

RESOLUTION NO. 18-366

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, APPROVING THE ATTACHED "FIRST AMENDMENT TO CONTRACT" TO THE "AGREEMENT FOR OPERATIONS, MAINTENANCE, AND MANAGEMENT SERVICES FOR THE CITY OF KEY WEST, FLORIDA, WASTEWATER FACILITIES" BETWEEN THE CITY AND OPERATIONS MANAGEMENT INTERNATIONAL, INC. (OMI); AUTHORIZING A FIVE-YEAR RENEWAL, PURSUANT TO SECTION 4.1 OF THE AGREEMENT; AUTHORIZING THE CITY MANAGER TO EXECUTE NECESSARY PAPERWORK UPON CONSENT OF THE CITY ATTORNEY; PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, in Resolution No. 13-304 the City Commission approved an Agreement with OMI to operate, maintain and manage the City's Wastewater Treatment Facilities; and

WHEREAS, City staff and OMI have requested an amendment to Section 2.5 of the Agreement, specifically amending the Direct Cost process for electricity charges, which is expected to save the City additional funds; and

WHEREAS, City staff recommends approval of a five-year renewal term, pursuant to Section 4.1 of the contract; and

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

Section 1: That the attached "First Amendment to
Contract", amending Section 2.5 of the "Agreement for
Operations, Maintenance, and Management Services for the City
of Key West, Florida, Wastewater Facilities" is hereby
approved.

Section 2: That the contract is renewed for a term
of five years, pursuant to section 4.1 of the Contract.

Section 3: That the City Manager, upon the advice and
consent of the City Attorney, is authorized to execute any
necessary documents.

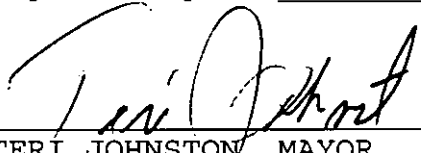
Section 4: That this Resolution shall go into effect immediately upon its passage and adoption and authentication by the signature of the Presiding Officer and the Clerk of the Commission.

Passed and adopted by the City Commission at a meeting held this 4th day of December, 2018.

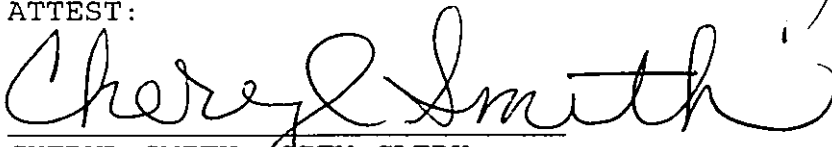
Authenticated by the Presiding Officer and Clerk of the Commission on 5th day of December, 2018.

Filed with the Clerk on December 5, 2018.

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


TERI JOHNSTON, MAYOR

ATTEST:


CHERYL SMITH, CITY CLERK

FIRST AMENDMENT TO CONTRACT

This First Amendment to the Contract is entered into this 4th day of December 2018, by and between the City of Key West, Florida, a municipal corporation (hereinafter the "CITY") and Operations Management International, Inc., a Florida corporation (hereinafter "OMI").

WITNESSETH

WHEREAS, On November 19th, 2013 the City Commission approved a 5-year contract establishing OMI to provide operation and maintenance services for wastewater and stormwater utilities for the City of Key West. (Resolution 13-304). This contract governs the operations of the Wastewater Treatment Plant and all pump/lift stations for wastewater and stormwater, and all associated infrastructure. The contract has an initial 5-year term, a renewal 5-year term, and a final 5-year renewal term.

RFP 09-13 was advertised for this contract was developed by Black and Veatch Engineering, Inc. who approved of the proposer's responsiveness and financial stability. From those proposers OMI was the highest rated amongst the ranking committee.

WHEREAS, CITY and OMI desire to amend certain provisions of the Contract to remove the responsibility of OMI to pay for electricity.

NOW, THEREFORE, in mutual consideration of the benefits conferred upon the parties by the terms of this Amendment, CITY and OMI agree to modify the Contract as follows:

RECITALS: That the above recitals are true and correct and made a part hereof;

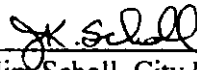
Section 1: Paragraph 2.5 of the Contract is hereby deleted in its entirety and replaced with the following:

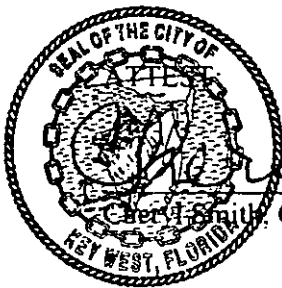
Section 2.5 Direct Cost

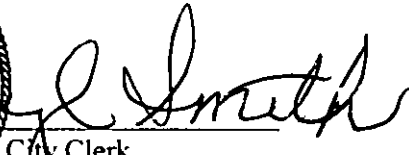
The cost incurred for the direct benefit of the Facilities, including, but not limited to, expenditures for direct labor, employee benefits, chemical lab supplies, repairs, repair parts, maintenance, parts, safety supplies, gasoline, oil, equipment rental, office supplies, other supplies, uniforms, telephone, postage, water, utilities (excluding electricity), tools, insurance, professional memberships, and training supplies.

IN WITNESS WHEREOF, the parties have executed this First Amendment to Contract on the date first written above.

CITY OF KEY WEST, FLORIDA

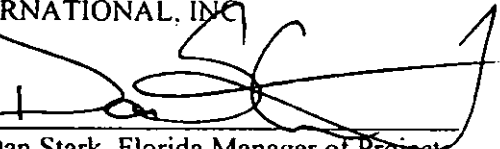
By: 
Jim Scholl, City Manager

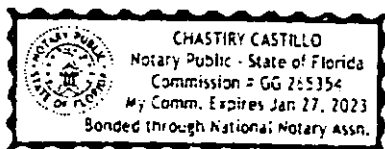



Cheryl Smith, City Clerk


Witness


Witness

OPERATIONS MANAGEMENT
INTERNATIONAL, INC
By: 
Dan Stark, Florida Manager of Projects



Chastiry Castillo 11/20/2018



THE CITY OF KEY WEST

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

MEMORANDUM

TO: Jim Scholl, City Manager

Cc: Greg Veliz, Asst. City Manager

FROM: John Paul Castro, Utilities Director

DATE: November 14, 2018

SUBJECT: Extending the Operations Management International, Inc. Contract for 5 years, Amending Section 2.5

Action statement:

Staff requests extending the contract for Wastewater and Stormwater Operations with Operations Management International, Inc. (OMI) for 5 years pursuant to section 4.1 of the contract and amending Section 2.5 of the contract to exclude electricity.

Background:

In 2013, the City of Key West advertised a request for proposals (RFP), RFP 09-13 to operate, maintain, and manage the City's wastewater treatment plant, wastewater collection and lift/pumping stations, and stormwater collection and pumping stations.

OMI was the highest ranked firm as decided by City Staff ranking committee. On March 24th of 2014, the City signed into agreement with Operations Management International, Inc., as the most qualified and cost-efficient respondent to the RFP. The contract term was for 5 years with an option for two additional 5-year terms approved by resolution 13-304.

Prior to the 2013 RFP for a contract operator of the City's wastewater and stormwater utilities, OMI has managed the two utilities for the City of Key West since the commissioning of the Richard A. Heyman Environmental Facility in 1989. The current project manager, John Bartelmo, was on staff for the opening of the facility.

Purpose and Justification:

The wastewater and stormwater utilities are two of the most important operations the City of Key West owns and operates. The Wastewater Treatment Plant (WWTP) treats on average 4.5 million gallons of wastewater

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

a day and is estimated that over 50% or all rainfall in the City enters into the City's stormwater system. The management of these utilities are of utmost importance for the health and safety of the community.

On the operations side OMI operates the WWTP and stormwater infrastructure nearly flawlessly. In their contract term they have won multiple national plant of the year awards, as well as the recent Water Heroes Award from WEF for their response to Hurricane Irma. The City was just approved for a 5-year operational permit from FDEP for the WWTP without challenge. The FDEP operations permit application is based on but not limited to the quality of the plant operations in areas such as quality of effluent, violations of environmental metrics, mechanical maintenance and operations, etc.

The OMI budgets for the two utilities as of FY 2018 is \$5.85 million dollars. The contract is on a cost-plus basis with an incentive to return surplus budgeted funds back to the City. During the current 5-year term the project has operated under budget every year with budget surplus's as high as \$200,000. OMI has been as excellent a financially efficient contractor as it has been operationally.

City staff and OMI are also requesting an amendment to Section 2.5 of the contract for direct cost. Electricity is currently being paid by OMI through the contract with a management fee of 13.75% as standard for all costs. Staff has requested to take over the payment of electricity bills which are approximately \$850,000 per year. This amendment, agreed to by OMI, will save the City approximately \$115,000 per year.

Options:

- 1) The City may choose to deny staff's recommendation to apply the contractually available 5-year extension. This would forego one of the City's longest and contractual relationships, require a new RFQ to be developed, and risk increased costs for operations.
- 2) The City can approve the 5-year extension with OMI, pursuant to Section 4.1 of the contract as recommended by City staff.
- 3) The City can approve the 5-year extension with OMI, pursuant to Section 4.1 of the contract, including amending Section 2.5 of the contract which omits "electricity" as a responsibility of the contractor.

Recommendation:

Staff recommends approving option #3, extending the contract with Operations Management International, Inc. for 5 years and amending Section 2.5 of the contract.

RESOLUTION NO. 13-304

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, APPROVING THE AWARD OF BID TO OPERATIONS MANAGEMENT INTERNATIONAL, INC. (OMI), A SUBSIDIARY OF CH2M HILL COMPANIES, LTD., IN RESPONSE TO RFP 09-13, TO OPERATE, MAINTAIN AND MANAGE THE CITY'S WASTEWATER TREATMENT PLANT, WASTEWATER COLLECTION SYSTEM AND LIFT/PUMPING STATIONS, AND STORMWATER COLLECTION SYSTEM AND PUMPING STATIONS; AUTHORIZING THE CITY MANAGER TO EXECUTE A CONTRACT IN SUBSTANTIAL CONFORMANCE WITH THE RFP DOCUMENTS; PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, Request for Proposal (RFP) 09-13 was issued on August 19, 2013, and three proposals were opened by the City Clerk on October 2, 2013; and

WHEREAS, Black & Veatch, an engineering services consulting firm engaged by the City, reviewed the submittals, and found the proposals each to be responsive with good references and solid financial standing; and

WHEREAS, a Ranking Committee, consisting of City staff and a Navy representative, evaluated the proposals at an advertised public meeting on October 16th, 2013, and scored the proposals pursuant to criteria contained in the RFP, with OMI receiving the highest ranking; and

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

Section 1: That the attached proposal of OMI, in an amount based upon true operational costs, plus a management fee, to operate, maintain and manage the City's wastewater treatment plant, wastewater collection system and lift/pumping stations, and stormwater collection system and pumping stations, is hereby approved in accordance with the terms and conditions contained in Request for Proposal #09-13 and response thereto.

Section 2: That the City Manager, upon the advice and consent of the City Attorney, is authorized to enter into a contract in substantial conformance with the proposal documents.

Section 3: 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 19 day of November, 2013.

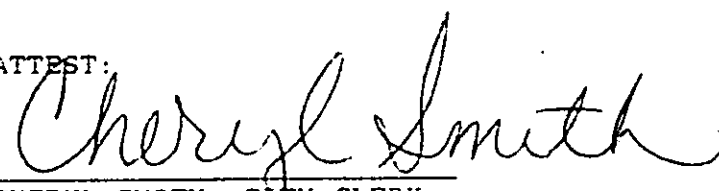
Authenticated by the presiding officer and Clerk of the Commission on November 20, 2013.

Filed with the Clerk November 20, 2013.

Mayor Craig Cates	<u>Yes</u>
Vice Mayor Mark Rossi	<u>No</u>
Commissioner Teri Johnston	<u>Yes</u>
Commissioner Clayton Lopez	<u>Yes</u>
Commissioner Billy Wardlow	<u>Yes</u>
Commissioner Jimmy Weekley	<u>Yes</u>
Commissioner Tony Yaniz	<u>Yes</u>


CRAIG CATES, MAYOR

ATTEST:


CHERYL SMITH, CITY CLERK

AGREEMENT FOR OPERATIONS, MAINTENANCE,
AND MANAGEMENT SERVICES FOR
The CITY OF KEY WEST, FLORIDA, WASTEWATER FACILITIES

THIS AGREEMENT made this 31st day of March, 2014, by and between the City of Key West, Florida, a Florida municipal corporation (the "City") with an office located at 525 Angela Street, Key West, Florida 33040, and Operations Management International, Inc. (hereinafter the CONTRACTOR) with an office located at 9191 S. Jamaica Street Englewood, CO 80112.

W I T N E S S T H :

WHEREAS, the City intends to hire a management company to operate, maintain and manage the wastewater treatment plant and related facilities (including collection and stormwater systems);

WHEREAS, the CONTRACTOR is a corporation engaged in the business of operating, maintaining, and managing such wastewater treatment plants and related facilities; and

WHEREAS, the City desires to receive, and the CONTRACTOR desires to provide, services for the operation, maintenance, and management of the wastewater treatment plant and related facilities (including collection and stormwater systems).

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Premises.

The foregoing recitals are hereby made a part of this Agreement.

2. Definitions.

In addition to all of the words and terms defined herein, the following words and terms (or pronouns used in their stead) shall, wherever they appear in this Agreement, be construed as follows, unless a different meaning is clear from the context. The masculine gender shall be deemed and construed to include correlative words of feminine and neuter genders. Unless the context shall otherwise indicate, all words shall include the plural as well as the singular number. The word "person" shall include the corporations and associations, including public bodies, as well as natural persons.

- 2.1. Adequate Nutrients. Plant influent nitrogen, phosphorous, and iron contents proportional to BOD₅, in the ratio of five (5) parts nitrogen, one (1) part phosphorous and one-half (0.5) part iron for each one hundred (100) parts BOD₅.
- 2.2. Biologically Toxic Substances. Any substance or combination of substances contained in the plant influent in sufficiently high concentrations so as to interfere with the biological processes necessary for the removal of the organic and chemical constituents of the Wastewater required to meet the discharge requirements of the NPDES Permit. Biologically toxic substances include, but are not limited to, heavy metals, phenols, cyanides, pesticides, and herbicides.
- 2.3. Purchasing Practices. Contractor must follow all City travel policies when travel relates to the Key West project and/or when expenses are allocated to the Key West Project. Airline tickets and other transportation requirements shall be purchased from the most economical and practical carrier. Tickets will be advance purchase unless the travel is on an emergency basis. Meal reimbursements are subject to the City, per diem rate as allocated, based on the travel items. No alcoholic beverages or other personal items will be reimbursed. City travel policies will be provided to the Contractor and will be followed in every respect.

No entertainment expenses of any kind will be charged to the Key West project "Direct Costs".

Corporate or regional expense allocation (split) will not include items otherwise defined as non billable expenses.

Purchasing practices under the terms of the contract shall follow the City's purchasing ordinance when purchases are made by the Contractor as a "Direct Cost". If the Contractor desires to modify any such purchasing procedure, the Contractor shall submit in writing a justification to the City for approval. When it is in the City's best interest for the Contractor to select vendors for reasons other than lowest price, the Contractor will document and disclose the reasons to the City for approval. The Contractor's nation or regional purchase agreements/contracts will be nonbinding on the Key West project. The Contractor will coordinate with the City by following City purchasing policies when direct purchases are to be made outside the scope of the contract.

The Contractor shall provide the City a list of anticipated equipment or materials, with justification for SOLE SOURCE purchases within 30 days of the Notice to Proceed for City Approval. Thereafter, the list shall be updated and resubmitted to the City within the first 30 days of the start for each fiscal year. As needed, the Contractor may also request SOLE SOURCE approval throughout the fiscal year.

City purchasing policies will be provided to the Contractor after the award of Contract.

The City encourages the Contractor to be a good corporate citizen; however, the City does not want said participation to be passed on to the City ratepayers. Community involvement in any form of contributions, fees or in kind services (employee time) shall

not be billed to Key West project "Direct Cost". Where it is expedient for an employee to participate in community involvement during working hours, said employee will be required to make up and document time (flex time).

Company parties, Christmas parties and employee award programs shall not be charged to "Direct Cost".

Computer leases, once the actual cost of local hardware and local software is recovered, no computer lease charges will appear as "Direct Cost" and the City will own all hardware and software charged to "Direct Cost". Computers charged to the project will remain property of the City. The total amortized cost charged to "Direct Cost" shall be disclosed to the City and shall not exceed reasonable market prices. All computers on site at the Key West project are City property. Computer upgrades will be required through established budgeting procedures subject to prior City approval.

Personally assigned vehicle costs (for the Project Manager) billed to "Direct Cost" shall not exceed \$300.00 per month without written prior City approval. City agrees to review new lease terms at the expiration of the current and subsequent leases.

Key West Project Reviews: Internal or external "project review" or other quality assurance program costs (except budgeted "quality training programs") will not be charged as a "Direct Cost".

New Project Startups (off-site): When Contractor employees of the Key West project help in new Contractor project startups, their salary and wage costs will be charged to the new Contractor project that is receiving their assistance. Any charges for overtime or temporary workers required due to their absence will be charged as a "Direct Cost" to Key West, as long as such temporary costs do not exceed the wage or salary cost of the employee participating in the new project startup.

Project Evaluations (off-site): When Contractor employees of the Key West project participate in off-site evaluations or reviews of existing or potential Contractor projects, their salary will be charged to Key West, as there is a definite benefit to Key West in exposing staff to new ideas, technologies and approaches to wastewater operations and maintenance. However, Key West will not be charged for any overtime or temporary labor associated with these employees being away from the project.

The Contractor will establish accounting procedures to segregate non billable costs as they are incurred. Contractor employees who have budget, accounts payable or purchasing responsibilities will be trained on what is non billable and how said cost shall be treated. Internal control procedures shall be established to review all "Direct Costs" to ensure proper handling of non billable cost.

The Contractor acknowledges the City's right to receive summary and detailed accounting records with associated source documents as frequently as deemed necessary by the "City's Representative".

Moving and Relocation expenses for the Project Manager will not occur more often than three years per assignment and will not exceed the current City policy amount as shown in the record for the City Manager. If it becomes necessary to move the Project Manager before the three-year limit for the Contractor's convenience, the Contractor will bear the expense of moving a new manger to the site. Should the City Commission request the Project Manager be replaced for any reason, Key West will bear the expense of moving a new manager to the site.

- 2.4. City's Representative. The person designated in writing, by the City Manager, to act on behalf of the City as its authorized representative in dealing with the CONTRACTOR under this Agreement.
- 2.5. Direct Cost. The cost incurred for the direct benefit of the Facilities, including, but not limited to, expenditures for direct labor, employee benefits, chemical lab supplies, repairs, repair parts, maintenance, parts, safety supplies, gasoline, oil, equipment rental, office supplies, other supplies, uniforms, telephone, postage, electricity, water, utilities, tools, insurance, professional memberships, and training supplies.

Direct Cost shall not include labor or other charges for Regional, District or Corporate personnel, offices or activities. All such costs shall be recovered through indirect cost and management fee provided for below.
- 2.6. Total Actual Direct Cost. The actual Direct Cost incurred by the CONTRACTOR in any one Fiscal Year for the operation of the Facilities.
- 2.7. Total Budget Direct Cost. The amount of Direct Cost agreed upon by the parties in the annual budget determined pursuant to Section 5.3 hereof, a copy of which budget for the first Fiscal Year hereof is attached hereto as Exhibit F and, by this reference incorporated herein. A copy of the 2014 approved Total Budget Direct Costs will be provided to the Contractor following Commission Approval. For reference, Exhibit F illustrates prior budget year approvals for "Direct Costs".
- 2.8. Total Budget Amount. The sum of Total Budget Direct Cost plus (13.75%) of Total Budget Direct Cost which (13.75%) percent figure shall constitute the CONTRACTOR's indirect costs and management fees.
- 2.9. EPA. The United States Environmental Protection Agency.
- 2.10. FDEP. The Florida Department of Environmental Protection.
- 2.11. Facilities. All equipment, vehicles, grounds and facilities described in Exhibit B attached hereto and, by this reference, incorporated herein.
- 2.12. Fiscal Year. The City's fiscal year commencing on October 1 and ending on September 30 of each calendar year.

- 2.13. Inflow/Infiltration. The inflow and infiltration of outside elements into the wastewater system as those terms are commonly used in wastewater treatment practices.
- 2.14. NPDES Permit. The Florida Department of Environmental Protection Domestic Wastewater Facility Permit FLA147222 effective on June 18, 2009 with an expiration date of June 17, 2014, a copy of which is attached hereto as Exhibit C and, by this reference, incorporated herein, as may be amended or such other permit as is in effect during the term hereof.
- 2.15. Navy Easement. The Grant of Easement dated March 31, 1986, by and between the United States of America, acting by and through the Department of the Navy, and the City, a copy of which is attached hereto as Exhibit A and, by this reference, incorporated herein, which easement allows the use by the City, subject to the terms contained therein, of the property described in Exhibit D attached hereto and, by this reference, incorporated herein.
- 2.16. Non-Processible Waste. Any ashes, foundry sand, human remains, animal carcasses, tree trunk sections, branches and stumps, motor vehicles (including major parts such as transmissions, rear ends, springs, and fenders), agriculture machinery and equipment, marine vessels and their major parts, any other large machinery or equipment, any matter or material the incineration of which in the Facility is prohibited by any law, ordinance, rule, or regulation of any government or public agency having jurisdiction over the Facility and its operations, noncombustible construction material or demolition debris, and hazardous waste, such as, but not limited to, explosives, hazardous chemicals, radioactive materials, cleaning fluids, crank case oils, cutting oils, paints, acids, caustics, poisons, or drugs.
- 2.17. The CONTRACTOR's Representative. The person designated in writing, by the CONTRACTOR, to act on behalf of the CONTRACTOR as its authorized representative in dealing with the City under this Agreement.
- 2.18. Plant. The wastewater treatment plant and all appurtenances thereto but not including any pump stations, lift stations or pipes located outside the physical structure of the building and structures.
- 2.19. Processible Waste. Wastewater brought to the Plant other than Non-Processible Waste.
- 2.20. Collection System. All components of the sewer collection system from (and excluding) lift stations, including gravity lines, force mains, and manholes.
- 2.21. Pump Stations/Lift Stations. The pump stations/lift stations are located as described on Exhibits B and G attached hereto.
- 2.22. Wastewater. The water carried through the wastewater collection system of the City and brought to the Plant for treatment and discharge.
- 2.23. Effluent Systems. The wastewater treatment plant point of discharge from the plant to the injection wells.

2.24. Navy Flow Meters. The Navy Flow Meters located as described on Exhibit B attached hereto.

2.26. Stormwater Drainage System. All components of the stormwater collection system to include minor pipe and catch basin repair and improvements.

3. Scope of Services.

3.1. The City hereby hires and contracts with the CONTRACTOR to operate, maintain, and manage the Facilities during the term hereof and upon the terms contained herein. The CONTRACTOR shall not subcontract or assign any portion of this contract without prior written approval of the City.

3.2. The CONTRACTOR.

3.2.1. Staffing. The CONTRACTOR will staff the facilities with its own employees who are qualified in wastewater and stormwater utility operations, maintenance, and management. The CONTRACTOR shall, at all times during the term hereof, provide qualified personnel needed to ensure the adequate and satisfactory monitoring and performance of the Facilities as required pursuant to this Agreement or by law. The CONTRACTOR may utilize any and all other additional personnel that may be necessary for the operation of the Facilities during abnormal or emergency conditions for Key West, Florida, upon receipt of approval of such additional personnel by the City. The CONTRACTOR shall be compensated for the costs of such personnel pursuant to Section 3.2.5 hereof. The CONTRACTOR shall submit the name of the Project Manager to the City for approval, which approval shall not be unreasonably withheld. If the City does not approve the person submitted by the CONTRACTOR, then the CONTRACTOR shall select another candidate for approval by the City. The CONTRACTOR shall reassign the Project Manager upon receipt of notice from the City that said Project Manager is no longer acceptable to the City.

3.2.2. Training. The CONTRACTOR shall provide classroom and on-the-job training for its employees to ensure proper and safe operation of the Facilities and to maintain the competency levels required by State of Florida certification standards. These training programs will be patterned after the CONTRACTOR programs currently utilized at other of the CONTRACTOR-operated facilities. The cost of these programs will be the sole responsibility of the CONTRACTOR as part of "Direct Cost". Where appropriate, said training will be made available to other City personnel.

3.2.3. Equipment. The CONTRACTOR shall, at its own cost and expense, provide all materials and equipment necessary for the operation and maintenance of the Facilities. The CONTRACTOR shall also maintain and furnish to the City on the first day of each

Fiscal Year, a current inventory listing the tools and equipment acquired by it for the City with budgeted funds during the previous Fiscal Year, containing the following information: reasonably detailed description of such tools and equipment; the date of purchase; the identification number, if any; and the manufacturer's name.

Such tools and equipment acquired by the City or by the CONTRACTOR for the City with budgeted funds will remain a part of the Facilities upon termination of this Agreement. Upon the termination of this Agreement, the CONTRACTOR will provide the City with the same quantity of fuel and chemicals, or the equivalent thereof, as are on hand at the commencement of operation of the Facilities. The CONTRACTOR shall take all steps necessary to preserve and maintain any warranties on any of the tools, equipment, and Facilities components and to keep the City informed in a timely manner of any and all steps taken to preserve and maintain such warranties.

3.2.4. Operation of Facilities. The CONTRACTOR shall, at a minimum, provide the following services during the continuing operation of the Facilities:

- 3.2.4.a. Respond immediately to, and immediately commence resolution of, any and all complaints concerning the Facilities made by the City, any other governmental agency, or any other person, agency, or body;
- 3.2.4.b. Periodically utilize all dormant equipment to ensure the proper functioning and maintenance of such equipment;
- 3.2.4.c. Maintain throughout the contract all Collection Systems, Stormwater System, Effluent Systems and Pump Stations/Lift Stations;
- 3.2.4.d. Comply with any and all terms of the Navy Easement of which it has control, and assist the City in complying with all other terms thereof;
- 3.2.4.e. Operate the Facilities unmanned for up to eight hours at a time as required by the Navy and at any time specified by the Navy. When the CONTRACTOR vacates the Facilities pursuant to the Navy's request, the Facilities shall be operating properly and shall continue to so operate under normal conditions for Key West, Florida, during the entire time that the CONTRACTOR is required to leave the Facilities unmanned;
- 3.2.4.f. Observe all rules and regulations concerning the exercise of the rights of ingress and egress to and from the Facilities;

- 3.2.4.g. Operate, maintain and repair the stormwater and wastewater Pump Stations/Lift Stations described in Exhibits B and G as consistent with normal wastewater treatment plant practices;
- 3.2.4.h. Operate, maintain and repair the WWTP described in Exhibit B as consistent with normal wastewater treatment Plant practices;
- 3.2.4.i. Operate, maintain and repair the entire City sewage collection and stormwater systems and discharge force mains of the Lift Stations described in Exhibits B and G and through the Effluent System.
- 3.2.4.j. Operate the Plant continuously, as consistent with normal wastewater treatment plant practice so as to maximize the efficient treatment of Wastewater;
- 3.2.4.k. Clean, maintain and minor repair of approximately 49,500 feet of storm sewer pipe with catch basins and injection wells;
- 3.2.4.l. Clean, maintain and repair Effluent System Deep Injection Well(s);
- 3.2.4.m. Installation of new small basins and French drains. Repair minor structural damage to stormwater system including up to 200 LF of stormwater collection system pipe;
- 3.2.4.n. Navy Flow Meters. Operate and maintain the Navy Flow Meters described in Exhibit B as consistent with normal wastewater treatment plant practices.
- 3.2.4.o. Provide twenty-four-hour access to the Facilities for the City's personnel. Visits to the Plant by the City's personnel may be made at any time by any of the City's employees so designated by the City's Representative. Keys to the Plant shall be provided to the City by the CONTRACTOR. All visitors to the Facilities shall comply with the CONTRACTOR's operating and safety procedures;
- 3.2.4.p. Provide adequate security of the Facilities at all times;
- 3.2.4.q. Continue training programs for all of the CONTRACTOR's employees;
- 3.2.4.r. Maintain a state of readiness and responsiveness to requests and/or after hour callouts on a 24 hour, 7 days per week basis. Such activities could include but not limited to, collection main

blockages, broken mains, high water events (flooding), pump station failures, treatment plant upsets, and power outages.

- 3.2.5. Additional Services. The CONTRACTOR shall provide and perform any other services that are outside of, or in addition to, the scope of services as provided herein, upon direction by the City. Such services will be invoiced to the City at the CONTRACTOR's actual cost plus (13.75%).
- 3.2.6. Direct Cost. The CONTRACTOR shall pay all Direct Cost incurred in the normal operation of the Facilities.
- 3.2.7. Wastewater Treatment. The CONTRACTOR shall manage, operate, and maintain the Facilities to the extent that the design capacity and capability of the Facilities permit such operation so that, at a minimum, the effluent discharge from the Facilities meets the requirements specified in Exhibit E attached hereto, as may be amended from time to time, and, by this reference, incorporated herein. The CONTRACTOR may reasonably alter the process and/or Facilities to achieve the objectives of this Agreement, provided, however, that no alteration which costs in excess of \$2000 shall be made without the City's prior written approval.
- 3.2.7.a. Acceptance of Processible Waste. The CONTRACTOR shall accept all Processible Waste delivered to the Facilities.
- 3.2.7.b. Removal of Non-Processible Waste. The CONTRACTOR shall remove non-processible Waste from the refuse storage pit of the Facilities at its sole cost and expense. All Non-Processible Waste removed by the CONTRACTOR shall be removed from the site promptly by the CONTRACTOR and delivered to the City's Rockland Key Transfer Station or such other FDEP approved landfill or such other FDEP approved compost site as may be designated by the City at the CONTRACTOR's sole cost and expense, except that the City shall pay for the increase in transportation of the Non-Processible Waste to such other landfill or compost site as part of the annual Budgeted Direct Cost.
- 3.2.7.c. Removal of Process Residue. The CONTRACTOR shall remove all Process Residue (i.e., screenings, grit and sludge) resulting from the processing of Processible Waste in the Facilities at its sole cost and expense. All Process Residue removed by the CONTRACTOR shall be removed from the site promptly by the CONTRACTOR and delivered to the City's transfer station or such other FDEP landfill or such other compost site as may be designated by the City at the CONTRACTOR's sole cost and expense, except that the City shall pay for the increase in transportation of the Process Residue to such other FDEP

landfill or compost site as part of the annual Budgeted Direct Cost.

3.2.8. Maintenance, Repair and Replacement.

- 3.2.8.a. General.** The CONTRACTOR shall, at its sole cost and expense, maintain the Facilities and grounds in good condition and repair, including making any and all necessary repairs and replacements consistent with standard wastewater treatment plant practices. The CONTRACTOR shall maintain the safety of the Facilities at a level consistent with applicable law and normal wastewater treatment plant practices for facilities of similar magnitude. The CONTRACTOR shall maintain the site, access roads, drives, parking lots, buildings, and other such appurtenances in good repair and in a neat, orderly, and litter-free condition in order to protect the Facilities against deterioration and to maintain the aesthetic quality of the Facilities. The CONTRACTOR shall correct any material deficiencies, inefficient operation and maintenance of the Facilities throughout the term hereof pursuant to the provisions hereof for normal conditions in Key West, Florida, and in accordance with standard wastewater treatment practices. The City shall have the right to inspect all records in detail during normal business hours. The CONTRACTOR shall maintain the Facilities in such a manner as to keep all warranties in full force and shall not act, or allow any other party to act, so as to interfere with the effectiveness of such warranties.
- 3.2.8.b. Preventive Maintenance.** The CONTRACTOR shall create and implement a plan for a preventive maintenance program for the Facilities and all related equipment, structures, and vehicles consistent with good preventive maintenance practices or the manufacturer's specifications, utilizing its computerized maintenance management system. Such preventive maintenance program shall include, at a minimum, the Collection System, Pump Stations/Lift Stations and all facilities at the WWTP. Collection System preventive maintenance must include line cleaning and Inflow/Infiltration remedial work. The CONTRACTOR shall maintain records of preventive maintenance activities.
- 3.2.8.c. Corrective Maintenance and Repair.** To the limits provided below, the CONTRACTOR will provide corrective maintenance and repairs for the Facilities and all related equipment, structures, and vehicles consistent with good corrective maintenance and repair practices or the manufacturer's specification, utilizing its computerized maintenance management system. Corrective maintenance and repairs are

deemed to be those non-preventive maintenance or repairs which cost less than \$5,000, other than repair of damages caused by Force Majeure, as hereinafter defined. During the term of this Agreement, the CONTRACTOR shall use methods of operation and maintenance which shall keep the Facilities in as good or better condition that at the start of this Agreement, excepting normal wear and tear. The CONTRACTOR shall maintain records of corrective maintenance and repair activities.

3.2.8.d. Capital Expenditures and Replacements. Capital expenditure and replacement are deemed to be any repairs or replacements which cost \$5,000 or more or which are caused by Force Majeure. The CONTRACTOR shall make no unreasonable request and shall ensure that items requested are reasonable and justifiable to carry out the terms of this Agreement in accordance with professional engineering practices. The City shall consent to all reasonable and justifiable capital expenditures and replacements, which consent shall not be unreasonably withheld. The City's cost of repairing and replacing these items shall be paid for either by reimbursement to the CONTRACTOR or by direct purchase by the City. Emergency items which are identified and which are needed for the safety of workers, will be given first priority. The CONTRACTOR shall submit to the City, by April 10 of each Fiscal Year, a list and estimate of capital expenditures and replacements, if any, to be provided by the City for the succeeding year. Because the City will be responsible for equipment replacement, the CONTRACTOR will submit documentation of the cost effectiveness of "repair versus replace" decisions recommended by the CONTRACTOR.

3.2.9. Analysis. The CONTRACTOR shall provide any and all laboratory testing necessary for monitoring of process control activities and compliance with the NPDES Permit. The CONTRACTOR shall employ and train all laboratory staff to the extent necessary and shall purchase all equipment and supplies necessary for the operation of the laboratory. The laboratory shall maintain an accreditation of NELAP certification for carbonaceous biological oxygen demand (CBOD), residue-nonfilterable (TSS), enterococci, and fecal coliforms.

3.2.10. Annual Budget. The CONTRACTOR shall submit to the City, by April 10 of each year, a budget for the upcoming fiscal year. The budget shall be in City format and shall detail Total Budgeted Direct Cost and the Total Budgeted Amount. The CONTRACTOR shall also include a labor worksheet that identifies the organizational structure by position, the number of employees per position, the salary per position, and a salary per position which includes the benefits package. The benefits package shall be defined for each position.

3.2.11. Reporting and Documentation.

- 3.2.11.a. **NPDES Permit Reports.** The CONTRACTOR shall prepare all NPDES Permit reports and submit them to the City no later than five (5) days prior to the due date for delivery of such reports to the appropriate government body.
- 3.2.11.b. **EPA Reports.** The CONTRACTOR shall submit all EPA reports required of the operator of a wastewater treatment facility.
- 3.2.11.c. **FDEP Reports.** The CONTRACTOR shall prepare all FDEP reports and submit them to the City no later than five (5) days prior to the due date for delivery of such reports to the appropriate government body.
- 3.2.11.d. **Monthly Operating Reports.** The CONTRACTOR will ensure that a certified operator prepares and signs any monthly operating report required by state, federal, or local government bodies or agencies and shall submit them to the City no later than five (5) day prior to the due date for delivery of such reports to the appropriate government body or agency.
- 3.2.11.e. **Reports to the City.** The CONTRACTOR shall provide a monthly report to the City of the Direct Cost for the operation of the Facilities for the month covered by such report. The CONTRACTOR shall provide an annual report to the City of all formant equipment and tools, and of all equipment and tools required to be purchased in the next fiscal year. The CONTRACTOR shall provide an annual report to the City comparing the Total Actual and Budgeted Direct Cost and an explanation of all budget variances. The CONTRACTOR shall also provide any other reports to the City that are reasonably requested by the City in the time period and in the manner reasonably requested by the City.
- 3.2.11.f. **Records.** The CONTRACTOR shall maintain all records related to the operation, maintenance, and management of the Facilities, including copies of all governmental reports and all financial documents, at the Facilities. Representatives of the City may review said records at any time. The CONTRACTOR shall maintain said records in accordance with sound business practices and generally accepted accounting practices or generally accepted accounting standards adopted by the Government Accounting Standards Board and the Government Financial Officers Association.
- 3.2.11.g. **Emergency Management Plans.** The CONTRACTOR within 90 days of the notice to proceed will provide the City with the

following emergency management plans, a hurricane plan, a high water/flooding plan, a spill plan, and a public information plan. Thereafter, each plan shall be update within the first 30 days of each fiscal year. The City, as needed, may request additional plans during the course of the contract. Likewise, the CONTRACTOR may have additional plans they desire to provide to the City.

3.2.12. Licenses and Permits. The CONTRACTOR shall act in a timely fashion to initiate an application for, and to maintain, with the City's assistance, all licenses, permits, and warranties necessary for the initial and continued operation of the Facilities. Unless stated otherwise herein, during the term hereof, the CONTRACTOR shall have the obligation to maintain all such licenses, permits, and warranties. The CONTRACTOR shall maintain all such licenses, permits, and warranties on behalf of, and in the name of, the City, at the CONTRACTOR's sole cost and expense. The City shall sign and certify applications for NPDES permits and any other permits in accordance with applicable state and federal laws and regulations.

3.2.13. Force Majeure. The CONTRACTOR shall not be deemed to be in default hereof if performance of the obligations required by this Agreement is delayed, disrupted, or becomes impossible because of any act of God, war, hurricane, fire, civil commotion, epidemic, act of government, its agencies or officers, or any other legitimate cause beyond the control of the parties, except any action required to be taken pursuant to the Navy Easement ("Force Majeure"). Upon the occurrence of any such event, the CONTRACTOR shall operate the Facilities on a best effort basis and shall not be responsible for effluent or product water quality/quantity/characteristics, or damages, fines, penalties or claims resulting therefrom. In the event labor stoppage by employee groups (e.g., picketing) causes a disruption of the CONTRACTOR employees entering and working at the Facilities, the CONTRACTOR shall seek appropriate legal injunctions or court order to terminate such disruption.

3.3. Obligations of the City.

3.3.1. Taxes. The City shall pay all property, franchise, or other taxes assessed against either the Facilities or the operation of the Facilities, except that the CONTRACTOR shall be responsible for any sales tax related to the Facilities, or any corporate or income taxes related to its operation, maintenance, and management of the Facilities.

4. Term and Terminations.

4.1. Term. The initial term of this Agreement shall be for (5) years commencing on March 1, 2014 and upon mutual agreement, will be renewable for up to (2) two additional terms of (5) five year periods.

4.2. Termination. The City or the CONTRACTOR shall have the right to terminate this Agreement, with or without cause, upon ninety-(90) days written notice to either party.

Either party hereto may terminate this Agreement upon a material breach of the terms hereof by the other party, provided that the non-breaching party gives written notice of the breach to the breaching party and allows said breaching party thirty (30) day to cure, or to take all responsible steps to commence to cure, said breach.

- 4.3. Operation of the Facilities After Termination. Upon termination of this Agreement, by failure to renew or by termination as provided above. The CONTRACTOR shall continue to provide the operations, maintenance, and management services required hereunder for a period of up to one-hundred eighty (180) days from said termination. During this period, the CONTRACTOR shall assist the City, or any party designated by the City, in assuming the operation, maintenance and management of the Facilities. The City shall pay the CONTRACTOR during this period within thirty (30) days of receipt of an invoice for such costs from the CONTRACTOR.

5. Compensation.

- 5.1. Fee. Subject to the adjustments contained in Section 5.2 and 5.3 hereof, the City shall pay to the CONTRACTOR as compensation for services performed for each Fiscal Year of this Agreement a fee (the "Fee"), which shall consist of the Total Budgeted Amount. At least Fifty percent (50%) of the Fee shall be fixed and not subject to the adjustment made pursuant to Section 5.3 hereof (the "fixed" portion of the Fee). The Fee shall not exceed a specified amount determined pursuant to Section 5.2 hereof for each subsequent Fiscal Year. The Fee shall be paid in equal monthly installments.
- 5.2. Total Budgeted Amount. The fee paid to the CONTRACTOR as compensation for services performed shall be (13.75%) markup over Total Budgeted Direct Cost, plus Total Budgeted Direct Cost. The Management Fee of 13.75% shall remain fixed for the entire duration of the Contract Term and any subsequent renewals. Total Budgeted Direct Cost expended for each Fiscal Year under this Agreement shall be negotiated annually commencing no later than five (5) months prior to the end of the then current Fiscal Year. If the parties fail to agree on the revision to the Fee by August 15 of each Fiscal Year, the Fee will be subject to Section 5.4 (iii) hereof, and be determined by arbitration pursuant to Section 9 hereof unless said date is mutually extended.
- 5.3. Annual Adjustments. Within sixty (60) days after the end of each Fiscal Year, the CONTRACTOR shall prepare and present to the City, a final financial report of the Direct Cost of the Facilities for such Fiscal Year, comparing the Total Actual and Budgeted Direct Cost. If the Total Actual Direct Cost exceed the Total Budgeted Direct Cost, then no adjustment shall be made for that fiscal year to the Fee. If the Total Actual Direct Cost for any Fiscal Year are less than the Total Budgeted Direct Cost for said Fiscal Year, then the CONTRACTOR shall be entitled to retain a portion of the estimated Fee paid for such fiscal Year pursuant to Section 5.1 hereof, based on the following formula:
1. Total Actual Cost plus
 2. (13.75%) of Total Actual Direct Cost plus;
 3. Fifty percent (50%) of the difference between Total Actual Direct Cost and Total Budgeted Direct Cost, up to a maximum difference of One Hundred Thousand Dollars (\$100,000.00).

The balance of the Fee, calculated above, paid by the City for said Fiscal Year shall be rebated to the City in one lump sum payment with the final financial report described above. The Fee as adjusted herein shall be subject to the parameters in Section 5.4.

5.4. **Fee Parameters.** Any annual compensation negotiated between the City and the CONTRACTOR pursuant to Section 5.2 of this Agreement shall be subject to the following parameters: (i) at least fifty percent (50%) of the annual compensation of the CONTRACTOR under this Agreement is based upon a periodic fixed amount and shall not be subject to any incentive based upon output of the Facilities; (ii) the annual compensation of the CONTRACTOR shall not be based (in whole or in part) on a share of the net profits of the Facilities; and (iii) in the event that the Fee is determined by arbitration pursuant to Section 5.2 and Section 9 hereof, the Fee so determined shall be subject to and comply with the provisions of Rev. Proc. 97-13, 1997-1 C.B. 632

5.4.1. **Fixed Fee.** The Fixed Fee shall be (\$4,796,254) and shall remain fixed for the term of the contract except for annual adjustments equal to Consumer Price Index for all Urban Consumers (CPI-U) (all items national).

5.4.2. **Variable Fee.** The fee as calculated in 5.2 above less the Fixed Fee as calculated in 5.4.1. In no case shall the Variable Fee exceed the Fixed Fee.

5.4.3. **Fee Paid to the CONTRACTOR.** The fee paid to the CONTRACTOR shall be the Fixed Fee plus the Variable Fee. In no case shall the total fee retained exceed twice the Fixed Fee.

5.5. **Change in Scope.** In the event of a change in the scope of services provided by the CONTRACTOR pursuant to this Agreement, the City and the CONTRACTOR shall negotiate, within the fee parameters described in Section 5.4 hereof, a commensurate adjustment in the Fee.

5.6. **Initial Period Fee.** The Fee for the initial period shall be (\$5,455,739) Total Budgeted Direct Cost and markup of (13.75%). Annual adjustments and Fee parameters under Section 5.3 and 5.4 shall be applied on a prorata basis where applicable (i.e., \$50,000 cap and Fixed Fee amount).

6. **Insurance.**

6.1. The CONTRACTOR.

6.1.1. **Worker's Compensation.** The CONTRACTOR shall maintain, during the term hereof, Worker's Compensation Insurance for all of the persons employed at the Facilities in the amount required by state law or regulation. In case any work is sublet to a party other than the CONTRACTOR, the CONTRACTOR shall require said subcontractor to provide Worker's Compensation Insurance for all of said subcontractor's employees unless such employees are covered by the protection provided by the CONTRACTOR.

- 6.1.2. Comprehensive General Liability Insurance. The CONTRACTOR shall maintain, during the term hereof, a comprehensive policy of hereof, and public liability insurance, including, but not limited to, products and completed operations liability and blanket contractual coverage's applying to, at a minimum, this Agreement, insuring against claims of liability, contingent and otherwise, for injury to, or death of, any person or persons, or damage to real or personal property, arising out of, by reason of, or in connection with, the CONTRACTOR's operations contemplated herein, and also to defend against all claims, demands, actions, or legal proceedings made or brought by any person or persons by reasons of any such injury, death, or damage, and to pay all judgments, interest, costs, or other expenses arising out of or in connection therewith. The limit of liability of such policy shall be not less than Five Million Dollars (\$5,000,000.00) combined single limit.
- 6.1.3. Automotive Liability Insurance. The CONTRACTOR shall maintain, during the term hereof, automotive liability insurance for all vehicles owned by the City or leased by the CONTRACTOR and that are used in connection with the facilities. Those vehicles owned by the City, but insured by the CONTRACTOR will be operated solely by the CONTRACTOR employees during the term hereof.
- 6.1.4. Property Damage. The CONTRACTOR shall maintain, during the term hereof, a property damage insurance policy for all property owned or acquired by the CONTRACTOR during the term hereof used in connection with the Facilities.
- 6.1.5. Pollution Liability Insurance. The CONTRACTOR shall maintain, during the term hereof, pollution liability insurance in connection with operation of the facilities.
- 6.1.6. Premiums. The cost of the premiums (self insurance cost allocation method) for the insurance required to be obtained and maintained by the CONTRACTOR pursuant to this Section 6.1 shall be included in Direct Cost, and all other insurance related costs, including, but not limited to, deductibles and loss retention, shall be at the CONTRACTOR's sole cost and expense.
- 6.1.7. Terrorism Coverage: All policies of insurance required to be obtained under the provisions of this Section 6 shall be endorsed providing that such policy or policies shall not exclude TRIA (terrorism) coverage.

6.2. General.

- 6.2.1. Obtaining Insurance. The CONTRACTOR shall not commence work pursuant to this Agreement until it shall have obtained all insurance required in this Section 6, and such insurance shall have been approved by the City or the City's Representative, as to form, amount and carrier, nor shall the CONTRACTOR allow any subcontractor to commence work.

- 6.2.2. Additional Insured. The CONTRACTOR will name both the City of Key West and the Navy as "additional insureds " on all insurance policies required by this Agreement with the exception of Workers' Compensation.
- 6.2.3. Proof of Insurance. The CONTRACTOR shall furnish satisfactory proof of coverage of the insurance required to be obtained under the provisions of this Section 6. All policies of insurance shall be endorsed providing that such policy or policies shall not be cancelled or materially modified by the carrier thereof until the non-obtaining party shall have been provided at least thirty (30) days prior written notice of such cancellation or material modification thereof. If the CONTRACTOR chooses to self-insure any of the obligations required in Section 6, the CONTRACTOR shall furnish to the City a letter certifying that the CONTRACTOR has provided for this coverage in the CONTRACTOR'S insurance system and that such coverage in the CONTRACTOR's insurance system shall be subject to the terms hereof. The letter should include a financial statement demonstrating financial solvency of the CONTRACTOR
- 6.2.4. Waiver of Subrogation. To the extent permitted by law, and only if such action does not invalidate the insurance carried by either party, the CONTRACTOR and the City, on behalf of themselves and their insurers, waive their rights of subrogation with respect to losses occurring to property of the other party insured as required hereunder.

7. Indemnification and Penalties.

7.1. The CONTRACTOR.

- 7.1.1. Indemnification. The CONTRACTOR will indemnify and hold harmless the Navy, the City, its elective and appointed boards, officers, agents, and employees from and against all liabilities, claims, damages, losses and expenses, including attorney's fees, arising out of, or resulting from, the negligent performance of its duties and obligations under this Agreement and the Navy Easement, including, without limitation, acts, and omissions of the CONTRACTOR, its employees, agents, officers, and subcontractors except that such indemnity and hold harmless agreement shall not apply to any liabilities, claims, damages, losses, and expenses arising out of the City's sole negligence. This covenant shall survive the termination of this Agreement.
- 7.1.2. Fines and Penalties. The CONTRACTOR shall be liable for (i) any fines or civil penalties which may be imposed by any governmental or quasi-governmental agency body or (ii) any judgments or liabilities arising from actions by non-governmental or quasi-governmental agencies or bodies for violations of the effluent guarantees specified herein arising out of, or resulting from, the performance or its duties and obligations under this Agreement, including, without limitation, acts and omissions of the CONTRACTORS, its employees, agents, officers and subcontractors. The City will assist the CONTRACTOR in any contest of any such fines or civil penalties in administrative and/or court proceedings; provided, however, that the CONTRACTOR shall pay such fines or

civil penalties prior to such protest if such payment is required prior to making such protest. The CONTRACTOR shall be solely responsible for all costs, including attorneys' and accountants' fees, of protesting any such fines or civil penalties. The CONTRACTOR shall also not be responsible for any fines or civil penalties due to EPA proceedings concluded prior to execution of this Agreement unless such fines or civil penalties are the direct result of an act or omission of the CONTRACTOR pursuant to the terms hereof.

- 7.1.3. Navy Easement. The CONTRACTOR shall be responsible for the performance of all of the City's obligations under the Navy Easement of which the CONTRACTOR has control. The CONTRACTOR will be liable for any damages or additional costs that result from a violation of any of the terms of the Navy Easement, unless caused by an act or omission or negligence of the City, Navy, or other outside entity or individual.

7.2. City.

- 7.2.1. Fines and Penalties. The City shall be responsible for fines or civil penalties due to violations of Ordinance 79-18, as amended, provided that the CONTRACTOR, not the City, shall be responsible for such fines or civil penalties if the CONTRACTOR negligently fails to prevent any damages arising from violations of Ordinance 79-18, as amended.

8. Default.

8.1. The CONTRACTOR.

- 8.1.1. Rejection of Processible Waste. If, at any time after the commencement of this Agreement, the CONTRACTOR rejects Processible Waste delivered by the City to the Facilities which the CONTRACTOR is required to accept, then such failure shall constitute an event of default.
- 8.1.2. Abandonment of Facilities. If the CONTRACTOR abandons the Facilities during the term hereof, such abandonment shall constitute an event of default. In addition to any other remedies described below, the CONTRACTOR shall be liable for any incidental and consequential damages resulting from its abandonment of the Facilities, including, but not limited to, any increase in fees paid by the City to subsequent operator of the Facilities. The CONTRACTOR's vacation of the Plant due to the Navy Easement shall not be deemed to be an abandonment of the Facilities.
- 8.1.3. Failure or Refusal to Comply With the Agreement. The failure to cure any breach hereof after notice as required in Section 4.2 hereof, or the persistent or repeated failure or refusal of the CONTRACTOR to operate, repair, and maintain the Facilities, or to substantially fulfill and of its material obligations in accordance with this Agreement, notwithstanding the payment by the CONTRACTOR of any penalties, damages, or other amounts provided for under

this Agreement, unless excused or justified by Force majeure, default by the City, or other legally recognized cause customarily justifying or excusing nonperformance, shall constitute and event of default hereunder.

- 8.1.4. Bankruptcy. Written admission by the CONTRACTOR that it is bankrupt, or the filing by the CONTRACTOR of a voluntary petition of bankruptcy, or the consent by the CONTRACTOR to the court appointment of a receiver or trustee for all or a substantial portion of its property or business, or the making of any arrangement by the CONTRACTOR with, or final adjudication of the CONTRACTOR as bankrupt based upon any involuntary petition under federal bankruptcy laws, shall constitute an event of default.

8.2. City.

- 8.2.1. Failure to Make Payments. The failure or refusal by the City, without justification or excuse, to make any payment required hereunder within ninety (90) days of the date provided herein for such payment, shall constitute an event of default.
- 8.2.2. Failure or Refusal to Comply with the Agreement. The failure to cure any breach hereof after notice as required in Section 4.2 hereof, or the persistent or repeated failure or refusal by the City to perform any of its material obligations in accordance with this Agreement, notwithstanding the payment by the City of any penalties, damages, or other amounts provided for under this Agreement, unless excused or justified by Force Majeure, default by the CONTRACTOR, or other legally recognized cause customarily justifying or excusing non-performance shall constitute an event of default.

8.3. Remedies.

- 8.3.1. Termination. Either party may terminate this Agreement upon the occurrence of an event by default by the other party as provided in Section 4.2 hereof.
- 8.3.2. Default by the CONTRACTOR. In addition to the rights of termination contained herein, the City may collect any consequential and incidental damages arising from the CONTRACTOR's default hereunder.
- 8.3.3. Default by the City. In addition to the rights of termination contained herein, upon a default by the City, the CONTRACTOR will be entitled to collect all fees due and owing to it up to the date of termination.

9. Arbitration.

- 9.1. The parties shall submit to Arbitration as provided herein, unless the parties jointly agree in writing to waive Arbitration. In the event that the City and the CONTRACTOR are unable to reach an agreement as to any compensation issues or design and construction defects versus maintenance and repair obligations by July 15 of each Fiscal Year for the negotiation of the Annual Fee pursuant to Section 5.3 hereof, and by thirty

(3) days after receipt of notice by one party from the other party stating that the parties cannot agree on one of the above issues (the "Arbitration Notice") for all other issues, then those issues remaining unresolved shall be submitted to binding arbitration under the following terms, conditions, and procedures:

- 9.1.1. Unless specifically provided for herein to the contrary, the rules and procedures of the American Arbitration association as shall from time to time be amended, shall apply.
- 9.1.2. There shall be a three-member Arbitration Board composed of one member selected by the City and one member selected by the CONTRACTOR. Each party shall notify the other of its selection on or before May 25 of said Fiscal Year for the Annual Fee or ten (10) days after receipt of the Arbitration Notice for all other issues. The final member of the three-member Arbitration Board shall be selected by the initial two members selected within a reasonable time after their appointment.
- 9.1.3. On or before June 10 of said Fiscal Year for the Annual Fee or twenty-five (25) days after receipt of the Arbitration Notice for all other issues, each party shall submit to the Arbitration Board its written position on each unresolved issue. Such submission shall include not only the party's proposed resolution, but also all supporting data and argument. All exhibits intended for introduction at the hearing and a list of witnesses each party intends to call shall be submitted as exhibits to the submission.
- 9.1.4. The Arbitration Board may schedule such pre-hearing conferences as it shall deem advisable.
- 9.1.5. The arbitration hearing shall commence no earlier than June 11 of said Fiscal Year for the Annual Fee or twenty-six (26) days after receipt of the Arbitration Notice for all other issues, and no later than June 25 of said Fiscal Year for the Annual Fee or forty (40) days after receipt of the Arbitration Notice for all other issues, and shall be concluded no later than ten (10) working days after its commencement.
- 9.1.6. The parties hereby stipulate and agree for purposes of arbitration that any modification of the Fee shall be subject to the provisions of Rev. Proc. 97-13, 1997-1 C.B. 632. The parties hereby further agree and stipulate for purposes of arbitration that the pricing and cost estimates contained in this Agreement or any subsequent modification hereto are fair and reasonable and are not to be a factual issue for determination by the Arbitration Board. The sole question of fact(s) for the Arbitration board shall be confined to changes (or anticipated future changes) in circumstances between the effective date of this Agreement or any modification(s) hereto (including, but not limited to, negotiated or arbitrated changes to fees and cost estimates pursuant to this Agreement) and the effect such changed circumstance(s) should have on the then effective fees and/or cost estimates.

- 9.1.7. Within ten (10) days of the conclusion of the evidentiary phase of the arbitration hearing the Arbitration Board shall announce its Decision and Order. The possible Decision and Order shall be limited on each individual issue presented to either the position of the City or the position of the CONTRACTOR as set forth in the position submissions described in Section 9.1.3.
- 9.1.8. Findings of fact and conclusions of law shall not be required of the Arbitration Board unless specifically requested by either party within five (5) working days of the announcement of the Decision and Order.
- 9.1.9. Unless specifically requested by either party, the proceedings shall not be recorded by other than an audio tape recording device. In the event that either party requests the services of a court reporter or other means of transcription of the proceedings, the requesting party shall bear the cost of such recording and transcription.
- 9.1.10. The costs of arbitration services shall be borne equally by the parties, provided, however, that in the event that the Arbitration Board makes a specific written finding of fact that one party has prosecuted its case frivolously or in bad faith, then the Arbitration Board shall assess the costs of arbitration services to the offending party.
- 9.1.11. The Decision and Order shall be binding on both parties and shall not be subject to appeal.
- 9.1.12. If the day or performance of any obligation under this Section 9 occurs on a Saturday, Sunday, or federal holiday, then such obligation shall be performed on the next business day thereafter.

10. Miscellaneous.

- 10.1 Notice. All notices and other communications required in connection with this Agreement shall be in writing unless otherwise specified herein, and any notice or other communication required hereunder shall be deemed delivered to the addressee thereof when delivered in person at the address set forth below, or three (3) business days after the deposit thereof in any main or branch office of the United States Post Office, certified or registered mail, return receipt requested, postage prepaid, properly addressed to the properties respectively as follows;

For notices and communication to the City:

The City of Key West
3140 FLAGLER AVENUE
PO BOX 1409
Key West, Florida 33041
Attention: City Manager

with a copy (which need not be sent via certified or registered mail) to:

The City of Key West
3140 FLAGLER AVENUE
PO BOX 1409
Key West, Florida 33041
Attention: City Attorney

For notices and communication to the CONTRACTOR:

Attn: Director of Contracts OMBG
9191 S. Jamaica Street
Englewood, CO 80112

By notice complying with the foregoing requirements of this section, each party shall have the right to change the address or addressee or both for all future notices and communication to such party, but no notice of a change of address shall be effective until actually received.

- 10.2. Binding Effect. Each of the covenants, agreements, and provisions contained herein shall be binding upon, and shall inure to the benefit of, the parties hereto, and their respective successors and assigns.
- 10.3. Governing Law. This Agreement and the rights of the parties hereunder shall be interpreted and enforced in accordance with the laws of Monroe County, State of Florida.
- 10.4. Captions. The titles or captions contained in the Agreement are inserted only as a matter of convenience and for reference, and such captions in no way define, limit, extend, or describe the scope of this Agreement or the intent of any provisions hereof.
- 10.5. Entire Agreement; Further Action. This Agreement, including the exhibits hereto, contains the entire agreement between the parties hereto relative to the operation, maintenance and management of the Facilities and matters related thereto. Each of the parties hereto agrees, from time to time, to execute and deliver such further instruments and to take such further action as may be reasonably necessary in order to fully perform and carry out the terms and intent hereof.
- 10.6. Facilities. All grounds, Facilities, equipment, and vehicles now owned by the City, or acquired by the City during the term hereof, or acquired by the CONTRACTOR for the City with budgeted funds for the operation, maintenance, and management of the Facilities during the term hereof, shall remain or become the property of the City during the term hereof and upon the termination hereof.
- 10.7. Severability. If any provisions of this Agreement or the application thereof to any person or circumstances shall be held by a court of competent jurisdiction to be invalid or unenforceable to any extent, the remaining provisions of this Agreement and the validity, enforceability, and application of such provisions to other persons or

circumstances shall not be impaired thereby, but such remaining provisions of this Agreement shall be interpreted, applied and enforced so as to achieve, as near as may be, the purposes and intent of this Agreement to the greatest extent permitted by applicable law.

- 10.8. Independent Contractor. The relationship of the CONTRACTOR to the City is that of an independent contractor. The City and the CONTRACTOR hereby agree and covenant that at no time during the term of this Agreement shall any member of the governing body of the City be employed by, or be a member of the governing body of, the CONTRACTOR, nor shall any member of the governing body of the CONTRACTOR be employed by, or be a member of the governing body of, the City. The City and the CONTRACTOR hereby further covenant and agree that at no time during the term of this Agreement shall the members of the governing body of the City own a controlling interest in the CONTRACTOR.
- 10.9. Waiver. Unless otherwise specifically provided herein, no delay or failure to exercise a right resulting from any breach of this Agreement shall impair such right or shall be construed to be a waiver thereof, but such right may be exercised from time to time and as often as may be deemed expedient. Any waiver shall be in writing and signed by the party granting such waiver. In any representation, warranty, or covenant by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach under this Agreement.
- 10.10. Assignment. This Agreement shall not be assigned by the CONTRACTOR without the prior written consent of the City which consent shall not be unreasonably withheld, except that no consent shall be required to be obtained for an assignment to any affiliate or successor. The City has the right to transfer the contract to a regional wastewater authority if it is determined to be in the City's best interest.
- 10.11. Equal Opportunity. The CONTRACTOR is an equal opportunity employer with an approved affirmative action program.
- 10.12. Amendment. This Agreement may not be amended or modified in any respect, except by written agreement expressly referring to this Agreement and duly authorized, executed and delivered by authorized representatives of the parties hereto.
- 10.13. Representations of the CONTRACTOR. The CONTRACTOR represents that (i) it is a corporation duly organized under the laws of the State of NAME STATE, (ii) it is qualified to do business in the State of Florida, (iii) this Agreement has been duly authorized, executed and delivered by it, (iv) it has the required power and authority to perform this Agreement, and (v) it shall not claim, or attempt to claim, any depreciation or investment credit on the Facilities, and equipment provided by the CONTRACTOR pursuant to Section 3.2.5 hereof, or any maintenance, repair, or replacement expenditures made by the CONTRACTOR pursuant to Section 3.2.10 hereof, as would otherwise be allowed under the Internal Revenue Code, 26 U.S.C. 1, et seq. (1998).

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date and year first above written.

The CITY OF KEY WEST

ATTEST:

Susan P. Harrison

Begley
CITY MANAGER

ATTEST:

Cyril A. Bays

CH2M HILL OMI

Natalie L. Eldredge
Natalie L. Eldredge

Vice President

Operations Management International, Inc.

CNB for Bill
12-16-2013