

RESOLUTION NO. 21-125

**A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, AWARDED THE BID OF CHARLEY TOPPINO & SONS, INC. IN RESPONSE TO INVITATION TO BID (ITB) NO. 21-007 FOR GENERAL UTILITIES & INFRASTRUCTURE SERVICES; AUTHORIZING THE (INTERIM) CITY MANAGER TO NEGOTIATE AND EXECUTE A CONTRACT UPON ADVICE OF THE CITY ATTORNEY; PROVIDING THAT WORK ORDERS SHALL COMPLY WITH PROCUREMENT GUIDELINES; PROVIDING FOR AN EFFECTIVE DATE**

WHEREAS, the City issued an Invitation to Bid for firms capable of providing general utilities and infrastructure construction-related services on a unit price indefinite delivery/indefinite quantity (IDIQ) basis for engineering, utilities and port and marine departments; and

WHEREAS, one firm submitted a response on May 12, 2021, and city staff reviewed the response, and determined it to be responsive and responsible, and recommends that the City approve the bid on a Task Order basis.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, AS FOLLOWS:

Section 1: That an award of bid, based upon the response to ITB #21-007 for general utilities and infrastructure services submitted by Charley Toppino & Sons, Inc. is hereby approved.

Section 2: That the (Interim) City Manager is hereby authorized to negotiate and execute a contract in substantial conformance with the bid documents, upon advice and consent of the City Attorney, for a term of three (3) years, with an extension of up to two years, inclusive of a yearly CPI adjustment.

Section 3: Specific work orders issued pursuant to the contract shall comply with the City's procurement guidelines.

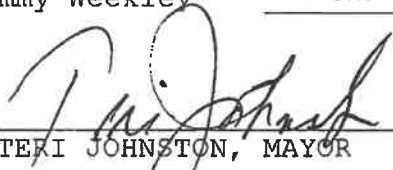
Section 4: That this Resolution shall go into effect immediately upon its passage and adoption and authentication by the signature of the Presiding Officer and the Clerk of the Commission.

Passed and adopted by the City Commission at a meeting held  
this 15th day of June, 2021.

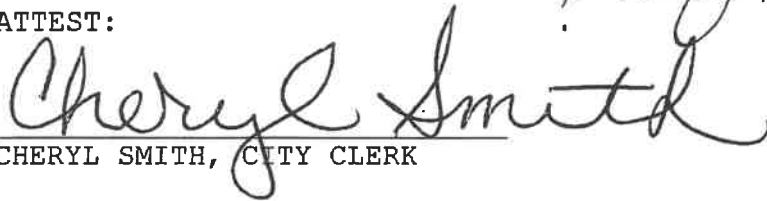
Authenticated by the Presiding Officer and Clerk of the  
Commission on 16th day of June, 2021.

Filed with the Clerk on June 16, 2021.

Mayor Teri Johnston	<u>Yes</u>
Vice Mayor Sam Kaufman	<u>Yes</u>
Commissioner Gregory Davila	<u>Yes</u>
Commissioner Mary Lou Hoover	<u>Yes</u>
Commissioner Clayton Lopez	<u>Yes</u>
Commissioner Billy Wardlow	<u>Yes</u>
Commissioner Jimmy Weekley	<u>Absent</u>

  
TERI JOHNSTON, MAYOR

ATTEST:

  
CHERYL SMITH, CITY CLERK



THE CITY OF KEY WEST

Post Office Box 1409 Key West, FL 33041-1409 (305) 809-3700

MEMORANDUM

**TO:** Patti McLaughlin, Interim City Manager

**Cc:** Todd Stoughton, Interim Asst. City Manager

**FROM:** John Paul Castro, Utilities Director

**DATE:** June 1, 2021

**SUBJECT:** Awarding the General Utilities & Infrastructure Services Contract to Charley Toppino & Son's, Inc.

**Action statement:**

Staff is requesting the City Commission award the general utilities and infrastructure services contract to Charley Toppino and Sons, Inc. (CTS) in response to ITB 21-007. The initial term is 3 years and is a unit price indefinite quantities contract.

**Background:**

The City has maintained general utility contracts for nearly 15 years. The indefinite delivery indefinite quantity (IDIQ) contracts are imperative to timely project implementation for the engineering, utilities, and port & marine departments.

Having an IDIQ contract in place allows the departments to task the contractor for specific efforts while knowing the unit price of each labor category and piece of equipment. This process eliminates timely and costly bid document package and advertising efforts.

**Purpose and Justification:**

The general utilities services contract was changed to add infrastructure unit prices in areas city staff has needed quick task orders in the past but has not been able to utilize the contract due to its specific nature. The infrastructure unit will allow staff to use the contract for task orders that fall outside of general utility work.

Staff also included FEMA and State of Florida contract guidelines into ITB 21-007. The inclusion of those of particular contract sections will allow staff to utilize the contract for both FEMA declared emergencies and FEMA and State funded grant projects.

The initial contract is for 3 years with an additional 2-year extension. A yearly CPI adjustment is available to the contractor.

*Key to the Caribbean - Average yearly temperature 77° F.*

Charley Toppino & Sons, Inc. was the only respondent to ITB 21-007. The unit pricing submitted is fair and reasonable with respect to the individual categories with the ITB. CTS is the largest civil contractor in the Florida Keys with decades of satisfactory projects completed for the City of Key West. The bid package was completely responsive.

**Financial Impact:**

There is no financial impact from awarding this ongoing contract.

**Options:**

1. The City Commission can award the contract to Charley Toppino & Son's, Inc. for 3 years.
2. The City Commission can decline to award the contract to Charley Toppino & Son's, Inc. This would create additional bid packages and advertising of bids for all utility and infrastructure jobs. This option would cause more staff time and money with no guarantee of better pricing or quality of work.

**Recommendation:**

Staff recommends that the City Commission select option 1, awarding the general utilities and infrastructure services contract to Charley Toppino & Son's, Inc.

AGREEMENT

between

CITY OF KEY WEST, FLORIDA

and

CHARLEY TOPPINO & SONS, INC.

for

GENERAL UTILITIES SERVICES

APRIL 2021

This is an Agreement between: CITY OF KEY WEST, FLORIDA, a municipal corporation, its successors and assigns, hereinafter referred to as "CITY," and CHARLEY TOPPINO & SONS, INC., a corporation organized under the laws of the State of Florida, authorized to conduct business in the State of Florida, its successors and assigns, hereinafter referred to as "CONTRACTOR".

WITNESSETH, in consideration of the mutual terms and conditions, promises, covenants and payments hereinafter set forth, CITY and CONTRACTOR agree as follows:

## ARTICLE 1

### DEFINITIONS AND IDENTIFICATIONS

For the purposes of this Agreement and the various covenants, conditions, terms and provisions which follow, the definitions and identifications set forth below are assumed to be true and correct and are agreed upon by the parties.

- 1.1. Agreement: This document, Articles 1 through 7, inclusive. Other terms and conditions are included in the CITY's ITB 21-007, CONTRACTOR's Response to ITB, dated April 2021, exhibits, task orders, and supplemental documents that are by this provision expressly incorporated herein by reference.
- 1.2. Commissioners: Members of the city commission with all legislative powers of the city vested therein. The city commission shall consist of seven (7) commissioners, six (6) of whom shall be elected from single member districts numbered I, II, III, IV, V and VI. The mayor shall be elected by the people at large for a term of two (2) years. Commissioners from districts numbered I, II, III, IV, V and VI shall be elected for a term of four (4) years.
- 1.3. Contract Administrator: The ranking managerial employee of the CITY or some other employee expressly designated as Contract Administrator by the City Manager, who is the representative of the CITY. In the administration of this Agreement, as contrasted with matters of policy, all parties may rely upon instructions or determinations made by the Contract Administrator; provided, however, that such instructions and determinations do not change the Scope of Services.
- 1.4. Contract Completion: The "Contract Completion" is the date the CITY accepts the entire work as being in compliance with the Task Order, or formally waives nonconforming work to extent of nonconformity, and issues the final payment in accordance with the requirements set forth in Article 5, "Compensation and Method of Payment" of this Agreement.
- 1.5. CONTRACTOR: The firm selected to perform the services pursuant to this Agreement.

- 1.6. CITY: City of Key West.
- 1.7. Days: Unless otherwise specifically stated, the term "days" will be understood to mean calendar days. Business day or working day means any day other than Saturday, Sunday, or legal holiday.
- 1.8. Notice: The term "notice" or the requirement to notify, as used in the Agreement or applicable state or federal statutes, shall signify a written communication delivered in person or by registered mail to the individual, or to a member of the firm, or to an officer of the corporation for whom it is intended. Certified or registered mail shall be addressed to the last business address known to him who gives the notice.
- 1.9. Notice to Proceed: A written notice given by the CITY to the CONTRACTOR fixing the date on which the Task Order time will commence to run and on which the CONTRACTOR shall start to perform his obligation under the Task Order.
- 1.10. Or Equal: The term "or equal" shall be understood to indicate that the "equal" product is equivalent to or better than the product named in function, performance, reliability, quality aesthetics, and general configuration. Determination of equality in reference to the project design requirements will be made by the CITY. Such equal products shall not be purchased or installed by the CONTRACTOR without written authorization.
- 1.11. Specifications: The term "Specifications" refers to those portion of the Task Order consisting of written technical descriptions of materials, equipment, construction systems, standards, and workmanship, as applied to the work and certain administrative details applicable thereto. Where standard specifications, such as those of ASTM, AASHTO, etc., have been referred to, the applicable portions of such standard specifications shall become a part of this Agreement.
- 1.12. Substantial Completion: "Substantial Completion" shall be that degree of completion of the project or a defined portion of the project, as evidenced by the CITY's written notice of Substantial Completion, the full-time use of the project or defined portion of the project for the purposes for which it was intended. "Substantial Completion" of an operating facility shall be that degree of completion that has provided a minimum of 7 continuous days of successful, trouble-free operation, which period shall begin after all performance and acceptance testing has been successfully demonstrated to the CITY. All equipment contained in the work, plus all other components necessary to enable the CITY to operate the facility in a manner that was intended, shall be complete on the substantial completion date.
- 1.13. Task Order: A detailed description of a particular service or services to be performed by CONTRACTOR under this Agreement.

1.14. Work: The word "work" within this Agreement shall include all material, labor, tools, and



all appliances, machinery, transportation, and appurtenances necessary to perform and complete the Task Order, and such additional items not specifically indicated or described which can be reasonably inferred as belonging to the item described or indicated and as required by good practice to provide a complete and satisfactory system or structure. As used herein, "provide" shall be understood to mean "furnish and install, complete in-place."

## **ARTICLE 2**

### **PREAMBLE**

In order to establish the background, context and frame of reference for this Agreement and generally to express the objectives and intentions of the respective parties hereto, the following statements, representations and explanations shall be accepted as predicates for the undertakings and commitments included within the provisions which follow and may be relied upon by the parties as essential elements of the mutual considerations upon which this Agreement is based.

- 2.1. The CONTRACTOR is not entitled to receive, and the CITY is not obligated to pay, any fees or expenses in excess of the amount budgeted for Task Orders authorized under this Agreement in each fiscal year (October 1-September 30) by CITY. The budgeted amount may only be modified per City Ordinance(s).
- 2.2. The CITY has met the requirements, as set forth in Section 255.20, Florida Statutes, and has selected CONTRACTOR to perform the services hereunder based on the ITB 21-007 incorporated by reference and made a part hereof and the Response to the ITB from CONTRACTOR dated January 21, 2021, incorporated by reference and made part of.
- 2.3. Negotiations pertaining to the services to be performed by CONTRACTOR were undertaken between CONTRACTOR and staff selected by the Commission, and this Agreement incorporates the results of such negotiations.

## **ARTICLE 3**

### **SCOPE OF SERVICES AND STANDARD OF CARE**

- 3.1. CONTRACTOR's services may include but are not limited to the following in regard to the Agreement:
  - A. Indefinite quantities for needed construction and repairs. The project contemplated consists of items of work required for the repair and replacement of storm and sanitary sewer systems, paving, sidewalks and other miscellaneous municipal work.
  - B. CONTRACTOR shall provide all necessary, incidental and related activities and services as required.
- 3.2. CONTRACTOR and CITY acknowledge that the Scope of Services does not delineate every detail and minor work task required to be performed by CONTRACTOR to complete

any particular task order. If, during the course of the performance of the services included in this Agreement, CONTRACTOR determines that work should be performed to complete the Task Order which is, in the CONTRACTOR's opinion, outside the level of effort originally anticipated, whether or not the Scope of Services identifies the work items, CONTRACTOR shall notify Contract Administrator in writing in a timely manner before proceeding with the work. If CONTRACTOR proceeds with such work without notifying the Contract Administrator, the work shall be deemed to be within the original level of effort, whether or not specifically addressed in the Scope of Services. Notice to Contract Administrator does not constitute authorization or approval by CITY to perform the work. Performance of work by CONTRACTOR outside the originally anticipated level of effort without prior written CITY approval or modification of task order is at CONTRACTOR's sole risk.

3.3. The specific services to be provided by the CONTRACTOR and the compensation for such services shall be as mutually agreed to in separate Task Orders to this AGREEMENT. Each Task Order when fully executed shall become a supplement to and a part of this AGREEMENT.

3.3.1. Each Task Order shall be supported by appropriate cost and pricing data and such other documentation as required by the CITY.

3.3.2. Task Orders shall be numbered consecutively as specified by CITY. Each Task Order shall include a description of the scope of services and specified deliverables, time of completion, total estimated costs of services, and method of compensation. Additional information shall be provided to the CITY if required. Amended Task Orders shall include substantially the same information and be submitted to the CITY for approval.

3.3.3. The CITY may make or approve changes within the general Scope of Services in any Task Order. If such changes affect the CONTRACTOR's materials cost or time required for performance of the services, an equitable adjustment shall be made through an amendment to the Task Order.

3.3.4. A Task Order may be terminated at any time, with or without cause, by the CITY upon written notice to CONTRACTOR. CONTRACTOR shall perform no further work upon receipt of this notice unless specifically authorized by the City Manager of the City of Key West. On termination, the CONTRACTOR shall be paid for all authorized services performed up to the termination date plus, if terminated for the convenience of the CITY, reasonable expenses incurred during the close-out of the Task Order. The CITY shall not pay for anticipatory profits. The termination of this Agreement pursuant to Paragraph 7.2, hereof, shall constitute the termination of any and all outstanding task orders.

3.3.5. The CONTRACTOR shall begin services under any Task Order when authorized

by a Purchase Order issued by the CITY and delivered to CONTRACTOR.

- 3.3.6. The CITY and CONTRACTOR may negotiate additional scopes of services, compensation, time and material costs, and other related matters for each Task Order as allowed by this Agreement. If CITY and CONTRACTOR cannot contractually agree, CITY shall have the right to immediately terminate negotiations at no cost to CITY and procure services from another source.
- 3.3.7. CONTRACTOR shall perform services under this Agreement in accordance with professional industry standards at the time and place where the services are provided. In the event CONTRACTOR does not achieve a competent workmanship standard, CONTRACTOR will correct such work, deficiency, or damage.
- 3.3.8. CONTRACTOR is required to perform the task orders consistent with current applicable Federal, State and City laws, codes and regulations that pertain to the Task Order. In all task orders, where changes to any laws, codes or regulations affecting the Task Order have a Task Ordered effective date or are anticipated to be effective at a future date, or if knowledge of anticipated changes is available to CONTRACTOR or any subcontractor, CONTRACTOR shall present options for their use or implementation.
- 3.3.9. CONTRACTOR shall examine and become familiar with the Task Order and determine the nature and location of the Work, the general and local conditions, and all other matters which can in any way affect the Work. Failure to make an examination necessary for this determination shall not release the CONTRACTOR from obligation of the Task Order. No verbal agreement or conversation with any officer, agent, or employee of the CITY shall affect or modify any of the terms or obligation herein contained.

#### **ARTICLE 4**

#### **TERM OF AGREEMENT; TIME FOR PERFORMANCE; CONTRACTOR DAMAGES**

The term of this Agreement shall be for a period of three (3) years from the effective date of the Agreement with the CITY having the option of one (1) two (2) year renewal. The Agreement will be in effect upon execution by both parties. The Agreement may be renewed at the discretion of the CITY.

- 4.1. CONTRACTOR shall perform the services described in each Task Order within the time periods specified. Each such time period shall commence from the date of the purchase order issued for such services.
- 4.2. CONTRACTOR must receive written approval from the Contract Administrator prior to

beginning the performance of services in any subsequent task order. Prior to granting approval for CONTRACTOR to proceed to a subsequent task order, the Contract Administrator may, at his or her sole option, require CONTRACTOR to submit any deliverables/documents for the Contract Administrator's review.

- 4.3. In the event CONTRACTOR is unable to complete the above services because of delays by CITY or other governmental authorities having jurisdiction over the Task Order, and such delays are not the fault of CONTRACTOR, or because of delays which were caused by factors outside the control of CONTRACTOR, CITY shall grant a reasonable extension of time for completion of the services and shall provide reasonable compensation, if appropriate. It shall be the responsibility of CONTRACTOR to notify CITY within 10 days in writing whenever a delay in approval by a governmental agency, including CITY, is anticipated or experienced, and to inform the Contract Administrator of all facts and details related to the delay.
- 4.4. In the event the CONTRACTOR fails to substantially complete the Task Order on or before the Substantial Completion date specified in its agreement with CITY, or if CONTRACTOR is granted an extension of time beyond said Substantial Completion date, and CONTRACTOR's services are extended beyond the Substantial Completion date,
- 4.5. through no fault of CONTRACTOR, CONTRACTOR shall be compensated in accordance with Article 5 for all services rendered by CONTRACTOR beyond the Substantial Completion date.
- 4.6. In the event CONTRACTOR fails to substantially complete the Task Order on or before the Substantial Completion date specified in its agreement with CITY, and the failure to substantially complete is caused in whole or in part by a negligent act, error or deficiency of CONTRACTOR, then CONTRACTOR shall pay to CITY its proportional share of any claim for damages arising out of the delay. This provision shall not affect the rights and obligations of either party as set forth in Paragraph 7.8, INDEMNIFICATION OF CITY.

## ARTICLE 5

### COMPENSATION AND METHOD OF PAYMENT

#### **5.1. AMOUNT AND METHOD OF COMPENSATION FOR CONTRACT WORK**

- 5.1.1. For performing the Work of this Agreement as set forth in any Task Order, the CITY shall compensate the CONTRACTOR an amount not to exceed the Task Order amount set forth in such Task Order.
- 5.1.2. Unless otherwise agreed upon by the parties, the rates set forth in the proposal ITB 21-007 Unit Price Items Bid Form shall be used to set the compensation amount of a Task

Order for one or more of the following purposes:

- 5.1.2.1 Payment method based on unit prices shall be the basis for determining unit costs for particular Task Order(s), which the CITY shall pay the CONTRACTOR upon completion and acceptance of such Task Order;
- 5.1.2.2 Payment method basis for determining a lump sum amount, which the CITY shall pay the CONTRACTOR upon completion and acceptance of the Task Order shall be substantiated by documentation with an itemized breakdown of Contractor costs, including labor, material, rentals, approved services, overhead and profit; or
- 5.1.2.3 Payment method for cost reimbursement compensation shall be understood to mean that payment for work will be made on a time and expense basis, which the CITY shall pay the CONTRACTOR for employment forces time, material, equipment, and other items of costs as required and used to do the work in the Task Order.

To receive partial payments and final payment for cost reimbursement work, the CONTRACTOR shall submit detailed and complete documentation verification of the CONTRACTOR's actual costs involved in the cost reimbursement work. Such costs shall be submitted within 30 days after said work has been performed.

- 5.1.2.4 The CITY reserves the right to furnish such materials and equipment as deemed expedient, and the CONTRACTOR shall have no claim for profit or added fees on the cost of such materials and equipment.
- 5.1.3. All rates must be set forth on the proposal ITB 21-007 Unit Price Items Bid Form and shall be inclusive of all material, labor, machinery, transportation, associated benefits, overhead, profit, and appurtenances necessary to perform and complete the Task Order, and such additional items not specifically indicated or described which can be reasonably inferred as belonging to the item described or indicated and as required by good practice to provide a complete and satisfactory system or structure. Any work, materials, or equipment that may reasonably be inferred from the Task Order as being required to produce the intended result shall be supplied whether or not specifically called for. The term "provide" shall be understood to mean "furnish, and install, complete in-place."
- 5.1.4. CONTRACTOR unit prices stated in the proposal ITB 21-007 Unit Price Items Bid Form shall be valid for three years, and for an additional two years unit prices shall be as in the proposal plus a CPI increase.
- 5.1.5. In the event of a change of scope, the CITY, without notice to the Sureties and without invalidating the Agreement, may order changes in the work within the general scope of the

task order by altering, adding to, or deducting from the work, the Task Order being adjusted accordingly. The CITY shall authorize in writing an appropriate decrease or increase in compensation. Quotations for alterations to the work shall include substantiating documentation with an itemized breakdown of Contractor costs, including labor, material, rentals, approved services, overhead and profit. All work shall be executed under the conditions of the original Task Order, except as specifically adjusted at the time of ordering such change.

If the work is reduced by alteration, such action shall not constitute a claim for damages based on loss of anticipated profits.

- 5.1.6. CONTRACTOR shall submit rates and other actual unit costs supporting the invoicing with certification stating work covered by invoice has been completed in accordance with Contract Documents, that all amounts are accurate and current.
- 5.1.7. A budgetary amount will be established for each Task Order. This budgetary amount shall not be exceeded unless prior written approval is provided by the CITY. CONTRACTOR shall make reasonable efforts to complete the work within the budget and keep CITY informed of progress toward that end so that the budget or work effort may be adjusted if necessary.
- 5.1.8. CONTRACTOR is not obligated to incur costs beyond the indicated budgets, as may be adjusted, nor is the CITY obligated to pay CONTRACTOR beyond these limits.
- 5.1.9. When any budget has been increased, CONTRACTOR's excess costs expended prior to such increase will be allowable to the same extent as if such costs had been incurred after the approval increase.
- 5.1.10. Nothing in this Article shall be construed to affect the right, hereby reserved, to reject the whole or any part of the aforesaid work, should such work be later found not to comply with the Task Order. All estimated quantities of work for which partial payments have been made are subject to review and correction on the final estimate. Payment by the CITY and acceptance by the CONTRACTOR of partial payments based on estimates of quantities of work performed shall not, in any way, constitute acceptance of the estimated quantities used as a basis for computing the amounts of the partial payments.
- 5.1.11. At least 30 days before each progress payment falls due, the CONTRACTOR shall submit to the CITY a detailed estimate of the amount earned during the preceding month for the separate portions of the work, and request payment. The words "amount earned" means the value, on the date of the estimate partial payment, of the work completed in accordance with a task order, and the value of approved materials delivered to the project site suitable stored and protected prior to incorporation into the work. Monthly invoicing will be based on an estimate of the percent of work completed at the end of the preceding month.

Owner may return the request to Contractor indicating in writing reasons for refusing to make payment. CONTRACTOR may, within 7 days, make the necessary corrections and resubmit the request.

Refusal to make payment may be because of subsequently discovered evidence or the results of subsequent inspections or tests, nullify any such payment previously recommended to such an extent as may be necessary to protect the CITY from loss because:

1. The work is defective, or completed work has been damaged requiring correction or replacement;
2. Written claims have been made against CITY or Liens have been filed in connection with the work;
3. The Contract Price has been reduced because of Change Orders;
4. CITY has been required to correct defective work or complete the work in accordance with Article 7;
5. Of CONTRACTOR's unsatisfactory prosecution of the work in accordance with the Task Order; or
6. CONTRACTOR's failure to make payment to Subcontractors or for labor, materials, or equipment.

5.1.12. The CITY will deduct from the estimate, and retain as part security, 10 percent of the amount earned for work satisfactorily completed. A deduction and retainage of 10 percent will be made on the estimated amount earned for approved items of material delivered to and properly stored at the jobsite but not incorporated into the work. When the work is 50 percent complete, the CITY may reduce the retainage to 5 percent of the dollar value of all work satisfactorily completed to date provided the CONTRACTOR is making satisfactory progress and there is no specific cause for greater retainage. The CITY may reinstate the retainage up to 10 percent if the CITY determines that the CONTRACTOR is not making satisfactory progress or where there is other specific cause for such withholding.

5.1.13. Qualification for partial payment for materials delivered by not yet incorporated into the work shall be described below:

1. Materials, as used herein, shall be considered to be those items which are fabricated and manufactured material and equipment. No consideration shall be given to individual purchases of less than \$200 for any one item.
2. To receive partial payment for materials delivered to the site, but not incorporated in the work, it shall be necessary for the CONTRACTOR to include a list of such materials on the Partial Payment Request. The CITY may approve items for which partial payment is to be made. Partial payment shall be based on the CONTRACTOR's actual cost for the materials as evidenced by invoices from the supplier. Proper storage and protection shall be provided by the CONTRACTOR,

and as approved by the CITY. Final payment shall be made only for materials actually incorporated in the work and, upon acceptance of the work, all materials remaining for which advance payments had been made shall revert to the CONTRACTOR, unless otherwise agreed, and partial payments made for these items shall be deducted from the final payment for the work.

3. CONTRACTOR warrants and guarantees that title to all work, materials, and equipment covered by any Application for Payment, whether incorporated in the project or not, will pass to CITY at the time of payment free and clear of all liens, claims, security interests, and encumbrances.
  4. If requested by the CITY, the CONTRACTOR shall provide, with subsequent pay requests, invoices receipted by the supplier showing payment in full has been made.
- 5.1.14. After deducting the retainage and the amount of all previous partial payments made to the CONTRACTOR from the amount earned, the amount due will be made payable to the CONTRACTOR.
- 5.1.15. In any case where the CONTRACTOR deems additional time or compensation will become due him under this Agreement for circumstances other than those defined in Article 7, the CONTRACTOR shall notify the CITY, in writing, of his intention to make claim for such time or compensation before he begins the work on which he bases the claim, in order that such matters may be settled, if possible, or other appropriate action taken. The notice of claim shall be in writing and shall state the circumstances and the reasons for the claim, but not state the amount. If such notification is not given or if the CITY is not afforded proper facilities by the CONTRACTOR for keeping strict account of actual cost, then the CONTRACTOR hereby agrees to waive the claim for such additional time or compensation. Such notice by the CONTRACTOR, and fact that the CITY has kept account of the cost as aforesaid, shall not in any way be construed as proving the validity of the claim.

No extension of time will be granted to the CONTRACTOR for delays resulting from extra work that have no measurable impact on the completion of the total Work under a Task Order. Claims for additional time or compensation shall be made in itemized detail and submitted, in writing, to the CITY within 10 days following completion of that portion of the work for which the CONTRACTOR bases his claim. Failure to make the claim for additional compensation in the manner and within the time specified above shall constitute waiver of that claim. In case the claim is found to be just, it shall be allowed and paid for as provided in paragraph 5.3.7.

- 5.1.16. The CONTRACTOR shall indemnify and hold harmless the CITY from all claims for labor and materials furnished under this Agreement. Prior to the final payment,



the CONTRACTOR shall furnish to the CITY, as part of his final payment request, a certification that all of the CONTRACTOR's obligations on the project have been satisfied and that all monetary claims and indebtedness have been paid. The CONTRACTOR shall furnish complete and legal effective releases or waivers, satisfactory to the CITY, of all liens arising out of or filed in connection with the work.

- 5.1.17. Upon completion of all the work under a Task Order, the CONTRACTOR shall notify the CITY, in writing, that he has completed his part of the Task Order and shall request final payment. Upon receipt of such notice the CITY will inspect and, if acceptable as to the completed work and the final estimate of the amount due to the CONTRACTOR, and compliance by the CONTRACTOR with provisions regarding release of liens or claims, and other provisions as may be applicable, the CITY shall pay the CONTRACTOR all monies due him under the provisions of the Task Order.
- 5.1.18. Neither the inspection by the CITY, nor any order by the CITY for payment of money, nor any payment for, or acceptance of, the whole or any part of the work by the CITY, nor any extension of time, nor any possession taken by the CITY or its employees, shall operate as a waiver of any provision of this Agreement, or any power herein reserved to the CITY, or any right to damages herein provided, nor shall any waiver of any breach in this Agreement be held to be a waiver of any other or subsequent breach. Acceptance or final payment shall not be final and conclusive with regards to latent defects, fraud, or such gross mistakes as may amount to fraud, or as regards the CITY's rights under the warranty.
- 5.1.19. The acceptance by the CONTRACTOR of the final payment shall release the CITY from all claims and all liability to the CONTRACTOR for all things done or furnished in connection with the work, and every act of the CITY and others relating to or arising out of the work except claims previously made in writing and still unsettled. No payment, however, final or otherwise, shall operate to release the CONTRACTOR or his Sureties from obligations under this Agreement and the Performance Bond, Payment Bond, and other bonds and warranties, as herein provided.

## **5.2. METHOD OF BILLING**

### **5.2.1. Lump Sum or Unit Cost Compensation**

CONTRACTOR shall submit invoicing that identifies the Task Order number or project name on a monthly basis in a timely manner. Invoices shall identify the nature of the work performed and estimate percent of work accomplished, show expenditure of personnel and equipment hours and material quantities and units' costs, and a summary of previous invoice costs. Invoices shall itemize and

summarize all work performed by total quantity and unit cost for each item of work performed.

- 5.2.2. If requested, CONTRACTOR shall provide copies of past paid invoices to any subcontractor prior to receiving payment. CITY reserves the right to pay any subcontractor if CONTRACTOR has not paid them timely and the services of the subcontractor are necessary to complete the Task Order or any Task Order.

### 5.3 METHOD OF PAYMENT

- 5.3.1 CITY shall pay CONTRACTOR within forty-five (45) calendar days from receipt of CONTRACTOR's proper invoice with documentation as provided above.

- 5.3.2 In the event CONTRACTOR has utilized a Subcontractor in order to perform the Task Order, CONTRACTOR will be required to provide documentation that subcontractor has been paid prior to payment being made to CONTRACTOR.

- 5.3.3 Upon completion of all the work under a Task Order, CONTRACTOR shall notify the CITY, in writing, that he has completed the Task Order, furnish release of liens or claims, and request final payment. Upon receipt of notice, the CITY shall inspect the completed work and final estimate of the amount due the CONTRACTOR and if acceptable, the CITY shall pay to the CONTRACTOR all monies due him under for the Task Order.

- 5.3.4 Payment will be made to CONTRACTOR at:

CHARLEY TOPPINO & SONS, INC.

Company address: PO BOX 787, KEY WEST, FL 33041

- 5.3.5 Neither the inspection nor any order by the CITY for payment for money, nor any payment for, or acceptance of, the whole or any part of the work by the CITY, nor any extension for time, nor any possession taken by the CITY, shall operate as a waiver of any provision of the Task Order, or any power herein reserved to the CITY, or any right to damages herein provide, nor shall any waiver of any breach in this Agreement be held to be a waiver of any other or subsequent breach. Acceptance or final payment shall not be final and conclusive with regards to latent defects, fraud, or such gross mistakes as may amount to fraud, or as regards to the CITY's rights under the warranty.

- 5.3.6 The acceptance by the CONTRACTOR of the final payment shall release the CITY from all claims and all liability to the CONTRACTOR for all things done or furnished

in connection with the work, and every act of the CITY and others relating to or arising out of the work except claims previously made in writing and still unsettled. No payment, however, final or otherwise, shall operate to release the CONTRACTOR or his Sureties from obligations under this Agreement and warranties, as herein provided.

- 5.3.7 The CITY's request for quotations on alterations to the work shall not be considered authorization to proceed with the work prior to issuance of a formal Change order, nor shall such request justify any delay in existing work. Quotations for alterations to the work shall include substantiating documentation with an itemized breakdown of CONTRACTOR and Subcontractor costs, including labor, material, rentals, approved services, overhead, and profit. CITY may require detailed cost data in order to substantiate the reasonableness of the proposed costs.

Any compensation paid in conjunction with the terms of a Change Order shall comprise total compensation due the CONTRACTOR for the work or alteration defined in the Change Order. By signing the Change Order, the CONTRACTOR acknowledges that the stipulated compensation includes payment for the work or alteration plus all payment for the interruption of schedules, extended overhead, delay, or any other impact claim or ripple effect, and by such signing specifically waives any reservation or claim for additional compensation in respect to the subject Change Order.

At the CITY's option, payment or credit for any alterations covered by a Change Order shall be determined by one or a combination of the methods set forth in A, B, or C below, as applicable:

**A. UNIT PRICES**

Those unit prices stipulated in the proposal ITB 21-007 Unit Price Items Bid Form shall be utilized where they are applicable. In the event the Change Order results in a change in the original quantity that is materially and significantly different from the original bid quantity, a new unit price shall be negotiated upon demand of either party. Unit prices for new items included in the Change Order shall be negotiated and mutually agreed upon.

**B. LUMPSUM**

A total lump sum for the work negotiated and mutually acceptable to the CONTRACTOR and the CITY.

Lump sum quotations for modifications to the work shall include substantiating documentation with an itemized breakdown of CONTRACTOR and Subcontractor costs, including labor, material, rentals, approved services, overhead, and profit, all calculated as specified under "C" below.

**C. COST REIMBURSEMENT WORK**

The term "cost reimbursement" shall be understood to mean that payment for the work will be made on a time and expense basis, that is, on an accounting of the CONTRACTOR's forces, materials, equipment, and other items of cost as required and used to do the work.

If the method of payment cannot be agreed upon prior to the beginning of the work, and the CITY directs by written Change Order that the work be done on a cost reimbursement basis, then the CONTRACTOR shall furnish labor, and furnish and install equipment and materials necessary to complete the work in a satisfactory manner and within a reasonable period of time. For the work performed, payment will be made for the documented actual cost of the following:

1. Labor including foremen for those hours they are assigned and participating in the cost reimbursement work (actual payroll cost, including wages, fringe benefits as established by negotiated labor agreements, labor insurance, and labor taxes as established by law). No other fixed labor burdens will be considered, unless approved in writing by the CITY.
2. Material delivered and used on the designated work, including sales tax, if paid by the CONTRACTOR or his Subcontractor.
3. Rental or equivalent rental cost of equipment, including necessary transportation for items having a value in excess of \$100.

Rental or equivalent rental cost will be allowed for only those days or hours during which the equipment is in actual use. Rental and transportation allowances shall not exceed the current rental rates prevailing in the locality. The rentals allowed for equipment will, in all cases, be understood to cover all fuel, supplies, repairs, and renewals, and no further allowances will be made for those items, unless specific agreement to that effect is made.

4. Additional bond, as required and approved by the CITY.
5. Additional insurance (other than labor insurance) as required and approved by the CITY.

In addition to items 1 through 5 above, an added fixed fee for general overhead and profit shall be negotiated and allowed for the CONTRACTOR (or approved Subcontractor) actually executing the Cost Reimbursement work.

An additional fixed fee shall be negotiated and allowed the CONTRACTOR for the administrative handling of portions of the work that are executed by an approved Subcontractor. No additional fixed fee will be allowed for the administrative handling of work executed by a Subcontractor of a Subcontractor, unless by written permission

from the CITY.

The added fixed fees shall be considered to be full compensation, covering the cost of general supervision, overhead, profit, and any other general expense. The CONTRACTOR's records shall make clear distinction between the direct costs of work paid for on a cost reimbursement basis and the costs of other work. The CONTRACTOR shall furnish the CITY report sheets for each day's cost reimbursement work no later than the working day following the performance of said work. The daily report sheets shall itemize the materials used and shall cover the direct cost of labor and the charges for equipment rental, whether furnished by the CONTRACTOR, Subcontractor or other forces. The daily report sheets shall provide names or identifications and classifications of workers, the hourly rate of pay and hours worked, and also the size, type, and identification number of equipment and hours operated.

Material charges shall be substantiated by valid copies of vendors' invoices. Such invoices shall be submitted with the daily report sheets, or, if not available, they shall be submitted with subsequent daily report sheets. Said daily report sheets shall be signed by the CONTRACTOR or his authorized agent.

The CITY reserves the right to furnish such materials and equipment as he deems expedient and the CONTRACTOR shall have no claim for profit or added fees on the cost of such materials and equipment. To receive partial payments and final payment for cost reimbursement work, the CONTRACTOR shall submit to the CITY, detailed and complete documented verification of the CONTRACTOR's and any of his Subcontractors' actual costs involved in the cost reimbursement work. Such costs shall be submitted within 30 days after said work has been performed.

#### **5.4. CORRECTION OF DEFECTIVE WORK DURING WARRANTY PERIOD**

5.4.1. Any defective work or nonconforming materials or equipment that may be discovered at any time prior to expiration of the warranty period shall be removed and replaced by work which shall conform to the provisions of the Task Order. Any material condemned or rejected shall be removed at once from the project site.

5.4.2. Failure on the part of the CITY to condemn or reject bad or inferior work or to note nonconforming materials or equipment on CONTRACTOR submittals shall not be construed to imply acceptance of such work. The CITY shall reserve and retain all of its rights and remedies at law against the CONTRACTOR and its Surety for correction of any and all latent defects discovered after the guarantee period.

5.4.3. The CONTRACTOR hereby agrees to make, at his own expense, all repairs or

replacements necessitated by defects in materials or workmanship, provided under terms of this Agreement, and pay for any damage to other works resulting from such defects, which become evident within 2 years after the date of final acceptance of the work or within 2 years after the date of substantial completion, or within such longer period as may be prescribed by law or by the terms of any applicable special guarantee required by a Task Order. Un-remedied defects identified for correction during the warranty period but remaining after its expiration shall be considered as part of the obligations of the warranty shall subject the remedied portion of the work to an extended warranty period of 2 years after the defect has been remedied.

- 5.4.4. The CONTRACTOR further assumes responsibility for a similar guarantee for all work and materials provided by subcontractors or manufacturers of packaged equipment components. The effective date for the start of the guarantee or warranty period for qualifying equipment shall be from the time of substantially complete.
- 5.4.5. The CONTRACTOR also agrees to hold the CITY harmless from liability of any kind arising from damage due to said defects. The CONTRACTOR shall make all repairs and replacements promptly upon receipt of written order for same from the CITY. If the CONTRACTOR fails to make the repairs and replacements promptly, or in an emergency where delay would cause serious risk, or loss, or damage, the CITY may have the defective work corrected or the rejected work removed and replaced, and the CONTRACTOR and his Surety shall be liable for the cost thereof.
- 5.4.6. The CITY may issue a written notice of substantial completion for the purpose of establishing the starting date for specific equipment guarantees, and to establish the date that the CITY will assume the responsibility for the cost of operating such equipment. Said notice shall not be considered as final acceptance of any portion of the work or relieve the CONTRACTOR from completing the remaining work within the specified time and in full compliance with the Task Order.

## ARTICLE 6

### CITY'S RESPONSIBILITIES

- 6.1 CITY shall assist CONTRACTOR by placing at CONTRACTOR's disposal all information CITY has available pertinent to the Task Order including previous reports and any other data relative to design or construction of the Task Order.
- 6.2 CITY shall arrange for access to, and make *all* provisions for, CONTRACTOR to enter upon public and private property as required for CONTRACTOR to perform its services.
- 6.3 CITY shall review the CONTRACTOR's Work, including materials and methods of installation, identified in the task orders and respond in writing with any comment

within the time set forth in the Task Order or within a reasonable time.

- 6.4 CITY shall give prompt written notice to CONTRACTOR whenever CITY observes or otherwise becomes aware of any development that affects the scope or timing of CONTRACTOR's services or any defect in the work of any Contractor.

## ARTICLE 7

### MISCELLANEOUS

#### **7.1 OWNERSHIP OF THE WORK**

##### **7.1.1 SUBMITTALS**

After checking and verifying *all* field measurements CONTRACTOR shall submit to CITY shop drawings, electrical diagrams, and catalog cuts for fabricated items and manufactured items (including mechanical and electrical equipment), which shall bear a stamp or specific written indication that Contractor has satisfied Contractor's responsibilities with respect to the review of the submittal. The data shown shall be complete with respect to quantities, dimensions specified, performance and design criteria, materials, and similar data to enable CITY to review the information. Contractor shall also submit to CITY for review, with such promptness as to cause no delay in work, all samples required by the Contract Documents. All samples shall have been checked by and accompanied by a specific written indication that Contractor has satisfied Contractor's responsibilities with respect to the review of the submission and shall be identified clearly as to material, supplier, pertinent data such as catalog numbers and the use for which intended.

Before submission of each submittal, Contractor shall have determined and verified all quantities, dimensions, specified performance criteria, installation requirements, materials, catalog numbers, and similar data with respect thereto and reviewed or coordinated each submittal with other submittals and with the requirements of the work.

At the time of each submission, CONTRACTOR shall give CITY specific written notice of each variation that the submittal may have from the requirements of the Task Order, and, in addition, shall cause a specific notation to be made on each shop drawing submitted to CITY for review and approval of each variation.

CITY will review submittals with reasonable promptness, but CITY's review will be only for conformance with the design concept of the project and for compliance with the Task Order and shall not extend to means, methods, techniques, sequences, or procedures of construction (except where a specific means, method, technique, sequence, or procedure of construction is indicated in or required by the Task Order) or to safety precautions or programs incident thereto. The review of a separate item as

such will not indicate review of the assembly in which the item functions. CONTRACTOR shall make corrections required by CITY and shall return the required number of corrected copies of shop drawings and submit as required new samples for review. Contractor shall direct specific attention in writing to revisions other than the corrections called for by CITY on previous submittals.

CITY's review of submittals shall not relieve CONTRACTOR from the responsibility for any variation from the requirements of the Task Order unless CONTRACTOR has in writing called CITY's attention to each such variation at the time of submission and CITY has given written approval of each such variation by a specific written notation thereof incorporated therein or accompanying the shop drawing or sample approval; nor will any approval by CITY relieve CONTRACTOR from responsibility for errors or omissions in the shop drawings or from responsibility for having complied with the provisions herein.

Where a shop drawing or sample is required by the specifications, any related work performed prior to CITY's review and approval of the pertinent submission shall be at the sole expense and responsibility of the CONTRACTOR.

#### 7.1.2 MATERIALS AND APPLIANCES

Unless otherwise stipulated, the Contractor shall provide and pay for all materials, labor, water, tools, equipment, heat, light, fuel, power, transportation, construction equipment and machinery, appliances, telephone, sanitary facilities, temporary facilities and other facilities and incidentals necessary for the execution and completion of the work.

Unless otherwise specified, all materials shall be new, and both workmanship and materials shall be of good quality. The CONTRACTOR shall, if required, furnish satisfactory evidence as to the kind and quality of materials.

In selecting and/or approving equipment for installation in the project, the CITY assumes no responsibility for injury or claims resulting from failure of the equipment to comply with applicable federal, state, and local safety codes or requirements, or the safety requirements of a recognized agency, or failure due to faulty design concepts, or defective workmanship and materials.

#### 7.1.3 CONTRACTOR AND MANUFACTURER COMPLIANCE WITH STATE SAFETY, OSHA, AND OTHER CODE REQUIREMENTS

The completed work shall include all necessary permanent safety devices, such as machinery guards and similar ordinary safety items required by the state and federal (OSHA) industrial authorities and applicable local and national codes. Further, any features of the work subject to such safety regulations shall be fabricated, furnished, and installed (including CITY-furnished equipment) in compliance with these requirements. Contractors and manufacturers of equipment shall be held responsible for



compliance with the requirements included herein. CONTRACTOR shall notify all equipment suppliers and Subcontractors of the provisions of this Article.

#### 7.1.4 SUBSTITUTION OF MATERIALS

Except for CITY-selected equipment items, and items where no substitution is clearly specified, whenever any material, article, device, product, fixture, form, type of construction, or process is indicated or specified by patent or proprietary name, by name of manufacturer, or by catalog number, such specifications shall be deemed to be used for the purpose of establishing a standard of quality and facilitating the description of the material or process desired. This procedure is not to be construed as eliminating from competition other products of equal or better quality by other manufacturers where fully suitable in design and shall be deemed to be followed by the words "or equal". The CONTRACTOR may, in such cases, submit complete data to the CITY for consideration of another material, type, or process which shall be substantially equal in every respect to that so indicated or specified. Substitute materials shall not be used unless approved in writing. The CITY will be the sole judge of the substituted article or material.

#### 7.1.5 PERFORMANCE TESTING

Operating equipment and systems shall be performance tested in the presence of the CITY to demonstrate compliance with the specified requirements. Performance testing shall be conducted under the specified design operating conditions or under such simulated operating conditions as recommended or approved by the CITY. Schedule such testing with the CITY at least one week in advance of the planned date for testing.

The CONTRACTOR shall furnish, without extra charge, the necessary test pieces and samples, including facilities and labor for obtaining the same, and as requested by the CITY. When required, the CONTRACTOR shall furnish certificates of tests of materials and equipment made at the point of manufacture by a recognized testing laboratory.

The CITY, and authorized government agents, and their representatives shall at all times be provided safe access to the work wherever it is in preparation or progress, and the CONTRACTOR shall provide facilities for such access and for observations, including maintenance of temporary and permanent access.

If the Specifications, laws, ordinances, or any public authority require any work, to be specially tested or approved, the CONTRACTOR shall give timely notice of its readiness for observations. If any work should be covered up without approval or consent of the CITY, it shall, if required by the CITY, be uncovered for examination at the CONTRACTOR's expense.

Reexamination of questioned work may be ordered by the CITY, and, if so ordered, the work shall be uncovered by the CONTRACTOR. If such work is found to be in

accordance with the Task Order, the CITY will pay the cost of uncovering, exposure, observation, inspection, testing and reconstruction. If such work is found to be not in accordance with the Task Order, the CONTRACTOR shall correct the defective work, and the cost of reexamination and correction of the defective work shall be paid by the CONTRACTOR.

**7.1.6 CUTTING AND PATCHING**

The CONTRACTOR shall do all cutting, fitting, or patching of his work that may be required to make its several parts come together properly and fit it to receive or be received by work of other Contractors shown upon or reasonably implied by the Task Order.

**7.1.7 CLEAN UP**

The CONTRACTOR shall, at all times, keep property on which work is in progress and the adjacent property free from accumulations of waste material or rubbish caused by employees or by the work. Upon completion of the construction, the CONTRACTOR shall remove all temporary structures, rubbish, and waste materials resulting from his operations.

**7.1.8 SAFETY**

The CONTRACTOR shall be solely and completely responsible for conditions of the jobsite, including safety of all persons (including employees) and property during performance of the work. This requirement shall apply continuously and not be limited to normal working hours. Safety provisions shall conform to U.S. Department of Labor (OSHA), and all other applicable federal, state, county, and local laws, ordinances, codes, and regulations. Where any of these are in conflict, the more stringent requirement shall be followed. The CONTRACTOR's failure to thoroughly familiarize himself with the aforementioned safety provisions shall not relieve him from compliance with the obligations and penalties set forth therein.

The CONTRACTOR shall develop and maintain for the duration of the Task Order, a safety program that will effectively incorporate and implement all required safety provisions. The CONTRACTOR shall appoint an employee who is qualified and authorized to supervise and enforce compliance with the safety program.

The duty of the CITY to conduct construction review of the work does not include review or approval of the adequacy of the CONTRACTOR's safety program, safety supervisor, or any safety measures taken in, on, or near the construction site.

The CONTRACTOR, as a part of his safety program, shall maintain at his office or other well-known place at the jobsite, safety equipment applicable to the work as prescribed by the aforementioned authorities, all articles necessary for giving first-aid to the injured, and shall establish the procedure for the immediate removal to a hospital or a doctor's care of persons (including employees) who may be injured on the jobsite.

If death or serious injuries or serious damages are caused, the accident shall be reported immediately by telephone or messenger to CITY. In addition, the CONTRACTOR must promptly report in writing to the CITY all accidents whatsoever arising out of, or in connection with, the performance of the work whether on, or adjacent to, the site, giving full details and statements of witnesses.

If a claim is made by anyone against the CONTRACTOR or any Subcontractor on account of any accident, the CONTRACTOR shall promptly report the facts in writing to the CITY, giving full details of the claim.

#### 7.1.9 PROTECTION OF WORK AND PROPERTY

The CONTRACTOR shall at all times safely guard and protect from damage the CITY's property, adjacent property, and his own work from injury or loss in connection with a Task Order. All facilities required for protection by federal, state, or municipal laws and regulations and local conditions must be provided and maintained.

The CONTRACTOR shall protect his work and materials from damage due to the nature of the work, the elements, carelessness of other contractors, or from any cause whatever until the completion and acceptance of the work. All loss or damages arising out of the nature of the work to be done under a Task Order, or from any unforeseen obstruction or defects which may be encountered in the prosecution of the work, or from the action of the elements, shall be sustained by the CONTRACTOR.

#### 7.1.10 RESPONSIBILITY OF CONTRACT TO ACT IN AN EMERGENCY

In case of an emergency which threatens loss or injury of property, and/or safety of life, the CONTRACTOR shall act, without previous instructions from the CITY, as the situation may warrant. The CONTRACTOR shall notify the CITY thereof immediately thereafter. Any claim for compensation by the CONTRACTOR, together with substantiating documents in regard to expense, shall be submitted to the CITY and the amount of compensation shall be determined by agreement.

#### 7.1.11 CITY'S USE OF PORTIONS OF THE WORK

Following issuance of the written notice of substantial completion, the CITY may initiate operation of the facility. Such use shall not be considered as final acceptance of any portion of the work, nor shall such use be considered as cause for an extension of the Task Order completion time, unless authorized by a Change Order issued by the CITY.

#### 7.1.12 CITY'S RIGHT TO RETAIN IMPERFECT WORK

If any part or portion of the work completed under this Agreement shall prove to be defective and not in accordance with a Task Order, and if the imperfection in the same shall not be of sufficient magnitude or importance as to make the work dangerous or unsuitable, or if the removal of such work will create conditions which are dangerous or undesirable, the CITY shall have the right and authority to retain such work but will

make such deduction in the final payment therefore as may be just and reasonable.

#### 7.1.13 CITY'S RIGHT TO DO WORK

Should the CONTRACTOR neglect to prosecute the work in conformance with the Task Order or neglect or refuse at his own cost to remove and replace work rejected by the CITY, then the CITY may notify the Surety of the condition, and after 10 days written notice to the CONTRACTOR and the Surety, or without notice if an emergency or danger to the work or public exists, and without prejudice to any other right which the CITY may have under Agreement, or otherwise, take over that portion of the work which has been improperly or non-timely executed, and make good the deficiencies and deduct the cost thereof from the payments then or thereafter due the CONTRACTOR.

#### 7.1.14 CITY'S RIGHT TO TRANSFER EMPLOYMENT

If the CONTRACTOR should abandon the work or if he should persistently or repeatedly refuse or should fail to make prompt payment to Subcontractors for material or labor, or to persistently disregard laws, ordinances, or to prosecute the work in conformance with the Task Order, or otherwise be guilty of a substantial violation of any provision of the Agreement or any laws or ordinance, then the CITY may, without prejudice to any other right or remedy, and after giving the CONTRACTOR and Surety 10 days' written notice, transfer the employment for said work from the CONTRACTOR to the Surety. Upon receipt of such notice, such Surety shall enter upon the premises and take possession of all materials, tools, and appliances thereon for the purpose of completing the work included under the Task Order and employ by contract or otherwise, any qualified person or persons to finish the work and provide the materials therefor, in accordance with the Task Order, without termination of the continuing full force and effect of this Agreement. In case of such transfer of employment to such Surety, the Surety shall be paid in its own name on estimates according to the terms hereof without any right of the CONTRACTOR to make any claim for the same or any part thereof.

If, after the furnishing of said written notice to the Surety, the CONTRACTOR and the Surety still fail to make reasonable progress on the performance of the work, the CITY may terminate the employment of the CONTRACTOR and take possession of the premises and of all materials, tools, and appliances thereon and finish the work by whatever method he may deem expedient and charge the cost thereof to the CONTRACTOR and the Surety. In such case, the CONTRACTOR shall not be entitled to receive any further payment until the work is finished. If the expense of completing the Task Order, including compensation for additional managerial and administrative services, shall exceed such unpaid balance, the CONTRACTOR and the Surety shall pay the difference to the CITY.

#### 7.1.15 DELAYS AND EXTENSION OF TIME

If the CONTRACTOR is delayed in the progress of the work by any act or neglect of

the CITY, or by any separate Contractor employed by the CITY, or by strikes, lockouts, fire, adverse weather conditions not reasonably anticipated, or acts of Nature, and if the CONTRACTOR, within 48 hours of the start of the occurrence, gives written notice to the CITY of the cause of the potential delay and estimate of the possible time extension involved, and within 10 days after the cause of the delay has been remedied, the CONTRACTOR gives written notice to the CITY of any actual time extension requested as a result of the aforementioned occurrence, then the Task Order time may be extended by change order for such reasonable time as the CITY determines. It is agreed that no claim shall be made or allowed for any damages, loss, or expense which may arise out of any delay caused by the above referenced acts or occurrences other than claims for the appropriate extension of time.

No extension of time will be granted to the CONTRACTOR for delays occurring to parts of the work that have no measurable impact on the completion of the total work under a task order. No extension of time will be considered for weather conditions reasonably anticipated for the area in which the work is being performed. Reasonably anticipated weather conditions will be based on official records of monthly precipitation and other historical data. Adverse weather conditions, if determined to be of a severity that would impact progress of the work, may be considered as cause for an extension of a task order completion time.

Delays in delivery of equipment or material purchased by the CONTRACTOR or his Subcontractors, including CITY-selected equipment shall not be considered as a just cause for delay, unless the CITY determines that for good cause the delay is beyond the control of the CONTRACTOR. The CONTRACTOR shall be fully responsible for the timely ordering, scheduling, expediting, delivery, and installation of all equipment and materials.

The CONTRACTOR shall submit to the CITY a written request for an extension of time and recommendation as to the number of days for time extension. The CITY will make the final decision on all requests for extension of time.

#### 7.1.16 OTHER CONTRACTS

The CITY reserves the right to let other Contracts in connection with the work. The CONTRACTOR shall afford other Contractors reasonable opportunity for the introduction and storage of their materials and the execution of their work and shall properly connect and coordinate his work with theirs.

If any part of the work under this Agreement depends, for proper execution or results upon the work of any other Contractor, utility service company or Owner, the CONTRACTOR shall inspect and promptly report to the CITY in writing any patent or apparent defects to deficiencies in such work that render it unsuitable for such proper execution and results. The CONTRACTOR's failure to so report shall constitute and

acceptance of the work by others as being fit and proper for integration with work under this Agreement, except for latent or non-apparent defects and deficiencies in the work.

#### **7.1.17 USE OF PREMISES**

The CONTRACTOR shall confine his equipment, the storage of materials and the operation of his workers to project area limits, as indicated by law, ordinances, permits, or directions of the CITY, and shall not unreasonably encumber the premises with his materials. The CONTRACTOR shall provide, at his own expense, the necessary rights-of-way and access to the work which may be required outside the project area limits and shall furnish the CITY copies of permits and agreements for use of property outside that provided by the CITY.

The Contractor shall not load nor permit any part of the structure to be loaded in any manner that will endanger the structure, nor shall CONTRACTOR subject any part of the work or adjacent property to stresses or pressures that will endanger it.

#### **7.2 TERMINATION**

7.2.1 This Agreement may be terminated with or without cause by CITY at any time.

7.2.2 Notice of termination shall be provided in accordance with paragraph 7.12 of this Agreement.

7.2.3 In the event this Agreement is terminated, CONTRACTOR shall be paid for any services performed to the date the Agreement is terminated. Compensation shall be withheld until all documents specified in Section 7.1 of this Agreement are provided to the CITY. Upon being notified of CITY's election to terminate, CONTRACTOR shall refrain from performing further services or incurring additional expenses under the terms of this Agreement. Under no circumstances shall CITY make payment of profit for services that have not been performed.

#### **7.2.4 CONTRACTOR'S RIGHT TO TERMINATE TASK ORDER**

If the work should be stopped under an order of any court or other public authority for a period of more than three months, through no act or fault of the CONTRACTOR, its Subcontractors, or respective employees, or if the CITY should fail to make payment on an approved properly submitted pay request or return payment request to Contractor for revision within 30 days after it is due, or if the CITY should fail to pay the CONTRACTOR within 45 days after time specified in Article 5, then the CONTRACTOR may, upon 15 days' written notice to the CITY, stop work or terminate the Task Order and recover from the CITY payment for all acceptable work performed and reasonable termination expenses, unless said default has been remedied.

#### **7.3 AUDIT RIGHT AND RETENTION OF RECORDS**

7.3.1 CITY shall have the right to audit the books, records, and accounts of CONTRACTOR that are related to this Task Order. CONTRACTOR shall keep such books, records, and accounts as may be necessary in order to record complete and correct entries related to the Task Order.

7.3.1 CONTRACTOR shall preserve and make available, at reasonable times for examination and audit by CITY, all financial records, supporting documents, statistical records, and any other documents pertinent to this Agreement for the required retention period of the Florida Public Records Act (Chapter 119, Fla. Stat.), if applicable, or, if the Florida Public Records Act is not applicable, for a minimum period of three (3) years after termination of this Agreement. If any audit has been initiated and audit findings have not been resolved at the end of the retention period or three (3) years, whichever is longer, the books, records, and accounts shall be retained until resolution of the audit findings. If the Florida Public Records Act is determined by CITY to be applicable to CONTRACTOR's records, CONTRACTOR shall comply with all requirements thereof; however, CONTRACTOR shall violate no confidentiality or non-disclosure requirement of either federal or state law. Any incomplete or incorrect entry in such books, records, and accounts shall be a basis for CITY's disallowance and recovery of any payment upon such entry.

**7.4 NONDISCRIMINATION, EQUAL EMPLOYMENT OPPORTUNITY, AMERICANS WITH DISABILITIES ACT, AND EQUAL BENEFITS FOR DOMESTIC PARTNERS**

7.4.1 CONTRACTOR shall not unlawfully discriminate against any person in its operations and activities in its use or expenditure of the funds or any portion of the funds provided by this Agreement and shall affirmatively comply with all applicable provisions of the Americans with Disabilities Act (ADA) in the course of providing any services funded in whole or in part by CITY, including Titles I and II of the ADA (regarding nondiscrimination on the basis of disability), and all applicable regulations, guidelines, and standards.

7.4.2 CONTRACTOR's decisions regarding the delivery of services under this Agreement shall be made without regard to or consideration of race, age, religion, color, gender, sexual orientation, gender identity or expression, national origin, marital status, physical or mental disability, political affiliation, or any other factor that cannot be lawfully or appropriately used as a basis for service delivery. CONTRACTOR shall comply with Title I of the Americans with Disabilities Act regarding nondiscrimination on the basis of disability in employment and further shall not discriminate against any employee or applicant for employment because of race, age, religion, color, gender, sexual orientation, national origin, gender identity or expression, marital status, political affiliation, or physical or mental disability. Such actions shall include, but not be limited to, the following: employment, upgrading,

demotion, transfer, recruitment or recruitment advertising, layoff, termination, rates of pay, other forms of compensation, terms and conditions of employment, training (including apprenticeship), and accessibility.

- 7.4.3 CONTRACTOR shall comply with City Ordinance Sec. 2-799 Requirements for City Contractors to Provide Equal Benefits for Domestic Partners.

## **7.5 PUBLIC ENTITY CRIMES ACT**

- 7.5.1 CONTRACTOR represents that the execution of this Agreement shall not violate the Public Entity Crimes Act (Section 287.133, Florida Statutes), which essentially provides that a person or affiliate who is a contractor, consultant or other provider and who has been placed on the convicted vendor list following a conviction for a Public Entity Crime may not submit a bid on a contract to provide any goods or services to CITY, may not submit a bid on a contract with CITY for the construction or repair of a public building or public work, may not submit bids on leases of real property to CITY, may not be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a contract with CITY, and may not transact any business with CITY in excess of the threshold amount provided in Section 287.017, Florida Statutes, for category two purchases for a period of 36 months from the date of being placed on the convicted vendor list. Violation of this section shall result in termination of this Agreement and recovery of all monies paid hereto and may result in being barred from CITY's competitive procurement activities.

- 7.5.2 In addition to the foregoing, CONTRACTOR further represents that there has been no determination, based on an audit, that it or any subcontractor, has committed an act defined by Section 287.133, Florida Statutes, as a "public entity crime" and that it has not been formally charged with committing an act defined as a "public entity crime" regardless of the amount of money involved or whether CONTRACTOR has been placed on the convicted vendor list.

- 7.5.3 CONTRACTOR shall promptly notify CITY if it or any subcontractor is formally charged with an act defined as a "public entity crime" or has been placed on the convicted vendor list.

## **7.6 SUBCONTRACTORS**

CONTRACTOR may use the subcontractors identified in the proposal that was a material part of the selection of CONTRACTOR to provide the services under this Agreement. The CITY reserves the right to accept the use of a subcontractor or to reject the selection of a particular subcontractor and to inspect all facilities of any subcontractors in order to make determination as to the capability of the subcontractor to perform properly under this Contract. The CITY's acceptance of a subcontractor shall not be unreasonably withheld. CONTRACTOR shall obtain written approval of



Contract Administrator prior to changing or adding to the list of subcontractors. The list of subcontractors submitted is as follows:

- a. General Asphalt Company
- b. Affordable Asphalt
- c. \_\_\_\_\_
- d. \_\_\_\_\_

**7.7 ASSIGNMENT AND PERFORMANCE**

7.7.1 Neither this Agreement nor any interest herein shall be assigned, transferred, or encumbered by either party and CONTRACTOR shall not subcontract any portion of the work required by this Agreement except as authorized pursuant to Section 7.6.

7.7.2 CONTRACTOR represents that all persons delivering the services required by this Agreement have the knowledge and skills, either by training, experience, education, or a combination thereof, to adequately and competently perform the duties, obligations, and services set forth in the Scope of Services and to provide and perform such services to CITY's satisfaction for the agreed compensation.

7.7.3 CONTRACTOR shall perform its duties, obligations, and services under this Agreement in a skillful and respectable manner. The quality of CONTRACTOR's performance and all interim and final product(s) provided to or on behalf of CITY shall be in accordance with the standard of care set forth in Paragraph 3.5.

**7.8 INDEMNIFICATION OF CITY**

7.8.1 To the fullest extent permitted by law, the CONTRACTOR expressly agrees to indemnify and hold harmless the City of Key West, their officers, directors, agents, and employees (herein called the "indemnities") from liabilities, damages, losses and costs, including, but not limited to, reasonable attorney's fees and court costs, such legal expenses to include costs incurred in establishing the indemnification and other rights agreed to in this Paragraph, to persons or property, to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of the CONTRACTOR, its Subcontractors or persons employed or utilized by them in the performance of the Contract. Claims by indemnities for indemnification shall be limited to the amount of CONTRACTOR's insurance or \$1 million per occurrence, whichever is greater. The parties acknowledge that the amount of the indemnity required hereunder bears a reasonable commercial relationship to the Contract and it is part of the project specifications or the bid documents, if any.

7.8.2 The indemnification obligations under the Contract shall not be restricted in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for the CONTRACTOR under workers' compensation acts, disability benefits acts, or other employee benefits acts, and shall extend to and include any actions brought by or in the name of any employee of the CONTRACTOR or of any third party to whom CONTRACTOR may subcontract a part or all of the Work. This indemnification shall continue beyond the date of completion of the Work.

**7.9 INSURANCE**

7.9.1 CONTRACTOR is to secure, pay for and file with the City of Key West, prior to commencing any work under the Contract, all certificates for workers' compensation, public liability, and property damage liability insurance, and such other insurance coverages as may be required by specifications and addenda thereto, in at least the following minimum amounts with specification amounts to prevail if greater than minimum amounts indicated. Notwithstanding any other provision of the Contract, the CONTRACTOR shall provide the minimum limits of liability insurance coverage as follows:

Auto Liability	\$1,000,000	Combined Single Limit
General Liability	\$2,000,000	Aggregate (Per Project)
	\$2,000,000	Products Aggregate
	\$1,000,000	Any One Occurrence
	\$1,000,000	Personal Injury
	\$ 300,000	Fire Damage/Legal
	.	
Additional Umbrella Liability	\$2,000,000	Occurrence /Aggregate

7.9.2 CONTRACTOR shall furnish an original Certificate of Insurance indicating, and such policy providing coverage to, City of Key West named as an additional insured on all policies- excepting Professional Liability-on a PRIMARY and NON CONTRIBUTORY basis utilizing an ISO standard endorsement at least as broad as CG 2010 (11/85) or its equivalent, (combination of CG 20 10 07 04 and CG 20 37 07 04, providing coverage for completed operations, is acceptable) including a waiver of subrogation clause in favor of City of Key West on all policies. CONTRACTOR will maintain General Liability insurance coverages summarized above with coverage continuing in full force including the additional insured endorsement until at least 3 years beyond completion and delivery of the work contracted herein.

7.9.3 Notwithstanding any other provision of the Contract, the CONTRACTOR shall maintain complete workers compensation coverage for each and every employee, principal, officer, representative, or agent of the CONTRACTOR who is performing any labor, services, or

material under the Contract. Further, CONTRACTOR shall additionally maintain the following minimum limits of coverage:

Bodily Injury Each Accident	\$1,000,000
Bodily Injury by Disease Each Employee	\$1,000,000
Bodily Injury by Disease Policy Limit	\$1,000,000

- 7.9.4 If the work is being done on or near a navigable waterway, CONTRACTOR's workers compensation policy shall be endorsed to provide USL&H Act (WC 00 01 06 A) and Jones Act (WC 00 02 01 A) coverage if specified by the City of Key West. CONTRACTOR shall provide the City of Key West with a Certificate of Insurance verifying compliance with the workers compensation coverage as set forth herein and shall provide as often as required by the City of Key West such certification which shall also show the insurance company, policy number, effective and expiration date, and the limits of workers compensation coverage under each policy.
- 7.9.5 CONTRACTOR's insurance policies shall be endorsed to give 30 days written notice to the City of Key West in the event of cancellation or material change, using form CG 02 24, or its equivalent.
- 7.9.6 Certificates of Insurance submitted to the City of Key West will not be accepted without copies of the endorsements being requested. This includes additional insured endorsements, cancellation/material change notice endorsements, and waivers of subrogation. Copies of USL&H Act and Jones Act endorsements will also be required if necessary. PLEASE ADVISE YOUR INSURANCE AGENT ACCORDINGLY.
- 7.9.7 CONTRACTOR will comply with any and all safety regulations required by any agency or regulatory body including but not limited to OSHA. CONTRACTOR will notify City of Key West immediately by telephone at (305) 809-3811 any accident or injury to anyone that occurs on the jobsite and is related to any of the work being performed by the CONTRACTOR.
- 7.9.8 It shall be the responsibility of the CONTRACTOR to ensure that all subcontractors comply with the same insurance requirements as is required of CONTRACTOR.
- 7.9.9 In addition, it is understood if at any time any of the policies required by the City shall become unsatisfactory to the City as to form or substance, or if a company issuing any such policy shall become unsatisfactory to the City, the CONTRACTOR shall obtain a new policy, submit the same to the City for approval and submit a certificate of insurance as which may be required by the contract. It is understood that upon failure of the CONTRACTOR to furnish, deliver and maintain such insurance as required above, the contract at the election of the City may be declared suspended, discontinued or terminated. Further, failure of the CONTRACTOR to take out and/or maintain any required insurance shall not relieve the CONTRACTOR from any liability under the contract, nor shall the

insurance requirements be construed to conflict with the obligations of the CONTRACTOR concerning indemnification.

#### **7.10 REPRESENTATIVE OF CITY AND CONTRACTOR**

7.10.1 The parties recognize that questions in the day-to-day conduct of the Task Order will arise. The Contract Administrator, upon CONTRACTOR's request, shall advise CONTRACTOR in writing of one (1) or more CITY employees to whom all communications pertaining to the day-to-day conduct of the Task Order shall be addressed.

7.10.2 CONTRACTOR shall inform the Contract Administrator in writing of CONTRACTOR's representative to whom matters involving the conduct of the Task Order shall be addressed.

#### **7.11 ALL PRIOR AGREEMENTS SUPERSEDED**

7.11.1 This document incorporates and includes all prior negotiations, correspondence, conversations, agreements or understandings applicable to the matters contained herein; and the parties agree that there are no commitments, agreements or understandings concerning the subject matter of this Agreement that are not contained in this document and the exhibits attached. Accordingly, the parties agree that no deviation from the terms hereof shall be predicated upon any prior representations or agreements whether oral or written.

7.11.2 It is further agreed that no modification, amendment or alteration in the terms or conditions contained herein shall be effective unless contained in a written document executed with the same formality and of equal dignity herewith.

#### **7.12 NOTICES**

Whenever either party desires to give notice unto the other, such notice must be in writing, sent by certified United States mail, return receipt requested, addressed to the party for whom it is intended at the place last specified; and the place for giving of notice shall remain such until it shall have been changed by written notice in compliance with the provisions of this paragraph. For the present, the parties designate the following as the respective places for giving of notice:

##### **FOR CITY OF KEY WEST:**

City of Key West

Department: \_\_\_\_\_

P.O. BOX 1409

Key West, FL 33041

**FOR CONTRACTOR:**

Contact: Richard Toppino

Address: PO Box 787, Key West, FL 33041

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**7.13 TRUTH-IN-NEGOTIATION CERTIFICATE**

Signature of this Agreement by CONTRACTOR shall act as the execution of a truth-in negotiation certificate stating that wage rates and other factual unit costs supporting the compensation of this Agreement are accurate, complete, and current at the time of contracting. The original contract price for any task order and any additions thereto shall be adjusted to exclude any significant sums, by which CITY determines the contract price was increased due to inaccurate, incomplete, or non-current wage rates and other factual unit costs. All such contract adjustments shall be made within one (1) year following the end of this Agreement.

**7.14 INTERPRETATION**

The language of this Agreement has been agreed to by both parties to express their mutual intent and no rule of strict construction shall be applied against either party hereto. The headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement. All personal pronouns used in this Agreement shall include the other gender, and the singular shall include the plural, and vice versa, unless the context otherwise requires. Terms such as "herein," "hereof," "hereunder," and "hereinafter" refer to this Agreement as a whole and not to any particular sentence or paragraph where they appear, unless the context otherwise requires. Whenever reference is made to a Paragraph or Article of this Agreement, such reference is to the Paragraph or Article as a whole, including all of the subsections of such Paragraph, unless the reference is made to a particular subsection or subparagraph of such Paragraph or Article.

**7.15 INDEPENDENT CONTRACTOR**

CONTRACTOR is an independent contractor under this Agreement. Services provided by CONTRACTOR shall be subject to the supervision of CONTRACTOR. In providing the services, CONTRACTOR or its agents shall not be acting and shall not be deemed as acting as officers, employees, or agents of the CITY, nor shall they accrue any of the rights or benefits of a CITY employee. The parties expressly acknowledge that

it is not their intent to create any rights or obligations in any third person or entity under this Agreement.

#### **7.16 THIRD PARTY BENEFICIARIES**

Neither CONTRACTOR nor CITY intend directly or substantially to benefit a third party by this Agreement. Therefore, the parties agree that there are no third-party beneficiaries to this Agreement and that no third party shall be entitled to assert a claim against either of them based upon this Agreement. No subcontractor, whether named or unnamed, shall be a third-party beneficiary of this Agreement.

#### **7.17 CONFLICTS**

- 7.17.1 Neither CONTRACTOR nor its employees shall have or hold any continuing or frequently recurring employment or contractual relationship that is substantially antagonistic or incompatible with CONTRACTOR's loyal and conscientious exercise of judgment related to its performance under this Agreement.
- 7.17.2 CONTRACTOR agrees that none of its officers or employees shall, during the term of this Agreement, serve as an expert witness against CITY in any legal or administrative proceeding in which he or she is not a party, unless compelled by court process, nor shall such persons give sworn testimony or issue a report or writing, as an expression of his or her expert opinion, which is adverse or prejudicial to the interests of CITY or in connection with any such pending or threatened legal or administrative proceeding. The limitations of this section shall not preclude such persons from representing themselves in any action or in any administrative or legal proceeding.
- 7.17.3 In the event CONTRACTOR is permitted to use subcontractors to perform any services required by this Agreement, CONTRACTOR agrees to prohibit such subcontractors from having any conflicts as within the meaning of this section and shall so notify them in writing.

#### **7.18 CONTINGENCY FEE**

CONTRACTOR warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for CONTRACTOR, to solicit or secure this Agreement and that it has not paid or agreed to pay any person, company, corporation, individual or firm, other than a bona fide employee working solely for CONTRACTOR, any fee, commission, percentage, gift, or other consideration contingent upon or resulting from the award or making of this Agreement. For a breach or violation of this provision, CITY shall have the right to terminate this Agreement without liability at its discretion, or to deduct from the Agreement price or otherwise recover the full amount of such fee, commission, percentage, gift, or consideration.

## **7.19 WAIVER OF BREACH AND MATERIALITY**

- 7.19.1 Failure by CITY to enforce any provision of this Agreement shall not be deemed a waiver of such provision or modification of this Agreement. A waiver of any breach of a provision of this Agreement shall not be deemed a waiver of any subsequent breach and shall not be construed to be a modification of the terms of this Agreement.
- 7.19.2 CITY and CONTRACTOR agree that each requirement, duty, and obligation set forth herein is substantial and important to the formation of this Agreement and, therefore, is a material term hereof.

## **7.20 COMPLIANCE WITH LAWS**

CONTRACTOR shall comply with federal, state, and local laws, codes, ordinances, rules, and regulations in performing its duties, responsibilities, and obligations related to this Agreement applicable at the time the scope of services was drafted for this agreement. In addition, at the time each Task Order is executed, any revisions to applicable federal state, and local laws, codes, ordinances, rules and regulations shall apply.

## **7.21 SEVERABILITY**

In the event this Agreement or a portion of this Agreement is found by a court of competent jurisdiction to be invalid, the remaining provisions shall continue to be effective unless CITY or CONTRACTOR elects to terminate this Agreement.

## **7.22 JOINT PREPARATION**

Preparation of this Agreement has been a joint effort of CITY and CONTRACTOR and the resulting document shall not, solely as a matter of judicial construction, be construed more severely against one of the parties than any other.

## **7.23 PRIORITY OF PROVISIONS**

If there is a conflict or inconsistency between any term, statement, requirement, or provision of any exhibit attached hereto, any document or events referred to herein, or any document incorporated into this Agreement by reference and a term, statement, requirement, or provision of this Agreement, the term, statement, requirement, or provision contained in Articles 1 through 7 of this Agreement shall prevail and be given effect.

## **7.24 APPLICABLE LAW AND VENUE**

The laws of the State of Florida govern the validity of this Agreement, its interpretation

and performance, and any claims related to it. The venue for mediation, arbitration or any other legal proceeding shall be Monroe County, Florida.

#### **7.25 INCORPORATION BY REFERENCE**

The attached exhibits are incorporated into and made a part of this Agreement:  
Exhibit A- ITB 21-007 PROPOSAL UNIT PRICE BID FORM

#### **7.26 COUNTERPARTS**

This Agreement may be executed in two (2) counterparts, each of which shall be deemed to be an original.

### **ARTICLE 8**

#### **FEDERAL REQUIREMENTS**

The following Federal requirements are incorporated by this Addendum for FEMA reimbursable work.

- a. **ACCESS BY THE GRANTEE, SUBGRANTEE, FEDERAL GRANTOR AGENCY AND COMPTROLLER GENERAL:** The CONTRACTOR shall allow access by the grantee, subgrantee, Federal grantor agency and Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the CONTRACTOR which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts and transcriptions.
- b. **COPYRIGHTS:** The Grantee is free to copyright original work developed in the course of or under the agreement. FEMA reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use, and to authorize others to use the work for Government purposes. Publication resulting from work performed under this agreement shall include an acknowledgement of FEMA financial support, by granted number, and a statement that the publication does not constitute an endorsement by FEMA or reflect FEMA views.
- c. **DISADVANTAGED BUSINESS ENTERPRISES (DBE) CONTRACTORS:** The CONTRACTOR agrees to ensure that Disadvantage Business Enterprises as defined in 49 C.F.R. Part 23, as amended, have the maximum opportunity to participate in the performance of contracts and this agreement. In this regard, CONTRACTOR shall take all necessary and reasonable steps in accordance with 49 C.F.R. Part 23, as amended, to ensure that the Disadvantaged Business Enterprises have the maximum opportunity to compete for and perform contracts. The CONTRACTOR shall not discriminate on the basis of race, color, national origin or sex in the award and performance of federal assisted contracts.



- d. **ENERGY POLICY AND CONSERVATION ACT:** The CONTRACTOR shall comply with mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).
- e. **EQUAL EMPLOYMENT OPPORTUNITY:** During the performance of this contract, the CONTRACTOR agrees as follows:
- i. The CONTRACTOR will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The CONTRACTOR will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The CONTRACTOR agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.
  - ii. The CONTRACTOR will, in all solicitations or advertisements for employees placed by or on behalf of the CONTRACTOR, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, or national origin.
  - iii. The CONTRACTOR will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the CONTRACTOR's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
  - iv. The CONTRACTOR will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
  - v. The CONTRACTOR will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
  - vi. In the event of the CONTRACTOR's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the CONTRACTOR may be

declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions as may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

vii. The CONTRACTOR will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The CONTRACTOR will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, That in the event a CONTRACTOR becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency the CONTRACTOR may request the United States to enter into such litigation to protect the interests of the United States.

viii. CONTRACTOR shall:

1. Place qualified small and minority businesses and women's business enterprises on solicitation lists.
2. Assure that small and minority businesses and women's business enterprises are solicited whenever they are potential sources.
3. Divide work, when economically feasible, into smaller tasks to permit maximum participation by small and minority businesses, and women's business enterprises.
4. Establish delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises.
5. Provide documentation of compliance with 1-4 above.

f. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT COMPLIANCE

- i. Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.
- ii. Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph (1) of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States, for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (1) of this

section, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (1) of this section.

- iii. Withholding for unpaid wages and liquidated damages. The Federal Emergency Management Agency (FEMA) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (2) of this section.
- iv. Subcontracts. The CONTRACTOR Or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (1) through (4) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (1) through (4) of this section.”

g. CLEAN AIR ACT

The contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. § 7401 et seq.

The contractor agrees to report each violation to the City of Key West and understands and agrees that the City of Key West will, in turn, report each violation as required to assure notification to the Federal Emergency Management Agency, and the appropriate Environmental Protection Agency Regional Office.

The contractor agrees to include these requirements in each subcontract exceeding \$150,000 financed in whole or in part with Federal assistance provided by FEMA.

h. FEDERAL WATER POLLUTION CONTROL ACT

The contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 et seq.

The contractor agrees to report each violation to the City of Key West and understands and agrees that the City of Key West will, in turn, report each violation as required to assure notification to the Federal Emergency Management Agency, and the appropriate Environmental Protection Agency Regional Office.

The contractor agrees to include these requirements in each subcontract exceeding \$150,000 financed in whole or in part with Federal assistance provided by FEMA.”

i. DEBARMENT AND SUSPENSION:

- i. This contract is a covered transaction for purposes of 2 C.F.R. pt.180 and 2 C.F.R. pt. 3000. As such the CONTRACTOR is required to verify that none of the CONTRACTOR, its principals (defined at 2 C.F.R. § 180.995), or its affiliates (defined at 2 C.F.R. § 180.905) are excluded (defined at 2 C.F.R. § 180.940) or disqualified (defined at 2 C.F.R. § 180.935).
- ii. The CONTRACTOR must comply with 2 C.F.R. pt. 180, subpart C and 2C.F.R. part 3000, subpart C and must include a requirement to comply with these regulations in any lower tier covered transaction it enters into.
- iii. This certification is a material representation of fact relied upon by (insert name of subrecipient). If it is later determined that the CONTRACTOR did not comply with 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C, in addition to remedies available to (name of state agency serving as recipient and name of subrecipient), the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment.
- iv. The bidder or proposer agrees to comply with the requirements of 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C while this offer is valid and throughout the period of any contract that may arise from this offer. The bidder or proposer further agrees to include a provision requiring such compliance in its lower tier covered transactions.

j. BYRD ANTI-LOBBYING AMENDMENT,

Byrd Anti-Lobbying Amendment, 31 U.S.C. § 1352 (as amended)

- i. Contractors who apply or bid for an award of \$100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant, or any other award covered by 31 U.S.C. § 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.
- ii. Attach Certification for Contracts, Grants, Loans, and Cooperative Agreements submitted with bid if exceeding \$100,000)

k. PROCUREMENT OF RECOVERED MATERIALS

- i. In the performance of this contract, the CONTRACTOR shall make maximum use of products containing recovered materials that are EPA- designated items unless the product cannot be acquired-
    - a) Competitively within a timeframe providing for compliance with the contract performance schedule;
    - b) Meeting contract performance requirements; or
    - c) At a reasonable price.
  - ii. Information about this requirement, along with the list of EPA- designate items, is available at EPA's Comprehensive Procurement Guidelines web site, <https://www.epa.gov/smm/comprehensive-procurement-guideline-cpg-program>.”
1. RETENTION OF ALL RECORDS: The CONTRACTOR is required to retain all records for seven (7) years after grantees or subgrantees make final payments and all other pending matters are closed.

#### **ADDITIONAL FEDERAL REQUIREMENTS**

- a. REMEDIES – In the event of a breach by CONTRACTOR of the terms and conditions of this Agreement CITY shall be entitled to recover any and all monetary damages arising therefrom including the recovery of reasonable attorney fees at all trial and appellate levels.
- b. ACCESS TO RECORDS
  - i. The CONTRACTOR agrees to provide (insert name of state agency or local or Indian tribal government), (insert name of recipient), the FEMA Administrator, the Comptroller General of the United States, or any of their authorized representatives access to any books, documents, papers, and records of the CONTRACTOR which are directly pertinent to this contract for the purposes of making audits, examinations, excerpts, and transcriptions.
  - ii. The CONTRACTOR agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.
  - iii. The CONTRACTOR agrees to provide the FEMA Administrator or his authorized representatives access to construction or other work sites pertaining to the work being completed under the contract.
- c. DHS SEAL, LOGO AND FLAGS: the CONTRACTOR shall not use the DHS seal(s), logos, crests, or reproductions of flags or likenesses of DHS agency officials without specific FEMA pre- approval.
- d. COMPLIANCE WITH FEDERAL LAW, REGULATIONS AND EXECUTIVE ORDERS: This is an acknowledgement that FEMA financial assistance will be used to fund the contract only. The CONTRACTOR will comply will all applicable federal law,

regulations, executive orders, FEMA policies, procedures, and directives.

- e. NO OBLIGATION: The Federal Government is not a party to this contract and is not subject to any obligations or liabilities to the non-Federal entity, CONTRACTOR, or any other party pertaining to any matter resulting from the contract.”
- f. FRAUD AND FALSE OR FRAUDULENT OR RELATED ACTS: CONTRACTOR acknowledges that 31 U.S.C. Chap. 38 (Administrative Remedies for False Claims and Statements) applies to the CONTRACTOR’s actions pertaining to this contract.

IN WITNESS WHEREOF, the parties hereto have made and executed this Agreement on the respective dates under each signature.



[Signature]  
City Clerk

CITY OF KEY WEST, FLORIDA

[Signature]  
Patti McLaughlin, City Manager

30 Day of June

30 Day of June, 2021

CONTRACTOR

By [Signature]  
Richard Lopez  
Name

President  
Title

23 Day of June, 2021

APPROVED AS TO FORM

[Signature]  
Attorney for Owner