



# MIAMIBEACH

BUDGET AND PERFORMANCE IMPROVEMENT  
Internal Audit Division

## INTERNAL AUDIT REPORT

TO: Jimmy L. Morales, City Manager  
VIA: John Woodruff, Budget and Performance Improvement Director  
FROM: James J. Sutter, Internal Auditor  
DATE: April 28, 2014  
AUDIT: Miami Beach Marina Lease Agreement - Rental Payment Compliance  
PERIOD: January 01, 2008 through December 31, 2009

This report is the result of a scheduled audit to review the accountability and accuracy of the Miami Beach Marina lease rental payments assessed. Review the sufficiency of internal controls with respect to the collection of rental revenues by the Marina, as well as documentation with respect to the same.

### INTRODUCTION

The Miami Beach Marina is located adjacent to Government Cut and offers dockage and other marina related services for the use and benefit of the public. With 400 boat slips, the marina can accommodate vessels up to 250 feet in length. Also available on site are casual and formal dining facilities, marine hardware retailers, dive charters and boat sales.

On June 15<sup>th</sup>, 1983, after reviewing the proposals submitted for the marina, the Mayor and Commission of Miami Beach approved and authorized the execution of a lease agreement with Carner-Mason Associates, LTD. for the construction and management of a marina and dry storage facility in the south shore development area. This authorization was done through Resolution No. 83-17385 after soliciting and receiving proposals pursuant to the Community Redevelopment Act and pursuant to Bid No. 54-83 for the lease of the marina. The lease agreement was then signed and entered into on June 24, 1983.

Subsequent to the initial agreement, four amendments to the agreement were created, documented and entered into as follows:

First Amendment (October 23, 1991): One of the purposes of the parties entering into this amendment was to reconcile certain potential conflicts between the South Shore Developers, Inc. (SSDI) documents and the marina lease, as a result of litigation pursuant to a stipulation and Order dated July 1, 1985 styled South Shore Developers, Inc., Clipper South Shore, Inc., and Venture Concept, Inc., d/b/a BT South Shore Associates, f/k/a BT Associates v. City of Miami Beach, Florida and Miami Beach Redevelopment Agency, Case No. 82-24526 (19), in the Circuit Court of the 11<sup>th</sup> Judicial Circuit in and for Dade County, Florida. Collectively, the Stipulation and Order executed was referred to as the "SSDI Documents". Also pursuant to a foreclosure of a mortgage on the Marina Lease, a new lessee, a wholly-owned subsidiary of Heller Financial, Inc, acquired the interest in the Marina Lease previously owned by Carner-Mason. The City and Lessee, Tallahassee Building Corporation (TBC), agreed to modify certain terms and conditions of the Marina Lease, as set forth in the amendment. Such modification (included parking requirements to the City and guarantees from lessee among other terms) was a material inducement for the Lessee to enter into the agreement as amended. The Marina Lease, as amended by the first amendment, was referred to as the "Modified Lease".

Internal Audit Report  
Miami Beach Marina Lease Agreement - Rental Payment Compliance  
April 28, 2014

Second Amendment (July 18, 1994): The Second Amendment to the Marina Lease Agreement was made between the City of Miami Beach and Tallahassee Building Corporation, a Florida Corporation (Lessee). In undertaking its responsibilities to design, permit and construct the drystack facility pursuant to the First Amendment, Lessee prepared plans which called for the construction of the drystack facility with an internal crane system approximately 120 feet tall. The Miami Beach Housing Authority objected to the construction of the drystack facility and formally protested the issuance of permits for said facility. After evaluating all of the various alternatives, the City and Lessee determined that it would be in both parties interest to eliminate the requirement for the drystack facility from the Marina Lease, as amended, if the City could provide the required marina parking on the marina site, thereby avoiding the cost of land acquisition for the required parking and the construction of a pedestrian overpass. Other amendments agreed by both, the City and Lessee, were included in this second amendment to be part of the overall agreement.

Third Amendment (May 27, 1997): Third Amendment was created as Tallahassee Building Corporation agreed to assign all of its right, title and interest in the Marina Lease to Miami Beach Marina, Ltd., a Florida Limited Partnership, subject to the City's consent to the assignment. The approval and consent of the City to assign was subjected to the terms and conditions of the Third Amendment to the marina lease agreement, as agreed by both parties to the agreement.

Fourth Amendment (April 15, 1998): Subsequent to entering into the Third Amendment, the City settled certain litigation with West Side Partners, LTD., pursuant to a settlement agreement in 1998. Such settlement agreement affected the parking arrangements for the marina. As a result, it was necessary and desirable to enter into a Fourth Amendment to the Marina Lease Agreement to make provision, among other things, for changes to the parking arrangements for the marina and to modify certain other provisions of the marina lease, as previously amended. Authorization by the Mayor and City Commission to execute this fourth amendment was documented in Resolution No. 98-22719. Included in this amendment were changes to provisions for construction disruption that better defined disruptions events, outlined communication requirements under such events, and provided guidance and relieve when calculating rental amounts payable to the City. Such provisions were executed, exercised, and prevailed during our audit period as a result of the groundbreaking for the construction of the Murano Grande Towers and The Yacht Club along with parking garages and laundry facilities on what is considered areas 3 and 4 of the marina site under the lease agreement.

Provisions in relation to maintenance, parking requirements, construction, and management of the facilities, among others included in the original lease agreement dated June 24, 1983, and as amended by the first amendment dated October 23, 1991, and further amended by the second, third, and fourth amendments, dated July 18, 1994, May 27, 1997, and April 15, 1998 correspondingly, continue to be in full force and in effect in its entirety as the "Modified Miami Beach Marina Lease" agreement. The agreement expires January 1, 2022.

Total rents received by the City from the Miami Beach Marina during calendar years 2008 and 2009 were as follows:

Internal Audit Report  
Miami Beach Marina Lease Agreement- Rental Payment Compliance  
April 28, 2014

Description	2008	2009	Totals
Minimum Guaranteed Rent	\$ 120,000	\$ 120,000	\$ 240,000
Annual Percentage Rent	\$ 361,559	\$ 339,505	\$ 701,064
<b>Totals</b>	<b>\$ 481,559</b>	<b>\$ 459,505</b>	<b>\$ 941,064</b>

Above rental payments were calculated under the construction disruption provision under the fourth amendment. Under this provision, the minimum annual guaranteed rent was \$120,000 with the annual percentage rent calculated on a percentage rate of 8% of gross receipts (excluding a \$0.02 per gallon of fuel charged separately) less a minimum threshold amount subject to a CPI component. Subsequent to the audit period (effective for July 2010), the construction disruption provision was discontinued and the minimum guaranteed rent was returned to \$320,000 with an annual percentage rent based upon 10% of all gross revenues (excluding a \$0.02 per gallon of fuel charged separately).

### OVERALL OPINION

As a result of our audit, we conclude that supporting documentation regarding daily operations was well maintained and readily available by the Miami Beach Marina in conformity with stipulations in the lease agreement. However, despite the successes, some areas were identified that may have an impact on the annual rental payments received by the City; and therefore, in need of corrective action.

Other areas with less significance were also identified for corrective action and future consideration. Additional details regarding such areas can be found on the "Findings, Recommendations, and Management Responses" section of this report. In summary, areas identified in need of corrective action are as follows:

1. Differences observed between Gross Receipts reported on the Annual Report provided by the Marina and Gross Receipts reported on the State Sales Tax Returns were not fully reconciled and could not be identified.
2. No internal review process is currently in place from the City to ensure and verify the accuracy and reliability of Annual Percentage Rent payment calculations as reported to the City in the Lessee's annual audited schedule of annual percentage rent.
3. Dockage rates and rates for the use of other facilities and services were not recommended by the Lessee for approval of the City Manager based on agreement between the parties but not as provided for in the lease agreement.
4. While it is noted that construction disruption did occur, Construction Disruption Notices, as required by paragraph 3.2 of the agreement's fourth amendment, were not documented and/or maintained by neither the City, nor the Miami Beach Marina's management. Further the parties agreed that there should be no more construction disruption events under the lease and that the maximum cumulative total for all disruption events has been exhausted.

### PURPOSE

The purpose of this audit is to review compliance with provisions in the "Miami Beach Marina Lease Agreement" as it relates to the integrity, reliability, and accuracy of rental payments, records, and data; to ensure that amounts are properly and timely collected and accounted for; and to verify that sufficient documentation and accountability is maintained and available for review upon request

**SCOPE**

1. Verify that proper controls are in place to ensure the integrity, reliability, and accuracy of rental fee calculations, records, and data.
2. Ensure that rental revenues are properly and timely collected and accounted for.
3. Verify that sufficient accountability, documentation and files are maintained to support lease rental revenue calculations.

**FINDINGS, RECOMMENDATIONS, AND MANAGEMENT RESPONSES**

1. Finding – *Differences observed between Gross Receipts reported on the Annual Report provided by the Marina and Gross Receipts reported on the State Sales Tax Returns were not fully reconciled and could not be identified.*

Considering the fourth amendment stipulations, Internal Audit performed a comparison between gross receipts from all areas reported on the State Sales Tax Returns and the Gross Receipts for all areas, as reported on the Audited Annual Report provided to the City by the Miami Beach Marina, for the calendar years 2008 and 2009. Initial results from our comparison showed differences for each year.

In response to our inquiries regarding the initial differences, the Miami Beach Marina provided copies of their reconciliations of Gross Sales to Sales Tax returns for the two years. Reconciled items included receipts from fuel sales which were, as reflected on the "Summary Trial Balance" \$3,942,619 during calendar year 2008, and \$2,455,781 during calendar year 2009. Additional deductions included in the reconciliation of sales tax to reported revenues to the City comprised of income without profit of cable and telephone services (\$336,924 - 2008, \$369,934 - 2009), Common Area Maintenance charges (\$384,398 - 2008, \$343,152 - 2009), real estate taxes (\$256,322 - 2008, \$167,767 - 2009), and bad debts (\$0 - 2008, \$187,318 - 2009). The following table illustrates the differences between the reconciled receipts per the Marina's reconciliations and the amount reported to the City.

Year	Reconciled Receipts (Per Marina's Reconciliations)	Gross Receipt Reported to the City	Differences Unidentified
2008	\$ 8,796,077	\$ 9,277,173	\$ 481,096
2009	\$ 8,888,582	\$ 8,982,222	\$ 93,640
<b>Totals</b>	<b>\$17,684,659</b>	<b>\$18,259,395</b>	<b>\$ 574,736</b>

While the amounts reported to the City exceeded the reconciled receipts, no final and conclusive support was received with respect to the above remaining differences in gross receipts. Subsequent to our audit to support that their reconciliations were improving, the Marina submitted the reconciliation for calendar year 2012. Reconciled receipts amounted to \$9,434,784 which was \$12,041 over the reported receipts to the City of \$9,422,743.

Recommendation(s)

Going forward, the City should attempt to request that the Marina submit these reconciliation reports to the City for verification on an annual basis. The City's Administration can then identify the sources and nature of any differences noted in the Gross Receipts. Where receipts reported to the State exceed those reported to the City, the City should pursue payment of any shortfall.

Management's Response(s)

Lessee Response:

Miami Beach Marina has annually made reconciliations between revenues reported to the City and to those revenues reported on the State's Sales tax return. The reconciliation for both 2008 and 2009 show that the Gross Receipts reported for purposes of percentage rent are actually greater than the reconciled amounts of Gross Receipts per the sales tax returns.

City Response

In accordance to the lease agreement, the lessee is not required to submit their State sales tax reports and reconciliations to the City. Until such time that a lease amendment is proposed to require the submission of these reports to the City, these reports can be reviewed through the regular audit process provided in the agreement.

2. Finding – *No internal review process is currently in place from the City to ensure and verify the accuracy and reliability of Annual Percentage Rent payment calculations as reported to the City in the Lessee's annual audited schedule of annual percentage rent*

Monthly gross receipts reports, monthly volume of fuel sold (in gallons), and percentage rental payment calculations are submitted on a monthly basis to the City, along with a check for partial payment of the minimum guaranteed rent by the Miami Beach Marina. These reports and documentation are stored at the Finance Department without further review or verification for completeness and/or accuracy in calculations.

Recommendation(s)

The City should implement a review process of monthly reports being submitted by the lessee along with their corresponding documentation on a monthly basis. Such reviews should help to detect any irregularities in time, should any arise. In addition, a more detailed review of the Annual Percentage Rent calculation along with a reconciliation of all Minimum Guaranteed Rental payments received during the year should be performed annually to ensure the accuracy and full payment of all rentals due from the Miami Beach Marina pursuant to the lessee's annual audited schedule of annual percentage rent.

Management's Response(s)

City Response

The City Administration agrees a more detailed review of Annual Percentage Rent calculations, along with a reconciliation of all rental payments received during the year, should be performed annually to ensure the accuracy and full payment of all rentals due from the Miami Beach Marina.

As of calendar year 2011, the City Administration reviews the monthly statements with the rent payments provided by LESSEE on a monthly basis and reconciles the monthly statements with the outside auditor's annual report at year end. Effective July 1, 2013, LESSEE shall pay its Minimum Annual Guaranteed Rent or the Annual Percentage Rent, whichever is greater, on a monthly basis, in accordance with the terms of the Lease Agreement.

3. Finding – *Dockage rates and rates for the use of other facilities and services were not recommended by the Lessee for approval of the City Manager based on agreement between the parties but not as provided for in the lease agreement.*

Article XXXIV (Additional Responsibilities), paragraph 2 states that *"The Lessee shall recommend dockage rates and rates for the use of other facilities and services for approval by the City Manager. Dockage rates shall be generally consistent with those charged at other privately*

*financed marinas of comparable quality situated on public lands in the State of Florida.”*

No documentation was either maintained or provided by either, the City or the Marina, to document compliance to this provision.

Recommendation(s)

A greater effort to document compliance to this provision should be exercised by both, the City's Administration and the Miami Beach Marina Management. Changes to previously approved rates should also be presented to the City Manager for approval.

Management's Response(s)

Lessee Response:

Marina dockage rates are publically available and published. The Lessee is required to operate the Marina in a manner that will maximize the returns to the City. (Article XIII paragraph 4 on page 43). The Manager's Office had informed Lessee on several occasions that it does not have the expertise to operate the marina and that the Lessee is to set the rates based upon its operational experience to maximize rates while maintaining occupancy. The Manager's Office reserved the right to review the rates if the rates began to negatively affect occupancy and therefore revenues, however, as the Lessee has properly operated the Marina, the Manager's Office has never actually requested any changes.

City Response

The City Administration researched and recommended approval of the LESSEE's dockage rates and rates for the use of other facilities and services. The Interim City Manager approved the rates on August 15, 2012, subsequent to the audit period.

4. Finding – *While it is noted that construction disruption did occur, Construction Disruption Notices required by paragraph 3.2 of the agreement's fourth amendment were not documented and/or maintained by neither the City, nor the Miami Beach Marina's management. Further the parties agreed that there should be no more construction disruption events under the lease and that the maximum cumulative total for all disruption events has been exhausted.*

According to paragraph 3.2 of the fourth amendment to the Modified Lease Agreement, “At anytime, and from time to time, that the operations of the Marina are disrupted by construction, environmental remediation, baywalk or seawall reconstruction and other similar disruptive activities for a period of not less than thirty (30) days (a “Disruption Event”), the Marina Lessee shall give written notice to the City of its disruption (the “Disruption Notice”). Although allegedly there were informal communications and telephone conversation between the City and the Miami Beach Marina Management, no formal written notice was documented and maintained by neither the City nor the Marina regarding the disruptions experienced starting in 1998 as a result of the construction start of the Murano Grande, the ICON, and the Yacht Club Towers. Construction Disruption provisions under the fourth amendment to the agreement were put into effect as a result of the towers' construction, as well as additional work directly and/or indirectly related to the construction of those towers.

Recommendation(s)

In the future, documentation and formal communications regarding the lease agreement should be maintained and readily available for review by both, the City and the Marina.

Management's Response(s)

Lessee Response:

We disagree with your conclusion. Miami Beach Marina files a monthly revenue report and has done so each month since the construction disruption began. Each monthly report contains a statement on page two stating "PURSUANT TO THE SECOND AMENDMENT TO THE MIAMI BEACH MARINA LEASE AGREEMENT DATED AUGUST 11, 1994, PARAGRAPH 3.5.1, ANNUAL GUARANTEE RENT WAS REDUCED TO \$120,000 PER YEAR." This monthly statement is notice by the marina to the City that the disruption is continuing. In addition, on a few occasions, the City has requested specific information about the descriptions and that information has been provided, usually in face to face meetings on the Marina Site so that all parties can see and confirm disruption.

City Response

The City Administration agrees that LESSEE must provide proper notice, in accordance with the terms of the Lease, regarding any claims for business disruption. Any such claims not properly documented by LESSEE, and agreed to by the City, should not be recognized. Subsequent to this audit period, the City's Legal Department and LESSEE agreed that, effective March 31, 2011, LESSEE has exhausted the business disruption allowance, as provided in the Lease, and there shall be no future business disruption claims whatsoever made by LESSEE nor recognized by the City.

Internal Audit Observation:

The City's Attorney's Office has opined that the statement on the monthly report does not constitute valid Construction Disruption Notice.

**EXIT CONFERENCE**

An exit meeting was held to discuss the audit report and to solicit management responses noted above. Preliminary findings were sent to the management company and an initial response was sent to the City's Attorney Office by the management company's attorney. In their initial response, the management company disagreed with the findings. Subsequent meetings were held with both the City and the Marina representatives to discuss the findings and solicit management responses.

Audit performed by Fidel Miranda, Auditor

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