



Little River Band of Ottawa Indians
1762 U.S. 31 South
Manistee MI 49660
(231) 723-8288

original
ORIGINAL

Resolution No. #01-0614-01

**Authorizing the Tribal Ogema, or in the absence of, the Tribal Council
Speaker to Execute a Third Amendment to the Design/Build Agreement
with Cunningham-Limp Company**

WHEREAS, the Tribe's status as a federally-recognized Indian tribe was reaffirmed and restored by Congress pursuant to Public Law 103-324, 108 Stat. 2156 (25 U.S.C. §1300k et seq.)(hereinafter "Little River Act"); and

WHEREAS, the Tribe adopted a Constitution, pursuant to a vote of the membership on May 27, 1998, which Constitution became effective upon its approval by the Assistant Secretary-Indian Affairs on July 10, 1998; and

WHEREAS, the Tribe has determined that the development of the permanent casino/resort facilities is in the best, long-term interests of the Tribe and its members; and

WHEREAS, the Tribe has pursuant to Resolution No. #01-0303-02, authorized execution of a Design/Build Agreement, dated March 1, 2001, with Cunningham-Limp Company for design and construction of the Tribe's Permanent Casino/Resort (hereafter the "Agreement"); and

WHEREAS, the Tribe has pursuant to Resolution No. #01-0421-01, authorized execution of a first Amendment to the Agreement, which Amendment increased the Tribe's commitment of funds for additional work by \$4,500,000.00; and

WHEREAS, the Tribe has pursuant to Resolution No. #01-0509-04, authorized execution of a second Amendment to the Agreement, which among other things, prescribed the process by which the Tribe and Cunningham-Limp Company would negotiate adjustments to Milestone Dates for Substantial Completion of work under the Agreement following financial closing; and

WHEREAS, representatives of the Tribe and Cunningham-Limp have negotiated amendments to the Agreement to establish adjusted, Outside Milestone Dates for substantial completion of project portions and agreed to promptly negotiate adjustments in the Milestone Dates for completion of work on the Casino and Hotel facilities following the financial closing scheduled for June 21, 2001; and

WHEREAS, representatives of the Tribe and Cunningham-Limp have negotiated further amendments necessitated by adjustments to the Milestone Dates and to more efficiently administer progress payments and sub-contracting procedures following the financial closing; and

WHEREAS, pursuant to Article IV, Section 5 (a)(4) and Article V, Section 5(a)(3) and (8) of the Tribal Constitution, the Tribal Ogema, or in the absence of, the Tribal Council Speaker, is authorized to represent the Tribe in its relations with other organizations and manage the economic affairs/enterprises of the Tribe, in a manner consistent with the Tribal Constitution and resolutions of the Tribal Council; and

WHEREAS, the Tribal Council, pursuant to Article IV, Section 7 (b) of the Constitution, has the power to authorize and ratify agreements and contracts negotiated by the Tribal Ogema.

NOW THEREFORE IT IS RESOLVED THAT the Tribal Council of the Little River Band of Ottawa Indians hereby authorizes execution of a Third Amendment to the Design/Build Agreement with Cunningham-Limp Company in the form presented on June 14, 2001.


IT IS FURTHER RESOLVED THAT the Tribal Council affirms its agreement to submit disputes arising under the Agreement, as amended, to arbitration in accordance with Section 6 of the Part 1 Agreement; provided that any damages awarded against the Tribe in satisfaction of any arbitration award shall be enforceable solely against the funds or proceeds identified in the limited recourse provisions of Section 6.9 of the Part 1 Agreement, as amended.

IT IS FINALLY RESOLVED that except insofar as the terms of the Agreement are amended or superceded by the expressly terms of this Third Amendment, the terms of the Agreement, together with the First and Second Amendment, are ratified and confirmed.

Certificate of Adoption

This resolution was adopted by the Tribal Council of the Little River Band of Ottawa Indians an Emergency Session of the Tribal Council duly called and held for this purpose at the Little River Band Tribal Council Offices located at 375 River Street in Manistee, Michigan on June 14, 2001 by a vote of 7 in favor, 0 opposed, 2 absent and 0 abstentions. A quorum of the Tribal Council being present for such vote.

Date: 6-14-01



Janine M. Sam, Council Recorder

Attest:



Stephen Parsons, Council Speaker

Distribution: Council Records
Tribal Ogema
Tribal Court
Legal Department
Miller & Schroeder Investments Corp.
Comerica Bank

By my signature, I certify
that this is a true copy
of the Original Resolution.

X _____
Janine M. Sam, Council Recorder

Date: _____

SEAL

THIRD AMENDMENT

The Little River Band of Ottawa Indians ("Owner") and Cunningham-Limp Company, as Design/Builder ("Design/Builder"), agree as follows:

Recitals:

- A. Owner and Design/Builder entered into a design/build contract related to design and construction of a casino and related facilities in Manistee, Michigan (the "Project") dated as of March 28, 2001, which was amended by amendment dated April 21, 2001 and by amendment dated May 10, 2001 (the "Contract").
- B. The parties contemplate that a financial closing will occur on or about June 21, 2001.
- C. The parties wish to further amend the Contract to, among other things, adjust certain retainage provisions, establish revised Milestone Dates, and establish a procedure for adjusting those dates after financial closing, all as provided below.

Agreement:

In consideration of one dollar and other valuable consideration, receipt and sufficiency of which is acknowledged:

1. The Contract is amended as follows:

- a. Section 4.2.1.2 of Part Two of the Contract is amended by restating it in its entirety as follows:

"4.2.1.2 The date upon which the Work shall be sufficiently complete in accordance with the Contract Documents so that the Owner may begin moving gaming-related equipment, including slot and other gaming machines ("Gaming Equipment"), into the gaming area within the casino building, and may commence installing and testing such Gaming Equipment; and may commence moving food preparation and other restaurant furnishings and equipment into food service areas within the casino building (the "Second Milestone Date"). The Second Milestone Date shall be April 30, 2002."
- b. Section 4.2.1.3 of Part Two of the Contract is amended by restating it in its entirety as follows:

“4.2.1.3 The date upon which the Work on the casino and related food service preparation and service areas shall be Substantially Complete in accordance with the Contract Documents (the ("Third Milestone Date")). The Third Milestone Date shall be May 30, 2002.”

- c. Section 4.2.1.4 of Part Two of the Contract is amended by restating it in its entirety as follows:

“4.2.1.4 The date upon which the Work on the hotel and any food preparation and food service areas in the hotel shall be Substantially Complete in accordance with the Contract Documents so that the Owner may open the hotel and related food service businesses for business (the ("Fourth Milestone Date")). The Fourth Milestone Date shall be July 31, 2002.”

- d. Section 4.2.1.6 of Part Two of the Contract is amended by restating it in its entirety as follows:

“4.2.1.6 Design/Builder and Owner recognize that the Second, Third and Fourth Milestone Dates have been adjusted because of the delay in the financial closing for the Project and the related uncertainty as to subcontractor scheduling. Design/Builder will, promptly after the financial closing, determine subcontractor availability and negotiate in good faith with Owner as to advancing the Second, Third and Fourth Milestone Dates, to the extent feasible. The parties agree to execute an amendment of the contract reflecting those adjustments in Milestone Dates (if any) promptly after reaching agreement on such adjustments. There shall be no adjustment to the Guaranteed Maximum Price from such adjustments in Milestone Dates unless Owner’s election to adjust Milestone Dates will result in actual increased Costs; in which case there shall be a mutually agreeable adjustment in Guaranteed Maximum Price based on such actual increased Costs. The First Milestone Date shall exclude completion of the RV Park Pavilion roof.”

- e. Section 4.6 of Part Two of the Contract is amended by restating it in its entirety as follows:

“4.6 **Liquidated Damages.** If the Design\Builder fails to achieve Milestone Completion of the following Project Milestones by the dates indicated below, or fails to achieve Substantial Completion by the time specified in Article 14, subject to extensions of those dates in accordance with the Contract Documents or due to Owner's failure to perform, the

Owner may require the Design\Builder to pay to the Owner, as liquidated damages, (I) as to the Second Milestone Date, (a) the sum of One Thousand Dollars (\$1,000) for each day the Completion Date of any such Project Milestone is delayed past June 15, 2002, up to fifteen days, and (b) the sum of Ten Thousand Dollars (\$10,000) for each succeeding day, after such fifteen days, such Project Milestone is delayed, through and including the ninetieth day after the Second Milestone Date; (II) as to the Third Milestone Date, (a) the sum of One Thousand Dollars (\$1,000) for each day the Completion Date of any such Project Milestone is delayed past June 30, 2002, up to fifteen days, and (b) the sum of Ten Thousand Dollars (\$10,000) for each succeeding day, after such fifteen days, such Project Milestone is delayed, through and including the ninetieth day after the Third Milestone Date; (IV) as to the Fourth Project Milestone, Ten Thousand Dollars (\$10,000) for each day the Completion Date of such Project Milestone is delayed past its Milestone Date; and (III) as to Substantial Completion of the Project, (a) the sum of Five Thousand Dollars (\$5,000) for each day Substantial Completion is delayed past the date specified in Article 14, up to thirty days, and (b) the sum of Ten Thousand Dollars (\$10,000) for each succeeding day Substantial Completion is delayed after such thirty days, through and including the ninetieth day after the date specified in Article 14. It is agreed that the liquidated damages to which the Owner would be entitled under this subsection are a reasonable forecast of just compensation for the harm that would be caused by the Design\Builder's failure to achieve Milestone Completions or Substantial Completion, as the case may be, in accordance with the terms and provisions of the Contract Documents. It is agreed that the harm that would be caused by such failure, which may include, without limitation, loss of expected use of the Project, provision of alternative storage facilities and rescheduling of moving and occupancy dates, is one that is difficult or incapable of accurate estimation."

f. Section 4.6 of Part Two of the Contract is amended by adding the following after Section 4.6.1:

"4.6.2 The date on which liquidated damages shall commence for failure to meet the Milestone Dates shall be reduced, as to each Milestone Date, by the same number of days as the Milestone Date are advanced under Section 4.2.1.6, if any."

f. Section 5.1.9.1 of Part Two of the Contract is amended by restating it in its entirety as follows:

Section 5.1.9.1 of Part Two of the Contract is amended by restating it in its entirety as follows:

5.1.9.1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the work in the schedule of values, less retainage of ten percent (10%) until the Project is fifty percent (50%) complete, and thereafter less retainage of five percent (5%); and provided further that: (a) no retainage shall be withheld for architectural or engineering services; (b) all retainage for earth balancing and parking base material shall be released upon completion and acceptance by Design/Builder, with the approval of the Architect and Lender's Inspecting Architect; (c) all retainage on the cost of procuring structural steel shall be released upon its conforming delivery to the Site and acceptance by Design/Builder, with the approval of the Architect and Lender's Inspecting Architect; and (d) all retainage shall be released to the subcontractors for the RV Park listed on the attached Schedule I upon completion of the RV Park, subject to the approval of the Architect, Lender's Inspecting Architect and any surety, and Owner's reasonable approval. When the Project is fifty percent (50%) complete, based on Project Cost, Design/Builder may request release of up to one-half of the aggregate retainage retained through that date, through disbursements to specified subcontractors, provided that (a) the Work of each such subcontractor shall have been substantially completed, (b) retainage shall continue to be withheld as to each such subcontractor in an amount equal to 150% of the cost, if any, for incomplete Work and unsettled claims; and (c) each disbursement shall be subject to the approval of the Architect, Lender's Inspecting Architect and any surety, and the reasonable approval of the Owner; and provided further that in no event shall aggregate retainage withheld under this Section 5.1.9 for Work performed on the first half of the Project, or under Section 5.1.10 for Work performed by any subcontractor (other than set out in subsections (a) - (d) above), be less than 5% until final payment under Section 5.2.

- g. Section 5.1.10.1 of Part Two of the Contract is amended by restating it in its entirety as follows:

5.1.10.1 Take that portion of the subcontract sum properly allocable to completed Work as determined by multiplying the percentage completion for each portion of the subcontractor's Work by the share of the total subcontract sum allocated to that portion in the subcontractor's schedule of values, less retainage of ten percent (10%) until the Project is fifty percent

(50%) complete, based on Project Cost, and thereafter less retainage of five percent (5%); and provided further that: (a) no retainage shall be withheld for architectural or engineering services; (b) all retainage for earth balancing and parking base material shall be released upon completion and acceptance by Design/Builder, with the approval of the Architect and Lender's Architect and any surety; (c) all retainage on the cost of procuring structural steel shall be released upon its conforming delivery to the Site and acceptance by Design/Builder, with the approval of the Architect and Lender's Inspecting Architect and any surety; and (d) all retainage shall be released to the subcontractors for the RV Park listed on the attached Schedule I upon completion of the RV Park, subject to the approval of the Architect, Lender's Inspecting Architect and any surety, and Owner's reasonable approval. Notwithstanding the foregoing, payment in full shall be made to those subcontractors listed on Exhibit H to the Disbursing Agreement, if any, at such time as the Design\Builder establishes to the reasonable satisfaction of the Owner that the subcontractor has completed its Work, the consent of any surety has been obtained, the subcontract has been fully performed, and the Architect and Lender's Inspecting Architect have approved such Work and all related testing has been completed satisfactorily. Retainage shall also be released to the extent provided in Section 5.1.9.1 after the Project is fifty percent (50%) complete, based on Project Cost.

- h. Section 6.9 of Part One of the Contract is amended by restating it in its entirety as follows:

Damages awarded against the Owner in satisfaction of any enforcement proceedings under this Agreement shall be awarded only from the following: (i) financing provided to the Owner for the construction of the Project, (ii) up to \$14,750,000, plus interest as applicable (reduced by (A) the amount of any purchase orders issued by Owner and agreed to by Design/Builder for acquisition of materials or equipment under Section 3.4 of Part 2, and (B) any amounts previously paid by Owner to Design\Builder under the Part 1 or Part 2, and increased in accordance with Subparagraph 12.1.1 of Part 2 of this Agreement), against cash or cash equivalents of Owner; (iii) all Net Revenues of the Project, as defined in the Management Agreement between Owner and Manistee Gaming LLC dated as of July 15, 1999, as amended, or of any other gaming facility which is operated by or for the Owner, whether or not operated under a management agreement, prior to distribution of such Net Revenues from the Project; and (iv) any applicable insurance policies maintained by Owner with regard to the Project. Damages awarded against the Owner shall not constitute a lien upon or be collectable from any other

income or assets of the Owner, including without limitation funds distributed from the Project to Owner (except as provided in subsection (ii)) or assets purchased with such distributed funds, except with the Owner's written consent. Notwithstanding any other provision of this Agreement, in no event shall Owner's liability for (x) Work performed through June 30, 2001, and any related Design\Builder Fees and Reimbursable Expenses, and (y) for any obligations incurred by Design\Builder prior to June 30, 2001, exceed \$14,750,000, plus interest as applicable (less any purchase orders issued by Owner and agreed to by Design\Builder for acquisition of materials or equipment under Section 3.4 of Part 2 of this Agreement); and, if Owner fails to close on financing for the Project by June 30, 2001 and Owner thereafter terminates this Agreement within 10 days after that date, its aggregate liability on account of such termination shall not exceed \$14,750,000, plus interest as applicable (less any purchase orders issued by Owner for acquisition of materials or equipment under Section 3.4 of Part 2 of this Agreement), or if such date is extended in accordance with Article 12 of Part 2, as provided in such Article. Design\Builder shall not be obligated to incur obligations to perform Work on the Project aggregating in excess of \$14,750,000 prior to the earlier of financial closing or June 30, 2001, or if such date is extended in accordance with Article 12 of Part 2, in the amount provided in such Article.

- i. Section 13.1.1 of Part Two of the Contract is amended by restating the first sentence thereof as follows:

"13.1.1 For the Design/Builder's performance of the Work, as described in Paragraph 3.2 and including any other services listed in Article 14 as part of Basic Services, the Owner shall pay the Design/Builder in current funds the lesser of (a) the sum of the actual Cost of the Work (not including the unused contingency), the cost of materials purchased pursuant to Paragraph 3.4 and the Design\Builder's Fee, as defined below, or (b) the Guaranteed Maximum Price, adjusted in accordance with this Agreement. In addition, Owner shall pay; an incentive payment (the "Incentive Fee") equal to fifty percent (50%) of the Project Savings, provided that the Incentive Fee shall be reduced by one percent (1%) of the Project Savings for each day that **either** the Second Milestone Date is delayed after April 30, 2002 or the Third Milestone Date is delayed after May 31, 2002 **or** the Fourth Milestone Date is delayed after July 31, 2002 (in each case as advanced pursuant to Section 4.2.1.6, if any)."

- j. Section 14.1 of Part Two of the Contract is amended by restating it in its entirety as follows:

“14.1 The Design/Builder has commenced Basic Services as to preliminary Work under Section 2.10, and shall commence all other Work, as directed by the Owner, but no later than June 30, 2001 (subject to extension in accordance with Sections 2.10.2 and 12.3 of this Agreement); and, subject to authorized adjustments and to delays not caused by the Design/Builder, Substantial Completion of the Project shall be achieved no later than July 31, 2002 (as the Fourth Milestone Date may be extended pursuant to Section 4.2.1.6, if any).”

2. Except as expressly modified by this Second Amendment, the Contract is ratified and confirmed and remains in full force and effect.

Dated: June , 2001

Little River Band of Ottawa Indians

By: _____
Its:

Cunningham-Limp Company

By: _____
Its:

Schedule I
 Little River Band of Ottawa Indians - Main Casino Project
 RV Park Subcontractors Eligible for Retention Release

Subcontractor	Type of Improvement
Reith - Riley	Foundations, Interior
	Concrete
D a v e n p o r t	Masonry
Masonry	
Lutz Roofing	Roofing
Bob's Glass	Glass
Bouma	Carpentry
Gilford Trim	Carpentry
J.W. Kraus	Painting
A . B . I .	HVAC/Plumbing
Mechanical	
A d v a n t a g e	Electrical
Electric	
E d w a r d s	Landscaping
Landscaping	
N o r t h w e s t	Cabinetry
Industries	
C a r p e t	Carpet
Workroom	
Beaver Tile	Tile