11/05/07 through 11/04/08.

Concessionaire Response:

A check was submitted to City to make up for inadvertent error.

2. Finding – Product and Price Changes Were Made Without Prior Authorization from the City Manager or his Designee

Exhibit 3.1 of the restated and amended concession agreement lists the approved beach rental, water sports and sundry products and prices for Lummus Park. The same water sports products and prices for Lummus Park are also included in Exhibit 3.4.1. Similarly, Exhibit 3.2.1 lists the food and beverage products and prices which includes a footnote that prices are subject to change within a 15% range to be sold in Lummus Park.

Furthermore, section 3.1 requires any amendments to Exhibit 3.1 be approved in writing by the City Manager or his designee prior to such changes being implemented and a new exhibit be incorporated into the agreement. Similar wording can be found in sections 3.2.1 for food and beverage and 3.4.1 for water sports.

The concessionaire provided two letters dated 01/23/06 and 02/06/08 requesting authorization from the City for listed price changes but no documentation could be found whereby their requests were approved. Therefore, Internal Audit opines that the prices listed in the restated and amended concession agreement's exhibits are still in effect.

A 01/19/11 site visit found that the concessionaire's prices charged (adjusted for taxes and the 15% markup percentage where applicable) for twelve products exceeded those authorized in the aforementioned exhibits. The higher prices ranged from ice tea selling at \$.12 more to thirty minute single person wave runner rides selling at \$10.45 more. Furthermore, the parasailing prices were restructured from being time specific as stated in exhibits 3.1 and 3.4.1 to varying prices based on the number of riders.

Recommendation(s)

The concessionaire should have the City authorize all pricing and product changes before they are implemented in accordance with the terms listed in the signed amended and restated concession agreement. This could be resolved by better monitoring and communication between the parties.

Concessionaire Response:

Concessionaire management maintains that approval was granted by the City Administration for the implemented price changes but new exhibits were not submitted. Finally, the concessionaire agrees that better communication between the parties is needed.

City's (Office of Real Estate, Housing & Community Development) Response:

Staff agrees with Internal Audit's recommendation. Additionally, Staff will reiterate to Boucher Brothers the applicable sections of the Boucher Brothers Miami Beach LLC Public Beachfront Concession Agreement executed February 2, 2012 (hereinafter referred to as "New Concession Agreement").

3. Finding – *City Requested Documents*

Section 5 of the amended and restated concession agreement states “A monthly report of gross receipts must be submitted to the City, through the Finance Department’s Revenue Supervisor, to be received no later than thirty (30) days after the close of the month”. These monthly reports have not been received by the Finance Department since the agreement’s inception and no known attempts have been made to request and collect this information from the concessionaire. The Office of Asset Management did not pursue these reports since the agreement is based on an upfront minimum guarantee payment and any risk of non-payment is greatly reduced. However, these reports can be useful to the City in helping to estimate the amount of the concessionaire’s lump sum annual true-up settlement (if any) due at fiscal year end.

Furthermore, Section 5 states “Concessionaire shall submit at the end of each contract year, an annual statement of gross receipts, in a form consistent with generally accepted accounting principles. Additionally, such statement shall be accompanied by a report from an independent CPA firm which shall perform certain agreed upon procedures...” Although the concessionaire has complied with this provision and the corresponding annual reports have not identified any material shortcomings, there is no specified due date mentioned in Section 5. In many City agreements, the concessionaire has only ninety days to submit the required audit, review, etc. to the City. Analysis found that the reports furnished for concession agreement years 3 through 8 ranged from a high of 556 days to a low of 238 days after the November 5th concession agreement year end.

Recommendation(s)

The required monthly reports should be submitted timely to the Finance Department’s Revenue Supervisor and the Asset Manager. In turn, the City should develop a specific practice to review this information each month as a monitoring procedure. If these monthly reports are deemed not necessary then this provision should be removed from the concession agreement. Finally, the next concession agreement negotiated and approved by the City Commission should have a due date by which the required report stating the results of the independent CPA firm’s agreed upon procedures is to be furnished to the City.

Concessionaire’s Response:

Concessionaire management has performed Agreed Upon Procedures each required year and two years of audits. The City Administration did not request monthly reports from year 1 due to the up-front minimum guarantee payment and annual true-up.

City’s (Office of Real Estate, Housing & Community Development) Response:

Monthly reports are deemed necessary and the requirement is so stated in Section 5 (Maintenance and Examination of Records) of the New Concession Agreement. Staff has created a Monthly Report Review Process.

Staff and Concessionaire have agreed on a due date of February 10 of each year for the required annual statement of gross receipts and the report stating the results of the independent CPA’s report.

City's (Finance Department) Response:

The Finance Department agrees with the Internal Audit Report, the Concessionaire has complied with Section 5 requirements which state "Concessionaire shall submit at the end of each contract year, an annual statement of gross receipts, in a form consistent with generally accepted accounting principles. Additionally, such statement shall be accompanied by a report from an independent CPA firm which shall perform certain agreed upon procedures..." The Agreement is silent as to when the above is due, and the referenced Section 5 requirements have been complied with, as verified by this audit. If the City desires to establish a fixed due date for the above mentioned Section 5 requirements, it should be negotiated upon the next agreement.

The Finance Department has relied upon the above referenced report to analyze the concessionaire's lump sum annual true-up settlement (if any) due at the end of every fiscal year. As mentioned in the Audit, as the guaranteed upfront minimum payment, greatly reduces the risk non-payment to the City. If a report was sent on a monthly basis to the City, it would require analysis. We understand that the Office of Economic Development and Asset Management has created a new Financial Analyst II position. We would recommend that this position be charged with the responsibility of reviewing these monthly reports which carry no cash payment.

4. Finding – Miscellaneous Shortcomings are Addressed

Testing performed on other concession agreement sections and the annually furnished concessionaire's Excel spreadsheet used to support the concessionaire's claimed gross revenues found the following assorted shortcomings:

- a. Section 21.10 of the amended and restated concession agreement states "Any signage posted by Concessionaire on its facilities and equipment shall be subject to the prior approval of the City as to size, shape and placement of same." A 01/19/11 site visit found that the 9th Street water sports kiosk was closed but a sign listing the rides offered, the associated prices and the corresponding payment forms was affixed to the front and was visible to all passersby. Although Internal Audit maintains that a displayed price listing is a valuable internal control, no evidence was provided to show that the City had supplied prior approval.
- b. Sequentially numbered water sports agreements are to be prepared for each customer wishing to participate. Review of six randomly sampled days found that all were present except for one numbered 9795. However, the reviewed signed customer agreements did not list the amount paid hindering Internal Audit's attempts to reconcile the daily water sport rentals amount with those reported in the concessionaire's Excel spreadsheet.
- c. Minor immaterial formula errors were found in the concessionaire's provided Excel spreadsheet which did not affect the amounts paid to the City were subsequently forwarded to the concessionaire for correction.

Recommendation(s)

The concessionaire should implement the following recommendations:

- a. No signage should be displayed on the beach unless it is first approved by the City. However, price listings should be displayed in some manner at all concessionaire facilities accepting customers' monies.
- b. All sequentially numbered customer signed water sports agreements should be

maintained (including voids). Also, they should contain the amount of monies that the customer is remitting so that it can be more easily reconciled to the concessionaire's Excel spreadsheet.

- c. The concessionaire and independent CPA firm should continue to review the maintained Excel spreadsheet and its formulas for accuracy. The errors identified by Internal Audit and any others subsequently discovered should be immediately corrected.

Concessionaire's Response:

- a. Water sports staff inadvertently forgot to put away the price listing prior to leaving for the day in deference to normal operating procedures.
- b. Boucher Brothers management will meet to determine where to record the customer's payment on the pre-printed water sports agreements.
- c. The identified errors were quickly corrected and they did not affect the amount owed to the City. The spreadsheet is continually reviewed for accuracy by Boucher Brothers management and its external auditors but occasionally mistakes go unnoticed.

City's (Office of Real Estate, Housing & Community Development) Response:

- a. Staff agrees with Internal Audit's recommendation. Section 21.10 (Signage) of the New Concession Agreement requires the City to approve all advertising, signage and postings. While price listings have not yet been posted or approved by the City, or posted, the Concessionaire, in conjunction with the new Coca Cola contract, is in the process of designing the price postings for the City's approval.
- b. Staff agrees with Internal Audit's recommendation.
- c. Staff agrees with Internal Audit's recommendation

5. Finding – *City Bills Issued for Sanitation Violations Were Not Timely Paid*

Review of the City's Eden and Permits Plus systems found that the beach concessionaire was issued two Sanitation violations during the audit period totaling \$1,113. The first City Bill #17784 dated 07/06/10 for \$50 was issued for failing to clean up the trash around the beach chairs and umbrellas. While the second, City Bill #18270, dated 07/25/10 for \$1,063 was for operating without garbage collection and for dumping such biohazard waste as paint and paint brushes.

When questioned about the \$1,113 outstanding balance, the concessionaire claimed no knowledge of the citations which could not be confirmed. At a minimum, these City Bills are required to be resolved before the concessionaire's 2010/11 fiscal year business tax receipts were issued but they were not. Upon being notified by Internal Audit, the concessionaire contacted the Code Compliance Administrator whereby they negotiated the citations downwards to \$863 which was promptly paid on 01/14/11 with the remaining \$250 balance being waived.

Recommendation(s)

Although the concessionaire had not previously received any citations, they should strive to ensure that the surrounding beach areas are kept clean. If additional citations are issued, the concessionaire should be promptly notified so that the problem is corrected and any associated fines are paid. Finally, the Finance Department's Licensing Section should ensure that no outstanding amounts are owed to the City before business tax

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receipts are issued.

Concessionaire's Response:

Once notified by Internal Audit of the outstanding City Bills, the necessary payment to reduce the balance to zero was immediately made to resolve the issue.

City's (Finance Department) Response:

The Finance Department Business Tax Section does not issue Business Tax Receipts (BTR) to businesses which show outstanding amounts due to the City in our database system. If an amount is owed to the City, the Finance department withholds the BTR until payment is received in full.

EXIT CONFERENCE

An exit conference was held to discuss the audit report and to solicit management responses noted above. Participants included Financial Analyst II Richard Ajami, Redevelopment Specialist Robert Reboso, Assistant Finance Director Georgina Echert, Internal Auditor James Sutter and Senior Auditor Mark Coolidge. The audit report was also emailed to Boucher Brothers Miami Beach LLC management. The concessionaire's management responses were subsequently received and were added to this audit report. Management responses from the affected City departments were subsequently received and were also included in this audit report. All were in agreement with the contents of this report.

JJS:mc

Audit performed by Senior Auditor Mark Coolidge

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cc: Hilda Fernandez, Assistant City Manager
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