



MIAMIBEACH

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: April 13, 2010
AUDIT: Smith and Wollensky Lease Agreement
PERIOD: May 1, 2006 to April 30, 2009

This report is the result of the regularly scheduled audit of the lease agreement between the City and One Washington Avenue Corporation, operating the Smith and Wollensky restaurant located at South Pointe.

INTRODUCTION

By Resolution No. 85-18223, the City of Miami Beach entered into a lease agreement with Specialty Restaurant Corporation dated November 7, 1985, for the restaurant known as South Pointe Seafood House. On September 2, 1993, the Mayor and City Commission approved Resolution No. 93-20899 for an assignment of the Lease from Specialty Restaurant Corporation, as assignor, to One Washington Avenue Corporation. One Washington Avenue Corporation filed for bankruptcy on July 26, 1996. Resolution No. 97-22359 dated April 16, 1997 was for approving an addendum to the lease agreement subject to the final negotiations between the City of Miami Beach and the New York Restaurant Group LLC (Successor in interest to One Washington Avenue Corporation), for the purpose of opening a restaurant to be known as Smith and Wollensky (S&W).

An Addendum to the Lease was executed on June 1, 1997 between the City of Miami Beach and One Washington Avenue Corporations. On April 3, 1998 the City approved the additional two (2) ten year renewal options extending Smith and Wollensky lease to expire November 6, 2024. The lessee agrees to pay the City a scale percentage (2.5% - 3.5%) of its gross receipts or a minimum of \$2,500 per month. The lessee has also agreed to pay a parking fee equal to \$6,250 per month whereby all parking fees paid by the lessee shall be credited against lessee's percentage rent obligations. The lessee shall also pay \$9,600 parking impact fee; half of all Parking Impact Fees paid by lessee shall be credited against lessee's percentage rent obligations. During the first ten (10) year renewal period starting on November 7, 2004, the lessee shall pay to lessor the additional sum representing a Renewal Bonus fee of \$25,000 at the end of each applicable lease year. The second ten (10) year renewal period, this Renewal Bonus Fee shall increase to \$65,000 per year).

OVERALL OPINION

The lessee was in general compliance with the terms of the lease agreement. Gross receipts recorded on the lessee's books and records were adequately documented and in general agreement with the amounts reported to the City. However, the following items highlight those areas in need of improvement by both parties to the lease:

- Percentage rent payments were underpaid by the lessee by an error made in calculating the parking fees from April 2008 to May 2009 and incorrectly applying the wrong percentage rate for the months of March 2008 and 2009. In addition, minor discrepancies were noted between the

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reported amounts to their supporting POS systems. The total of these items represented \$98,412.21 which was paid to the City during the audit.

- The lessee had not paid their parking impact fees since March 2001 for the year ending December 31, 2001. Upon notification, the lessee paid the City \$38,400 from the years 2002 through 2009.
- The lessee did not submit the annual statements of gross receipts required by the lease agreement. In lieu of these statements, the lessee submitted when asked a letter specifying the gross receipts collected in each year.

PURPOSE

The purpose of this audit was to determine whether the lessee paid the correct rent based upon their supporting records, was otherwise in compliance with the lease agreement; and whether the City received and correctly recorded all revenues and sales taxes and effectively monitored the lease agreement.

SCOPE

1. Confirm by examination of the concessionaire's records that all receipts, from the sale of food, alcoholic or non alcoholic beverage, on site retail sales, space rental or from any source were correctly calculated and remitted in accordance with the signed agreement.
2. Confirm that all monthly percentage rents paid to the City were received timely during the audit period. The City's monthly minimum guarantee is due by the fifteenth of the month for the proceeding month.
3. Confirm that the Finance Department receives the sales and use tax from the concessionaire and remits it to the State.
4. Confirm that all transactions were properly recorded in the City's financial system.
5. Confirm that the annual statements of the gross receipts were timely submitted and the amounts reported therein agreed with corresponding amounts previously report to the City.
6. Confirm that all insurance requirements of the lease agreement were complied with.
7. Confirm that all property taxes were timely paid to Miami Dade County.

FINDINGS, RECOMMENDATIONS AND MANAGEMENT RESPONSES

1. Finding: *Difference Noted in Calculating Percentage Rent due on Monthly Reports of Gross Receipts*
For the most part, gross receipts recorded on the lessee's books and records were adequately supported by documentation and in agreement with the amounts reported to the City. However, it was noted that three errors were made in calculating the rental amounts

due to the City. The underpayments were as follows:

- a. Paragraph 7 of the amended lease agreement dated June 1, 1997 states the percentage rent to be paid by Lessee is as follows (2.5% to \$2,500,000, 3% to \$3,000,000 and 3.5% over \$3,000,000. In both March 2008 and March 2009, Smith and Wollensky paid the percentage rent based on the 3% instead of the 3.5%. This resulted in an underpayment of \$3,845.87 (\$3,594.28 plus sales tax of \$251.59).
- b. Paragraph 8 of the amendment to the lease dated June 1, 1997, reads the lessee is entitled to 105 parking spaces immediately adjacent to the premises. Upon commencement of the rent, the lessee shall pay the Lessor a parking fee of \$6,250 per month. All Parking fees paid by the Lessee shall be credited against Lessee's percentage rent obligations. For the period of April 2008 through May 2009 (14 months), S&W reduced the percentage rent paid by not adding the required Parking fee while applying the credit for the parking fee in error. This resulted in an underpayment of \$93,625.00 (\$87,500.00 plus sales tax of \$6,125.00).
- c. In addition, an analysis between the amounts reported to the City and Smith and Wollensky's POS system resulted in variances over the audit period. Smith and Wollensky had incorrectly posted the amounts from the POS system to their General Ledger. This resulted in a net underreporting of the percentage rent to the City for amount equal to \$941.34.

Upon notification of these mistakes, S&W remitted the monies due for the above amounts totaling \$98,412.21 on August 26, 2009. While these amounts included both the percentage rent and parking fees, this payment was placed into the General Fund since the Finance Department has initially transferred the parking fees to the parking fund.

Recommendation

Office of Asset Management should verify the calculation of remittance on a periodic basis, and advise the Lessee of any discrepancies that need to be resolved. Any outstanding amounts due and related Interest should be billed by the Office of Assets Management. It is also recommended that Asset Management coordinate with the Finance Department to calculate any interest due on the above amount paid and send a City bill to Lessee.

Management Response

The Office of Asset Management agrees with the first part of the recommendation and will follow-up accordingly. However, the Lease Agreement does not provide for the assessment of interest and/or penalty fees.

2. Finding: Parking Impact Fees

Paragraph 9 of the Addendum to Lease regarding parking impact fees states that "*Lessee shall pay lessor, annually the amount of \$9,600 as payment of all current applicable parking impact fees, as required by the City Ordinance No.89-2665, Section 7-7, as same may be amended from time to time. The \$9,600 parking impact fee shall represent payment for use, as made available to Lessee, of an additional 32 parking spaces thorough the term of the lease, making the total number of spaces available to Lessee a total of 137 spaces. Notwithstanding anything to the contrary contained in the Lease, half of all parking impact fees paid by the Lessee, as same may be amended from time to time, shall be credited against Lessee's percentage rent obligation.*"

Internal Audit inquired and it was determined that the last time that the parking impact fees had been paid was in March 2001 for the 2001 year. Furthermore, Smith and Wollensky

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were under the impression, that an invoice billed by the Parking Department on a monthly basis for an additional 40 spaces covered the parking impact fee. The City's Parking Department indicated that the invoice was for separate spaces not associated to with the parking impact fee. Therefore, Smith and Wollensky owed a total of \$38,400 in parking impact fees. On August 26, 2009 the lessee remitted the impact fees due. In subsequent conversation with the Planning Department it is believed that the amount charge to Smith and Wollensky was incorrectly done since there had been increases in the Parking Impact fee that was not taken into consideration.

Recommendation(s):

The City's Planning Department should ensure that the parking impact fees are invoiced on a yearly basis. It is further recommended that the Planning Department revisits the parking impact fees for Smith and Wollensky since this is a 1985 agreement and the seating capacity may have increased. It is further recommended that the Planning Department goes back and invoice Smith and Wollensky for the difference of the increases.

Management Response:

Planning Department staff is working with the Finance Department to refine and coordinate the billing function for Parking Impact Fees. While the Planning Department keeps the records for this program and bills for the one-time payments, when yearly billing is involved the Planning Department will work with the Finance Department to ensure proper billing of the yearly parking impact fees due in future. Planning Department staff has also verified the amount required to satisfy the yearly parking impact fee obligation is now actually \$33,600 per year, based upon the most recent increase in the adopted parking impact fee enacted December 6, 2006. The Auditor may wish to obtain the dates of the last few increases to this fee, which went from \$300 at the time the agreement was enacted, up to \$600, and then to the current \$1,050 in force as of December 2006. This would increase the actual amount of parking impact fees owed to the City. The Planning Departments agrees with the recommendation to invoice Smith and Wollensky the difference.

3. Finding: *Annual Statement of Gross Receipts*

Paragraph 13 of the 1985 lease agreement, Records, Accounts, Statements and Audits, specifies that "*within sixty (60) days after each fiscal year, Lessee shall deliver to Lessor a written annual statement of the gross receipts for such fiscal years. Said statement shall be certified as true, accurate, and complete by Lessee, by and through a duly authorized officer of Lessee.*"

During the audit period no annual statement of gross receipts has been received from the Lessee. However during the audit, the Lessee was informed and they immediately submitted a letter, as the annual statements of gross receipts for each period. Amounts were traced to the amounts submitted and no exceptions were noted.

Recommendation(s):

The Office of Asset Management should notify the Lessee in writing that, a certified statement of gross receipts must be delivered to the City within 60 days (by November 27th) after each of the Lessee's fiscal year ending September 28th. The Office of Asset Management should ensure that the certified statements are received in a timely manner. Meanwhile, the Finance Department should compare the certified figures with the reported amounts for agreement. If there is a discrepancy between what was submitted and what was reported by the certified statement, inquiries should be made to see if the City is owed additional money.

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Management Response:

The Office of Asset Management agrees with the recommendations and will follow-up accordingly.

EXIT CONFERENCE

An exit meeting was held to discuss the audit report and to solicit management responses noted above. Participants included Anna Parekh, Director, Office of Real Estate, Housing & Community Development, Robert Rebozo, Redevelopment Specialist - Asset Management, James Sutter, Internal Auditor and Laura Franco-Rubines, Assistant Internal Auditor. Responses were solicited from both the Finance and Planning Departments. Management responses were received thereafter and incorporated in the report. The Tenant/Concessionaire was provided a copy of the preliminary report. All were in agreement with the contents of this report.

JS:LR:lr
(Audit performed by Laura Franco-Rubines)

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cc: Hilda Fernandez, Assistant City Manager
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Anna Parekh, Director, Office of Real Estate, Housing & Community Development
Robert Rebozo, Redevelopment Specialist - Asset Management
Richard Lorber, Acting Planning Director
Patricia D. Walker, Chief Financial Officer
Shauna Grant, Senior Accountant, Smith and Wollensky Restaurant Group