



**AGENDA REPORT**  
**December 6, 2018**

**Masci General Contractor, Inc. v. Brevard County, Florida; Case No.: 05-2015-CA-46973**

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**SUBJECT:**

Masci General Contractor, Inc. v. Brevard County, Florida; Case No.: 05-2015-CA-46973

**FISCAL IMPACT:**

\$1,900,000.00

Fund/Account/Cost Code: 1163/265160/5650000 IO#6933500

**DEPT/OFFICE:**

ACM Development

**REQUESTED ACTION:**

It is requested that the Board approve and authorize the Chair to execute the attached settlement agreement to settle claims relating to Masci General Contractor, Inc. v. Brevard County, Florida; Case No.: 05-2015-CA-46973. If approved, it is also requested that the Board authorize the County Manager to approve all necessary Budget Change Requests and Bond Modification if needed to expedite expenditures associated with transportation improvement projects.

**SUMMARY EXPLANATION and BACKGROUND:**

The Board has previously met in executive session to discuss the progress of litigation in the above-mentioned matter. In light of those discussions, County staff recommends the approval of the attached settlement agreement relating to Masci General Contractor, Inc. v. Brevard County, Florida; Case No.: 05-2015-CA-46973. This agreement will settle all matters with Masci General Contractor, Inc. and assigns the County's claims against Jacobs Engineering Group, Inc., the City of Melbourne, and the City of West Melbourne to Masci General Contractor, Inc.

In the event the Board does not approve the requested action, staff proposes that the Board authorize staff to advertise an executive session of the Board of County Commissioners to discuss the referenced case at a later date.

**CLERK TO THE BOARD INSTRUCTIONS:**

Forward Board action to the County Manager's Office.

**ATTACHMENTS:**

**Description**

- **Settlement Agreement (Including Assignments) and Mutual Release**



Tammy Rowe, Clerk to the Board, 400 South Street • P.O. Box 999, Titusville, Florida 32781-0999

Telephone: (321) 637-2001  
Fax: (321) 264-6972  
Tammy.Rowe@brevardclerk.us

December 7, 2018

MEMORANDUM

TO: Frank Abbate, County Manager

RE: Item F.1., Masci General Contractor, Inc. v. Brevard County, Florida – Case No. 05-2015-CA-46973

The Board of County Commissioners, in regular session on December 6, 2018, executed and approved the Settlement Agreement and Mutual Release to settle claims related to Masci General Contractor, Inc. v. Brevard County, Florida – Case No. 05-2015-CA-46973; and authorized you to approve all necessary budget change requests and bond modification, if needed to expedite expenditures associated with transportation improvement projects. Enclosed is fully-executed Agreement for your action.

Your continued cooperation is always appreciated.

Sincerely,

BOARD OF COUNTY COMMISSIONERS  
SCOTT ELLIS, CLERK

*Tammy Rowe*

Tammy Rowe, Deputy Clerk

/ds

Encl. (1)

cc: County Attorney  
Contracts Administration  
Finance  
Budget

## SETTLEMENT AGREEMENT AND MUTUAL RELEASE

### I. PARTIES

This Settlement Agreement and Release ("Agreement") is made and entered into between:

A. Plaintiff, MASCI GENERAL CONTRACTORS, INC., and its respective past, present and future principals, agents, employees, members, partners, representatives, officers, directors, managers, shareholders, parent and affiliated entities, subsidiaries, divisions, joint ventures, predecessors, transferees, successors and assigns ("MASCI").

B. Defendant, BREVARD COUNTY, and its respective past, present and future principals, agents, employees, members, partners, representatives, officers, directors, managers, shareholders, parent and affiliated entities, subsidiaries, divisions, joint ventures, predecessors, transferees, successors and assigns (the "COUNTY").

MASCI and the COUNTY shall be collectively referred to as the "Settling Parties," or individually referred to as a "Settling Party."

### II. FACTUAL RECITALS

**WHEREAS**, MASCI filed suit against the COUNTY, among others, alleging damages as a result of schedule delay, loss of efficiency and other payment related issues relating to work performed on the Wickham Road Reconstruction Project located in Brevard County, Florida (the "Project"), in an action captioned *Masci General Contractor, Inc. v. Brevard County, et al.*, Case No.: 05-2015-CA-046973-XXXX-XX, currently pending in the Eighteenth Judicial Circuit in and for Brevard County, Florida (the "Lawsuit").

**WHEREAS**, the Settling Parties wish to resolve their disputes and claims in connection with the Project amicably and have agreed to do so as to avoid the uncertainties and vicissitudes of litigation.

**NOW, THEREFORE**, in consideration of the mutual promises, covenants, and obligations set forth herein, and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the Settling Parties hereby agree as follows:

### III. TERMS

A. **Settlement Payment:** The COUNTY, shall pay to MASCI the sum of One Million Nine Hundred Thousand Dollars and No Cents (\$1,900,000.00) ("the Settlement Payment"). The Settlement Payment shall be remitted by check made payable to "Howard M. Allen, PLLC Trust Account" and delivered to Howard M. Allen, PLLC, 325 N. Orlando Avenue, Cocoa Beach, Florida 32931 within thirty (30) days of the approval and execution of the Brevard County Board of County Commissioners.

B. **Dismissal with Prejudice:** Except as provided elsewhere herein, within ten (10) days of the clearance of the Settlement Payment and performance in accordance with the terms of this Agreement, MASCI and the COUNTY shall file a joint stipulation for dismissal with prejudice of all claims against the COUNTY in the Lawsuit, each party to bear its own attorney's fees and costs.

C. **Mutual Release:** Upon clearance of the Settlement Payment, and except as expressly stated elsewhere in this Agreement, MASCI and the COUNTY hereby release each other, and only each other, from any and all past, present, and future claims and demands for damages of every kind, nature, or basis, known as well as unknown, latent or patent defects, anticipated or unanticipated, arising from or relating to or deriving from the Project or the allegations relating to the Lawsuit, whether or not asserted in the Lawsuit, including without limitation damage to real and personal property, statutory violations, negligence, negligent misrepresentation, breach of contract, nuisance, trespass, building code violations, breach of express or implied warranties, whether seeking compensatory damages, punitive damages, exemplary damages, statutory multiple damages, attorneys' fees, interest, costs, or any other type of relief.

D. **Assignment:**

1) The COUNTY hereby assigns to MASCI, and MASCI hereby accepts and assumes, any and all claims and recoveries the COUNTY may have against any person or entity not a Settling Party herein (including, but not limited to, JACOBS ENGINEERING GROUP, INC., the CITY OF MELBOURNE, and the CITY OF WEST MELBOURNE), their respective insurers, and any other person or entity not expressly released in this Agreement (including their respective insurers), which relate to, arise out of, or are in any way connected with the Project and/or Lawsuit (the "Assigned Claims"). It is the Settling Parties' intent that this Assignment to MASCI be as broad as possible such that MASCI can prosecute the Assigned Claims as assignee of such claims against any person or entity not specifically released herein, including, but not limited to, claims for additional insured coverage (defense and indemnity), contractual indemnity, and to recover amounts paid by the COUNTY in the defense or settlement of the Lawsuit.

2) To the extent the Court allows for the amendment of the pleadings, any and all actions, lawsuits, arbitrations, mediations, or other proceedings of any type or nature whatsoever to recover the Assigned Claims shall be pursued in the name of MASCI, as assignee, and shall not be pursued in the name of the COUNTY. Otherwise, the pending claims shall proceed in the name of the COUNTY.

3) MASCI agrees to indemnify, defend, and hold harmless the COUNTY for any claim arising out of or related to the Assigned Claims (the "Indemnified Claims"). In the event an Indemnified Claim is asserted against the COUNTY, MASCI shall retain mutually agreeable counsel to provide any defense to the COUNTY for any Indemnified Claims and the COUNTY shall agree to said retention and waive any conflicts of interest, if any.

4) MASCI represents it has performed its own due diligence with regard to assignment of the Assigned Claims and acknowledges that the COUNTY is not making any representations or warranties regarding the value or recoverability of the Assigned Claims.

**E. Cooperation:**

1) Within 30 days of execution of this Agreement, the COUNTY agrees to provide MASCI'S counsel a summary statement of attorney's fees and costs paid by the COUNTY in defense of the Lawsuit and copies of all supporting invoices related thereto.

2) The Settling Parties agree to all reasonable cooperation to achieve the intent of this Agreement. Such cooperation may include, but is not limited to, the execution of documents including addenda to this Agreement necessary to preserve the ability of MASCI to litigate any and all claims and defenses.

3) MASCI shall have the exclusive use of COUNTY'S consultants and experts retained for the Lawsuit, at MASCI'S expense and at such experts' standard rates on a going-forward basis, from the date upon which this Agreement is executed by the COUNTY and the clearance of the Settlement Payment. Counsel for the COUNTY shall so advise and release unto MASCI these experts. Nothing contained herein shall be considered or construed to have waived either the attorney-client privilege or evidentiary objections based on the work-product doctrine.

**IV. ADDITIONAL TERMS AND MISCELLANEOUS PROVISIONS**

A. **No Limitation on MASCI's claims.** No provision of this Agreement is intended to limit the claims MASCI may pursue against non-settling parties or non-released parties. The Settling Parties agree that MASCI may assert or extinguish its own direct claims against any non-settling parties or non-released parties. The intent of this provision is, to the fullest extent possible, preserve the ability of MASCI to litigate any and all theories of liability, including inconsistent theories, and maximize the MASCI's available remedies through conclusion of the Lawsuit.

B. **Acknowledgment.** The Settling Parties acknowledge that the facts from which this Agreement arises are uncertain, and each of them assumes the risk that the damages alleged by MASCI may worsen in the future; that new or unforeseen damage may occur; or that the delays and damages may not be as severe as alleged in the Lawsuit. The Settling Parties acknowledge that their information regarding the facts alleged in the Lawsuit is sufficient to enter this Agreement; and therefore, each accept and assume all risk and agree that this Agreement shall be and remain in all respects effective and not subject to termination or rescission by virtue of any mistake, change, or difference in facts.

C. **No Admission of Liability.** The COUNTY denies any and all liability for the claims asserted in the Lawsuit and further state that the COUNTY's payment of the Settlement Payment was made solely in compromise and settlement of disputed claims, and such payment is not to be regarded as admission of liability or fault by any Settling Party. The Settling Parties agree that all actions taken, and statements made by the Settling Parties in connection with this

Agreement shall relate to this Lawsuit only and shall be without prejudice or value as precedent and shall not be taken as a course of performance or a standard by which other matters may be judged.

D. **Allocation.** MASCI may allocate any or all of the Settlement Payment and any and all other amounts collected, as MASCI sees fit and in MASCI's sole and absolute discretion.

E. **Severability.** Nothing contained herein shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provisions contained herein (other than in Section III) and any present or future statute, law, ordinance, or regulation contrary to which the Settling Parties have no legal right to contract, the latter shall prevail; but the provision of this Agreement which is affected shall be curtailed and limited only to the extent necessary to bring it within the requirements of the law. To the extent the offending provision cannot be curtailed or limited, it shall be fully severable, and the remainder of this Agreement shall remain in full force.

F. **Representation by Counsel.** Each Settling Party is represented by counsel and has consulted with its counsel regarding the terms and legal meaning of this Agreement. Each of the Settling Parties shall bear its own costs, attorney's fees, and expenses in connection with the negotiations for and preparation of this Agreement.

G. **No Transfer of Claims.** The Settling Parties represent and warrant that each has not previously assigned any substantive right (e.g., rights, claims, or defenses) at issue under this Agreement.

H. **Entire Agreement.** Except as otherwise provided herein, this Agreement constitutes the entire agreement among the Settling Parties and all terms cited or referenced in this document are contractually binding, not mere recitals. This Agreement supersedes any prior oral or written agreements or communications on the subject matter addressed herein.

I. **Counterparts.** This Agreement may be executed in counterparts, including counterparts transmitted by facsimile or electronic mail, each counterpart constituting an original.

J. **Dispute Resolution.** The Settling Parties agree that John Freud, Esq. shall serve as the sole and final arbitrator of any dispute arising over any performance obligation under this Agreement and his decision shall be binding. The prevailing party in any arbitrated dispute arising over any performance obligation under this Agreement shall be entitled to recover its reasonable attorney's fees and costs.

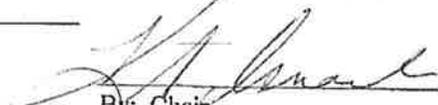
K. **Authority.** Each individual approving the form and content of this Agreement on behalf of a Settling Party represents and warrants that the Settling Party agrees to be and is bound by all terms and conditions in this Agreement, including all payment and performance obligations.

I. Further Assurances. The Settling Parties agree to take such action and execute such further documents, including judgments and modifications to this Agreement, as may be reasonably necessary to effectuate the intent of this Agreement.

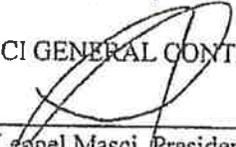
ATTEST:   
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Scott Ellis, Clerk

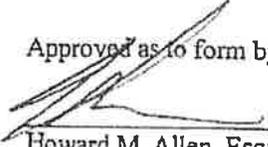
BOARD OF COUNTY COMMISSIONERS  
OF BREVARD COUNTY, FLORIDA

Reviewed for legal form:  
  
\_\_\_\_\_  
Michael E. Milne, Esquire  
Dated: 12/14/18

  
\_\_\_\_\_  
By: Chair  
Brevard County Commission

As Approved by the Brevard County  
Commission on: 12/6/18

MASCI GENERAL CONTRACTORS, INC.  
  
\_\_\_\_\_  
By: Leonel Masci, President  
Dated: 11/28/18

Approved as to form by:  
  
\_\_\_\_\_  
Howard M. Allen, Esquire  
11/28/18

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Scott Ellis, Clerk

BOARD OF COUNTY COMMISSIONERS  
OF BREVARD COUNTY, FLORIDA

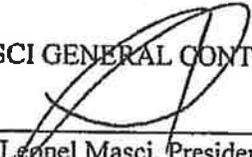
Reviewed for legal form:

  
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By: Chair  
Brevard County Commission

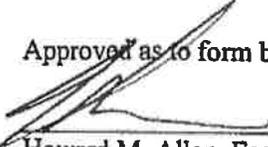
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Michael E. Milne, Esquire  
Dated: \_\_\_\_\_

As Approved by the Brevard County  
Commission on: \_\_\_\_\_

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By: Leonel Masci, President  
Dated: 11/28/18

Approved as to form by:

  
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Howard M. Allen, Esquire

11/28/18  
\_\_\_\_\_

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BOARD OF COUNTY COMMISSIONERS  
OF BREVARD COUNTY, FLORIDA

\_\_\_\_\_  
Scott Ellis, Clerk

Reviewed for legal form:

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By: Chair  
Brevard County Commission

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Michael E. Milne, Esquire  
Dated: \_\_\_\_\_

As Approved by the Brevard County  
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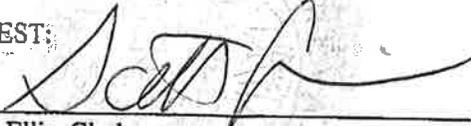
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11-28-2018

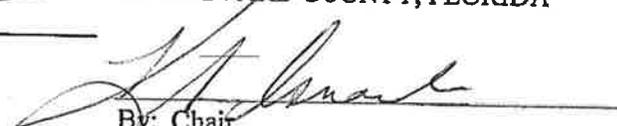
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Scott Ellis, Clerk

BOARD OF COUNTY COMMISSIONERS  
OF BREVARD COUNTY, FLORIDA

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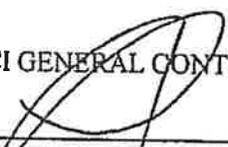
  
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By: Chair  
Brevard County Commission

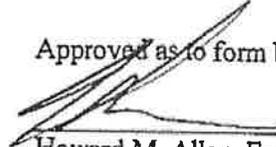
\_\_\_\_\_  
Michael E. Milne, Esquire  
Dated: \_\_\_\_\_

As Approved by the Brevard County  
Commission on: 12/6/18

MASCI GENERAL CONTRACTORS, INC.

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By: Leonel Masci, President  
Dated: 11/28/18

  
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Howard M. Allen, Esquire

11/28/18