

**AGREEMENT**

**between**

**CITY OF KEY WEST**

**and**

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**for**

**PROFESSIONAL SERVICES FOR**

**Fogarty and 3<sup>rd</sup> St Pump Assisted Stormwater Injection Well**

**KEY WEST, FLORIDA**

This is an Agreement between: CITY OF KEY WEST, FLORIDA, a municipal corporation, its successors and assigns, hereinafter referred to as "CITY," and Jacobs Engineering Group Inc. \_\_\_\_\_, a corporation organized under the laws of the State of Delaware \_\_\_\_\_, authorized to conduct business in the State of Florida, its successors and assigns, hereinafter referred to as "CONSULTANT."

WITNESSETH, in consideration of the mutual terms and conditions, promises, covenants and payments hereinafter set forth, CITY and CONSULTANT 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 22-003, CONSULTANT's Response to RFQ, dated February 2022, exhibits, task orders, and supplemental documents that are by this provision expressly incorporated herein by reference. The Professional Services Agreement between the City and the Consultant setting forth the obligations of the parties thereto, including but not limited to the performance of the work, furnishing of services, and the basis of payment.
- 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. CONSULTANT: The firm selected to perform the services, pursuant to this Agreement.
- 1.4. 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.
- 1.5. Contractor: The person, firm, corporation or other entity that enters into an agreement with CITY to perform the construction work for the Task Order.
- 1.6. CITY: City of Key West.
- 1.7. Task Order: A detailed description of a particular service or services to be performed by CONSULTANT under this Agreement.

## **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 CONSULTANT 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 of Consultants' Competitive Negotiation Act, as set forth in Section 287.055, Florida Statutes, and has selected CONSULTANT to perform the services hereunder based on the Request for Qualifications #22-003 incorporated by reference and made a part hereof and the Response to the Request for Qualifications from Consultant, dated February 2022, incorporated by reference and made part of.
- 2.3. Negotiations pertaining to the services to be performed by CONSULTANT were undertaken between CONSULTANT 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. CONSULTANT's services may include but are not limited to the following in regard to the Agreement:

Comprehensive engineering, design, surveying, permit preparation, preparing contract specifications, preparing bid and proposal documents, and assisting the City with technical review and ranking of the same to attain qualified contractors for work, environmental assessments, construction administration and owner project representation services relating to operation, new construction, permit modification, construction improvements, rehabilitation and/or retrofits, and any other lawful professional engineering services that the CONSULTANT is qualified to provide, and the CITY authorizes the CONSULTANT to undertake in connection with this Agreement. CONSULTANT shall provide all necessary, incidental and related activities and services required.

- 3.2. CONSULTANT and CITY acknowledge that the scope of services does not delineate every detail and minor work task required to be performed by CONSULTANT to complete any particular task order. If during the course of the performance of the services included in this Agreement, CONSULTANT determines that work should be performed to complete the Task Order which is, in the CONSULTANT's opinion, outside the level of effort originally anticipated, whether or not the scope of services identifies the work items, CONSULTANT

shall notify Contract Administrator in writing in a timely manner before proceeding with the work. If CONSULTANT 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 CONSULTANT outside the originally anticipated level of effort without prior written CITY approval or modification of Task Order is at CONSULTANT's sole risk.

- 3.3. The specific services to be provided by the CONSULTANT 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 CONSULTANT'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 CONSULTANT. CONSULTANT 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 CONSULTANT 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. Termination of this Agreement, pursuant to Section 7.2, hereof, shall constitute the termination of any and all outstanding task orders.
  - 3.3.5. The CONSULTANT shall begin services under any task order when authorized by a Purchase Order issued by the CITY and delivered to CONSULTANT.
  - 3.3.6. The CITY and CONSULTANT may negotiate additional scopes of services, compensation, time of performance, and other related matters for each Task Order, as allowed by this Agreement. If CITY and CONSULTANT 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. CONSULTANT shall perform the professional services under this Agreement at the level customary for competent and prudent professionals in CONSULTANT's field

performing such services at the time and place where the services are provided (“Standard of Care”). In the event CONSULTANT does not comply with this standard, and omissions or errors are made by CONSULTANT, CONSULTANT will correct such work that contains errors or omissions at no additional cost to CITY following completion of services and for a period of 12 months thereafter and the same is reported to CONSULTANT by CITY in writing.. CONSULTANT shall have no liability for costs related to repair, the repair, replacement, addition or deletion of materials, equipment or facilities as a result of such failure to conform to the above-referenced warranties, which costs shall be deemed costs of the project, whether incurred during performance of the Services or after completion of the services. All representations, warranties and guarantees made by CONSULTANT in connection with its services are limited to those set forth in this Article. IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE SPECIFICALLY EXCLUDED. For any deficiencies in the services, CITY shall be restricted to the remedies expressly set forth in this Article, whether asserted on the basis of contract, tort (including negligence) or otherwise.

- 3.3.8. CONSULTANT is required to perform the task orders consistent with current applicable Federal, state and local 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 order effective date or are anticipated to be effective at a future date, or if knowledge of anticipated changes is available to CONSULTANT or any subcontractor, CONSULTANT shall present options for their use or implementation.
- 3.3.9. Construction Responsibility. Notwithstanding anything in this Agreement, CONSULTANT shall not have control or charge of, and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety measures, precautions and programs, including enforcement of Federal and state safety requirements, in connection with construction work performed by CITY construction contractors.
- 3.3.10. Estimates. Since CONSULTANT has no control over local conditions, the cost of labor, materials, equipment or services furnished by others, or over competitive bidding or market conditions, CONSULTANT does not guarantee the accuracy of any opinions of probable construction cost as compared to construction contractor’s bids or the actual cost to the CITY.

#### ARTICLE 4

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

The term of this Agreement shall run for the duration of the project as determined by the CITY and CONSULTANT and shall be incorporated into the Agreement by an attachment that will include require milestones to be met by CONSULTANT.

- 4.1. CONSULTANT shall perform the services described in this Agreement within the time periods specified.
- 4.2. In the event CONSULTANT is unable to complete the above services because of delays

resulting from untimely review by CITY or other governmental authorities having jurisdiction over the Task Order, and such delays are not the fault of CONSULTANT, or because of delays which were caused by factors outside the control of CONSULTANT, 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 CONSULTANT 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.

- 4.3. In the event the CONSULTANT fails to substantially complete the work on or before the substantial completion date specified in its agreement with CITY, or if the CONSULTANT is granted an extension of time beyond said substantial completion date, and CONSULTANT's services are extended beyond the substantial completion date, through no fault of

CONSULTANT, CONSULTANT shall be compensated in accordance with Article 5 for all services rendered by CONSULTANT beyond the substantial completion date.

- 4.4. In the event the CONSULTANT fails to substantially complete the work on or before the substantial completion date specified in its agreement with CITY, and to the extent the failure to substantially complete is caused in whole or in part by a negligent act, of CONSULTANT, then CONSULTANT shall pay to CITY its proportional share of any costs and expenses incurred by the CITY as a result of the delay. This provision shall not affect the rights and obligations of either party as set forth in Section 7.8, INDEMNIFICATION OF CITY.

## **ARTICLE 5**

### **COMPENSATION AND METHOD OF PAYMENT**

#### **5.1. AMOUNT AND METHOD OF COMPENSATION**

The types of compensation methods, which shall be used to pay for the CONSULTANT's services, are limited to the following:

- 5.1.1. Lump sum payment/not-to-exceed, which includes compensation for all the CONSULTANT's salaries, general overhead costs, direct expenses, and profit.
- 5.1.2. If work timing deviates from the assumed schedule for causes beyond CONSULTANT's control, CONSULTANT and/or CITY reserves the right to request renegotiation of those portions of the lump sum affected by the time change. During construction contract administration, if tasked, it is agreed by both parties that whether construction is completed earlier or later, that a proportional part of the compensation will be adjusted and either given to CONSULTANT for additional work or deleted from amount owed CONSULTANT for less time required.
- 5.1.3. In the event of a change of scope, CITY shall authorize in writing an appropriate decrease or increase in compensation.
- 5.1.4. Monthly invoicing will be based on an estimate of the percent of work completed at the end of the preceding month.
- 5.1.5. Cost Reimbursable Per Diem (Time and Expenses)
- 5.1.5.1 Per diem rates are those hourly or daily rates charged for work performed on the work by CONSULTANT's employees of the indicated classifications and include all salaries, overhead, and profit, but do not include allowances for direct expenses. These rates are subject to annual adjustments based on the Consumer Price Index for All Urban Consumers: U.S. city average, all items index, U.S. Department of Labor Bureau of Labor Statistics.
- 5.1.5.2 Hourly rates for the contract (CONSULTANT and sub-consultants). Refer to Exhibit A.
- 5.1.5.3 A not-to-exceed budgetary amount will be established for the work. This budgetary amount shall not be exceeded unless prior written approval is provided

by the CITY. CONSULTANT shall make reasonable efforts to complete the work within the budget and will keep CITY informed of progress toward that end so that the budget or work effort can be adjusted if found necessary.

5.1.5.4 CONSULTANT is not obligated to incur costs beyond the indicated budgets, as may be adjusted, nor is CITY obligated to pay CONSULTANT beyond these limits.

5.1.5.5 When any budget has been increased, CONSULTANT's excess costs expended prior to such increase will be allowable to the same extent as if such costs had been incurred after the approved increase.

## **5.2. REIMBURSABLE EXPENSES**

5.2.1. Direct non-salary expenses, entitled reimbursable expenses, directly attributable to the work shall be charged at actual cost, and shall be limited to the following:

5.2.1.1 Identifiable transportation expenses in connection with the work, subject to the limitations of Section 112.061, Florida Statutes. There shall be no mileage reimbursement for travel within the City of Key West. Transportation expenses to locations outside the City area or from locations outside the City will not be reimbursed unless specifically pre-authorized in writing by the Contract Administrator.

5.2.1.2 Identifiable per diem, meals and lodgings, taxi fares, automobile rental, and miscellaneous travel-connected expenses for CONSULTANT's personnel subject to the limitations of Section 112.061 Florida Statutes. Meals for Class C travel inside the City of Key West will not be reimbursed. Lodging will be reimbursed only for room rates equivalent to Hampton Inn or Best Western located within the City of Key West city limits.

5.2.1.3 Identifiable communication expenses approved by Contract Administrator, long distance telephone, courier and express mail utilized to render the services required by this Agreement.

5.2.1.4 Cost of printing, reproduction or photography that is required by or of CONSULTANT to deliver services set forth in this Agreement.

5.2.1.5 Identifiable testing costs approved by Contract Administrator.

5.2.1.6 All permit fees paid to regulatory agencies for approvals directly attributable to the work. Permit fees do not include those permits required for the Contractor.

5.2.2. It is acknowledged and agreed to by CONSULTANT that the dollar limitation set forth in Sections 5.2.1.1 through 5.2.1.7 is a limitation upon and describes the maximum extent of the CITY's obligation to reimburse CONSULTANT for direct, non-salary expenses. If the CITY or Contract Administrator requests CONSULTANT to incur expenses not contemplated in the amount for reimbursable expenses, CONSULTANT shall notify Contract Administrator in writing before incurring such expenses. Any such expenses shall be reviewed and approved by



CITY prior to incurring such expenses.

- 5.2.3. All sub-consultants' hourly rates shall be billed in the actual amount paid by CONSULTANT. Sub-consultant reimbursable expenses are limited to the items in Sections 5.2.1.1 through 5.2.1.7 described above, when the sub-consultant's agreement provides for reimbursable expenses.

### **5.3. METHOD OF BILLING**

#### **5.3.1 Lump Sum Compensation**

CONSULTANT shall submit billings identifying type of work completed on a monthly basis, in a timely manner. Billings shall identify the nature of the work performed and estimate percent of work accomplished. The statement shall show a summary of fees with accrual of total and credits for portions paid previously. When requested, CONSULTANT shall provide backup for past and current invoices that record hours, personnel, and expense costs on a task basis, so that total hours and costs by task may be determined.

#### **5.3.2 Cost Reimbursable Per Diem (Time and Expenses) Compensation**

CONSULTANT shall submit billings identifying the type of work completed on a monthly basis, in a timely manner for all personnel hours and reimbursable expenses attributable to the work. Billings shall identify the nature of the work performed, total hours of work performed, and employee category and name of the individuals performing same. Billings shall itemize and summarize reimbursable expenses by category and identify same as to the personnel incurring the expense and the nature of the work with which such expense was associated. Where prior written approval by Contract Administrator is required for reimbursable expenses, a copy of the approval shall accompany the billing for such reimbursable. The statement shall show a summary of salary costs and reimbursable expenses with accrual of the total and credits for portions paid previously. External reimbursable expenses and sub-consultant fees must be documented by copies of invoices or receipts that describe the nature of the expenses and contain the purchase order number or other identifier that clearly indicates the expense is identifiable to the work. Subsequent addition of the identifier to the invoice or receipt by the CONSULTANT is not acceptable except for meals and travel expenses. Appropriate CONSULTANT's cost accounting forms with a summary of charges must document internal expenses by category. When requested, CONSULTANT shall provide backup for past and current invoices that records hours and rates by employee category, reimbursable expenses by category, and sub-consultant fees on a task basis, so that total hours and costs by task may be determined.

- 5.3.3 If requested, CONSULTANT shall provide copies of past paid invoices to any sub-consultant prior to receiving payment. CITY reserves the right to pay any sub-consultant if CONSULTANT has not paid them timely and the services of the sub-consultant are necessary to complete the WORK.

### **5.4.METHOD OF PAYMENT**

- 5.4.1. CITY shall pay CONSULTANT within thirty (30) calendar days from receipt of CONSULTANT's proper invoice with documentation as provided above.

5.4.2. In the event CONSULTANT has utilized a sub-consultant to perform the work, CONSULTANT will be required to provide documentation that subconsultant has been paid prior to payment being made to CONSULTANT.

5.4.3. Payment will be made to CONSULTANT at:

Company name \_\_\_\_\_

Company address \_\_\_\_\_

\_\_\_\_\_

**ARTICLE 6**

**CITY 'S RESPONSIBILITIES**

6.1 CITY shall assist CONSULTANT by placing at CONSULTANT'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. CONSULTANT shall not be required to affirmatively determine the accuracy of information, previous reports or any other data furnished by CITY to CONSULTANT. CONSULTANT is entitled to rely upon the accuracy and completion of information, reports or any other data furnished by CITY to CONSULTANT.

6.2 CITY shall arrange for access to, and make all provisions for, CONSULTANT to enter upon public and private property as required for CONSULTANT to perform its services.

6.3 CITY shall review the CONSULTANT's itemized deliverables and documents 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 CONSULTANT whenever CITY observes or otherwise becomes aware of any development that affects the scope or timing of CONSULTANT's services or any defect in the work of any contract.

**ARTICLE 7**

**MISCELLANEOUS**

**7.1 OWNERSHIP OF THE WORK**

Except for CONSULTANT’s pre-existing intellectual property, all finished or unfinished documents, data, data matrices and calculations generated and used to evaluate and compute the construction or material requirements for the Task Order, studies, surveys, drawings, maps, models, photographs and reports prepared or provided by CONSULTANT in connection with this Agreement, whether in hard copy or electronic form, shall become the property of CITY, whether the Task Order for which they are made is completed or not. If applicable, CITY may upon prior written notice withhold any payments then due to

CONSULTANT until CONSULTANT complies with the provisions of this Article. CONSULTANT is not responsible for damages caused by the unauthorized reuse by CITY or others of any of the materials for another Task Order.

All of the work product of CONSULTANT in executing a grant opportunity under this AGREEMENT shall become the property of the CITY. The City may use the deliverables solely for the purpose for which they were intended.

## **7.2 TERMINATION**

- 7.2.1 This Agreement may be terminated with or without cause by CITY upon thirty (30) days written notice to CONSULTANT. No further work will be performed by CONSULTANT upon receipt of this notice, unless specifically authorized by the City Manager of the City of Key West.
- 7.2.2 Notice of termination shall be provided in accordance with Section 7.12 of this Agreement.
- 7.2.3 In the event this Agreement is terminated, CONSULTANT shall be paid for any services performed to the date the Agreement is terminated. Compensation shall be withheld upon prior written notice 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, CONSULTANT 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.

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

- 7.3.1 CITY shall have the right to audit upon prior written notice the books, records, and accounts of CONSULTANT that are related to any Task Order. CONSULTANT shall keep such books, records, and accounts as may be necessary in order to record complete and correct entries related to the Task Order.
- 7.3.2 CONSULTANT shall preserve and make available upon written request, 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, Florida Statutes), 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 CONSULTANT's records, CONSULTANT shall comply with all requirements thereof; however, CONSULTANT 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 CONSULTANT 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 the 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 CONSULTANT'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. CONSULTANT 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 CONSULTANT 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 CONSULTANT 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, CONSULTANT 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 CONSULTANT has been placed on the convicted vendor list.

7.5.3 CONSULTANT 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**

CONSULTANT may use the subcontractors identified in the proposal that was a material part of the selection of CONSULTANT 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. CONSULTANT 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. \_\_\_\_\_
- b. \_\_\_\_\_
- 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 CONSULTANT shall not subcontract any portion of the work required by this Agreement, except as authorized pursuant to Section 7.6.

7.7.2 CONSULTANT 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 CONSULTANT shall perform its duties, obligations, and services under this Agreement in a skillful and respectable manner. The quality of CONSULTANT' 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 Article 3.

**7.8 INDEMNIFICATION OF CITY**

7.8.1 To the fullest extent permitted by law, the CONSULTANT expressly agrees to indemnify and hold harmless the City of Key West, their officers, directors, 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 Section, to persons or property, to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of the CONSULTANT, its Subcontractors or persons employed or utilized by them in the performance of the Contract. 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 Agreement 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 CONSULTANT 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 CONSULTANT or of any third party to whom CONSULTANT may subcontract a part or all of the Work. This indemnification shall continue beyond the date of completion of the Work.
- 7.8.3 Reports, documents and other deliverables of the CONSULTANT, whether in hard copy or in electronic form, are instruments of service for the project of the CITY. All documents provided to the City are the property of the City of Key West. Reuse, change, or alteration on another project, by the CITY or by others acting on behalf of the CITY of any such instruments of service without the written permission of the CONSULTANT will be at the CITY's sole risk. Nothing herein shall constitute a waiver of City's sovereign immunity rights, including, but not limited to, those expressed in Section 768.28, Florida Statutes.
- 7.8.4 It is not intended by any of the provisions of any part of this Agreement to create in the public, or any member thereof, a third-party beneficiary under this Agreement, or to authorize anyone not a party to this Agreement to maintain a suit for personal injuries or property damage, pursuant to the terms or provisions of this Agreement. CONSULTANT guaranties the payment of all just claims for materials, supplies, tools, or labor and other just claims against the CONSULTANT or any subcontractor, in connection with this Agreement. Additionally, to the extent permitted by law and as limited by and pursuant to the provisions of Section 768.28, Florida Statutes, the CONSULTANT agrees to indemnify and hold harmless the Department and the Division, including their officers and employees, from liabilities, damages, losses and costs, including, but not limited to, reasonable attorney's fees, to the extent caused by the negligence, recklessness or intentional wrongful misconduct of the CONSULTANT and persons employed or utilized by the CONSULTANT in the performance of this Agreement. Nothing contained in this paragraph is intended to, nor shall it constitute a waiver of the State of Florida and the CONSULTANT's sovereign immunity. Additionally, the CONSULTANT agrees to include the following indemnification in all contracts with contractors/subcontractors and consultants/sub-consultants (contractors/subcontractors and consultants/sub-consultants are referred to as "ENTITY") who perform work in connection with this Agreement:

“To the extent provided by law, [ENTITY] shall indemnify, defend, and hold harmless the [CONSULTANT] and the State of Florida Division of Emergency Management and the State of Florida Department of Economic Opportunity, including their officers, agents, and employees, against any actions, claims, or damages arising out of, relating to, or resulting from negligent or wrongful act(s) of [CONSULTANT], or any of its officers, agents, or employees, acting within the scope of their office or employment, in connection with the rights granted to or exercised by [CONSULTANT] hereunder, to the extent and within the limitations of Section 768.28, Florida Statutes.

The foregoing indemnification shall not constitute a waiver of sovereign immunity beyond the limits set forth in Section 768.28, Florida Statutes. Nor shall the same be construed to constitute agreement by [ENTITY] to indemnify [CONSULTANT] for the negligent acts or omissions of [CONSULTANT], its officers, agents, employees, or third parties. Nor shall the same be construed to constitute agreement by [ENTITY] to indemnify the Department or the Division for the negligent acts or omissions of the Department or the Division, its officers, agents, employees, or third parties. This indemnification shall survive the termination of this Agreement.”

## **7.9 INSURANCE**

- 7.9.1 During the Term of the Agreement, the Contractor shall provide, pay for, and maintain with insurance companies satisfactory to the City of Key West, Florida (“City”), the types of insurance described herein.
- 7.9.2 All insurance shall be from responsible insurance companies eligible to do business in the State of Florida. The required policies of insurance shall be performable in Monroe County, Florida, and shall be construed in accordance with the laws of the State of Florida.
- 7.9.3 The City shall be specifically included as an additional insured on the Contractor’s Liability policies with the exception of the Contractor’s Professional Liability policies (if required) and shall also provide the "Severability of Interest" provision (a/k/a "Separation of Insured’s" provision). The City’s additional insured status should be extended to all Completed Operations coverages.
- 7.9.4 The Contractor shall deliver to the City, prior to commencing work/activities under the Agreement, properly executed "Certificate(s) of Insurance" setting forth the insurance coverage and limits required herein. The Certificates must be signed by the authorized representative of the insurance company(s) shown on the Certificate of Insurance.
- 7.9.5 If the Contractor fails to provide or maintain the insurance coverages required in this Agreement at any time during the Term of the Agreement and if the Contractor refuses or otherwise neglects to deliver the required Certificate(s) of Insurance signed by the authorized representative of the insurance company(s) to the City, the City may, at the City’s sole discretion, terminate or suspend this Agreement and seize the amount of Contractor’s performance bond, letter of credit, or other security acceptable to the City).
- 7.9.6 The Contractor shall take immediate steps to make up any impairment to any Aggregate Policy Limit upon notification of the impairment. If at any time the City requests a written statement from the insurance company(s) as to any impairment to the Aggregate Limit, the Contractor shall promptly authorize and have delivered such statement to the City.



- 7.9.7 The Contractor authorizes the City and/or its insurance consultant to confirm all information furnished to the City, as to its compliance with its Bonds and Insurance Requirements, with the Contractor's insurance agents, brokers, surety, and insurance carriers.
- 7.9.8 Except for Professional Liability, all insurance coverage of the Contractor shall be primary to any insurance or self-insurance program carried by the City. The City's insurance or self-insurance programs or coverage shall not be contributory with any insurance required of the Contractor in this Agreement.
- 7.9.9 The acceptance of delivery to the City of any Certificate of Insurance evidencing the insurance coverage and limits required in the Agreement does not constitute approval or agreement by the City that the insurance requirements in the Agreement have been met or that the insurance policies shown in the Certificates of Insurance are in compliance with the Agreement requirements.
- 7.9.10 No work/activity under this Agreement shall commence or continue unless and until the required Certificate(s) of Insurance are in effect and the written Notice to Proceed is issued by the City.
- 7.9.11 The insurance coverage and limits required of the Contractor under this Agreement are designed to meet the requirements of the City. They are not designed as a recommended insurance program for the Contractor. The Contractor alone shall be responsible for the sufficiency of its own insurance program. Should the Contractor have any question concerning its exposures to loss under this Agreement or the possible insurance coverage needed therefore, it should seek professional assistance.
- 7.9.12 During the Term of this Agreement, the City and its agents and contractors may continue to engage in necessary business activities during the operations of the Contractor. No personal property owned by City used in connection with these business activities shall be considered by the Contractor's insurance company as being in the care, custody, or control of the Contractor.
- 7.9.13 Should any of the required insurances specified in this Agreement provide for a deductible, self-insured retention, self-insured amount, or any scheme other than a fully insured program, the Contractor shall be responsible for all deductibles and self-insured retentions.
- 7.9.14 All of the required insurance coverages shall be issued as required by law and shall be endorsed, where necessary, to comply with the requirements contained herein.
- 7.9.15 All policies of insurance required herein shall require that the insurer give the City thirty (30) days advance written notice of any cancellation, intent not to renew any policy and/or any change that will reduce the insurance coverage required in this Agreement, except for the application of the Aggregate Limits Provisions.
- 7.9.16 Renewal Certificate(s) of Insurance shall be provided to the City at least twenty (20) days prior to expiration of current coverage so that there shall be no termination of the Agreement due to lack of proof of the insurance coverage required of the Contractor.
- 7.9.17 If the Contractor utilizes contractors or sub-contractors to perform any operations or activities governed by this Agreement, the Contractor will ensure all contractors and sub-contractors to maintain the same types and amounts of insurance required of the Contractor. In addition, the Contractor will ensure that the contractor and sub-contractor insurances comply with all of the Insurance Requirements specified for the Contractor contained within this Agreement. The Contractor shall obtain Certificates of Insurance comparable to those required of the Contractor from all contractors and sub-contractors. Such Certificates of

Insurances shall be presented to the City upon written request. Contractor's obligation to ensure

that all contractor's and sub-contractor's insurance as provided herein shall not exculpate Contractor from the direct primary responsibility Contractor has to the City hereunder. The City will look directly to Contractor for any such liability hereunder and shall not be obligated to seek recovery from any contractor or subcontract or under such contractor's or sub-contractor's insurance coverages.

**7.9.18 SPECIFIC INSURANCE COVERAGES AND LIMITS:**

All requirements in this Insurance Section shall be complied with in full by the Contractor unless excused from compliance in writing by the City.

The amounts and types of insurance must conform to the following requirements. Current Insurance Service Office (ISO) or National Council on Compensation Insurance (NCCI) policies, forms, and endorsements or broader shall be used where applicable.

Notwithstanding the foregoing, the wording of all policies, forms, and endorsements must be acceptable to the City.

**Workers' Compensation and Employers' Liability Insurance** shall be maintained in force during the Term of this Agreement for all employees engaged in this work under this Agreement, in accordance with the laws of the State of Florida. The acceptable limits shall be:

Workers' Compensation	Florida Statutory Requirements
Employer's Liability	\$1,000,000.00 Limit Each Accident
	\$1,000,000.00 Limit Disease Aggregate
	\$1,000,000.00 Limit Disease Each Employee

If the Contractor has less than four (4) employees and has elected not to purchase Workers' Compensation/Employers Liability coverage as permitted by Florida Statutes, the Contractor will be required to issue a formal letter (on the Contractor's letterhead) stating that it has less than four (4) employees and has elected not to purchase Workers' Compensation/Employers Liability coverage as permitted by Florida Statutes. This exception does not apply to firms engaged in construction activities.

**Commercial General Liability Insurance** shall be maintained by the Contractor on a Full Occurrence Form. Coverage shall include, but not be limited to, Premises and Operations, Personal Injury, Contractual for this Agreement, Independent Contractors, and Products & Completed Operations Coverage. The limits of such coverage shall be:

Bodily Injury & Property Damage Liability	\$2,000,000.00 Combined Single Limit each Occurrence and Aggregate
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Completed Operations Liability Coverage shall be maintained by the Contractor for a period of not less than four (4) years following expiration or termination of this Agreement.

The use of an Excess, Umbrella and/or Bumbershoot policy shall be acceptable if the level of protection provided by the Excess, Umbrella and/or Bumbershoot policy is equal to or more comprehensive than the Primary Commercial General Liability policy.

**Business Automobile Liability Insurance** shall be maintained by the Contractor as to ownership, maintenance, use, loading and unloading of all owned, non-owned, leased, or hired vehicles with limits of such coverage of:

Bodily Injury                                \$1,000,000.00 Limit Each Accident  
Property Damage Liability                \$1,000,000.00 Limit Each Accident

or

Bodily Injury &  
Property Damage Liability                \$1,000,000.00 Combined Single Limit Each Accident

If the Contractor does not own any vehicles, this requirement can be satisfied by having the Contractor's Commercial General Liability policy endorsed with "Non-Owned and Hired Automobile" Liability coverage.

**Professional Liability Insurance** shall be maintained by the Contractor which will respond to damages resulting from any claim arising out of the performance of professional services or any negligent error or omission of the Contractor arising out of activities governed by this Agreement. The acceptable limits of liability shall be \$1,000,000 per Claim and \$2,000,000 Annual Aggregate. If the policy is structured on a "Claims Made" basis, the policy must contain a "Retroactive Date" of no later than the commencement date of the Agreement and will have an extended reporting period of four (4) years following expiration or termination of the Agreement.

#### **7.10 REPRESENTATIVE OF CITY AND CONSULTANT**

7.10.1 The parties recognize that questions in the day-to-day conduct of the Task Order will arise. The Contract Administrator, upon CONSULTANT's request, shall advise CONSULTANT 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 CONSULTANT shall inform the Contract Administrator in writing of CONSULTANT'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 Section. 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 CONSULTANT:

Contact name

Company name

Company address

\_\_\_\_\_

### **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 section where they appear, unless the context otherwise requires. Whenever reference is made to a Section or Article of this Agreement, such reference is to the Section or Article as a whole, including all of the subsections of such Section, unless the reference is made to a particular subsection or subparagraph of such Section or Article.

### **7.15 INDEPENDENT CONTRACTOR**

CONSULTANT is an independent contractor under this Agreement. Services provided by CONSULTANT shall be subject to the supervision of CONTRACTOR. In providing the services, CONSULTANT 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 CONSULTANT 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.

All work products will be prepared for the exclusive use of CITY for specific application as described in the proposed scope of services. No warranty, expressed or implied, is made. There are no beneficiaries of the work products other than CITY, and no other person or entity is entitled to rely upon the work products without the written consent of CITY. Any unauthorized assignment of related work product shall be void and unenforceable.

## **7.17 CONFLICTS**

7.17.1 Neither CONSULTANT nor its employees shall have or hold any continuing or frequently recurring employment or contractual relationship that is substantially antagonistic or incompatible with CONSULTANT's loyal and conscientious exercise of judgment related to its performance under this Agreement.

7.17.2 CONSULTANT 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 CONSULTANT 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**

CONSULTANT warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for CONSULTANT, 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 CONSULTANT, 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 CONSULTANT 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**

CONSULTANT 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 CONSULTANT elects to terminate this Agreement.

## **7.22 JOINT PREPARATION**

Preparation of this Agreement has been a joint effort of CITY and CONSULTANT 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 – Consultant Hourly Rates



Exhibit B – 2 CFR Appendix II to Part 200 – Contract Provisions for Non-Federal Entity Contracts Under Federal Awards

**7.26 COUNTERPARTS**

This Agreement may be executed in three (3) counterparts, each of which shall be deemed to be an original.

**7.27 LIMIT OF LIABILITY**

The total aggregate liability of CONSULTANT arising out of the performance or breach of this Agreement shall not exceed the total compensation paid to the CONSULTANT under applicable Task Order. Notwithstanding any other provision of this Agreement, CONSULTANT shall have no liability to CITY for contingent, consequential or other indirect damages including, without limitation damages for loss of use, revenue or profit; operating costs and facility downtime; or other similar business interruption losses, however the same may be caused. The limitations and exclusions of liability set forth in this Article shall apply regardless of the fault, breach of contract, tort (including negligence), strict liability or otherwise of CONSULTANT, its employees or subconsultants. The parties agree that the limitations and exclusions of liability set forth herein shall not be interpreted as a form of indemnification.

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

CITY OF KEY WEST, FLORIDA

CONSULTANT

By:

By:

\_\_\_\_\_  
Albert P. Childress, City Manager

\_\_\_\_\_

\_\_\_\_\_  
Print Name, Title

\_\_\_\_ Day of \_\_\_\_\_, \_\_\_\_\_

\_\_\_\_ Day of \_\_\_\_\_, \_\_\_\_\_

ATTEST:

ATTEST:

By:

By:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_

\_\_\_\_\_  
Print Name

\_\_\_\_ Day of \_\_\_\_\_, \_\_\_\_\_

\_\_\_\_ Day of \_\_\_\_\_, \_\_\_\_\_

APPROVED AS TO FORM

\_\_\_\_\_  
Attorney for Owner

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