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**CITY OF MARATHON, FLORIDA  
RESOLUTION 2004-048**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA, AUTHORIZING THE CITY MANAGER TO ENTER INTO A DESIGN/BUILD AGREEMENT WITH RECREATIONAL DESIGN & CONSTRUCTION, INC. FOR THE DESIGN AND CONSTRUCTION OF COMMUNITY PARK PHASE II IN THE AMOUNT OF \$3,361,780**

**WHEREAS**, on December 31, 2003, the City of Marathon (the "City") issues a request for proposals (the "RFP") for the design and construction of Community Park Phase II (the "Project"); and

**WHEREAS**, after submittals were received, the City Council authorized staff to negotiate a contract with Recreational Design and Construction, Inc. (the "Design Builder") on March 23, 2004; and

**WHEREAS**, City staff has met with the Design Builder to finalize the terms of the agreement.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA, THAT:**

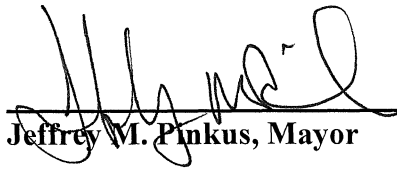
**Section 1.** The design/build agreement between the City of Marathon and Recreational Design & Construction, Inc. for \$3,361,780.00, a copy of which is attached as Exhibit "A", together with such non-material changes as may be acceptable to the City Manager and approved as to form and legality by the City Attorney, is approved.

**Section 2.** The City Manager is authorized to sign the agreement.

**Section 3.** This resolution shall take effect immediately upon its adoption.

**PASSED AND APPROVED** by the City Council of the city of Marathon, Florida, this 25th day of May, 2004.

**THE CITY OF MARATHON, FLORIDA**

  
\_\_\_\_\_  
Jeffrey M. Pinkus, Mayor

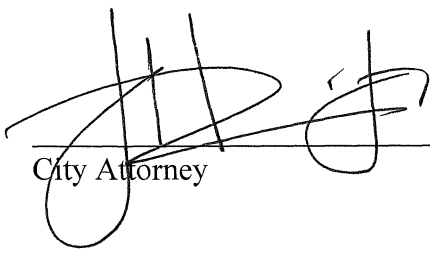
AYES: Bartus, Bull, Mearns, Miller, Pinkus  
NOES: None  
ABSENT: None  
ABSTAIN: None

**ATTEST:**

  
\_\_\_\_\_  
Cindy L. Ecklund  
City Clerk

(City Seal)

**APPROVED AS TO FORM AND LEGALITY FOR THE USE  
AND RELIANCE OF THE CITY OF MARATHON, FLORIDA ONLY:**

  
\_\_\_\_\_  
City Attorney

## NOTICE TO PROCEED

Dated June 2, 2004

TO: Recreational Design & Construction, Inc.  
ADDRESS: 3990 North Powerline Road, Ft. Lauderdale, Fl. 33309  
PROJECT: City of Marathon Community Park Phase II  
CONTRACT: Design Build Agreement

You are hereby notified that the Contract Times with respect to the Work under the above Design Build Agreement will commence to run on June 2, 2004. By that date, you are to start performing your obligations under the Contract Documents. In accordance with the Agreement, the following are certain dates relative to the Work:

Schematic Design Documents 30% Submittal 60 days from Notice to Proceed  
Design Development Documents 90% Submittal 60 days from Receipt of 30% Review Comments  
Construction Documents 100% Submittal 30 days from Receipt of 90% Review Comments

Before you may start any Work at the site, Section 10.2 of the Agreement requires you and all Subcontractors and Subconstultants, as applicable, each deliver to the City, who shall be listed as an additional insured, certain Certificates of Insurance that each is required to secure and maintain in accordance with the Contract Documents.

Supply bonds as required by contract.

**CITY OF MARATHON,  
a Florida municipal corporation**

By: Susie Thomas  
City's Project Representative

**CITY OF MARATHON  
DESIGN BUILD AGREEMENT  
COMMUNITY PARK PHASE II**

**THIS DESIGN BUILD AGREEMENT** (the "Agreement") is made and entered into as of the 25th day of May, 2004 by and between the **CITY OF MARATHON**, a Florida municipal corporation (the "City"), having an address at 10045-55 Overseas Highway, Marathon, Florida 33050 and Recreational Design & Construction, Inc. ("Design/Builder"), having an address at 3990 North Powerline Road, Fort Lauderdale, Florida 33309

**RECITALS**

1. On December 31, 2003, the City issued a Request for Proposals RFP #2003-MCPII ("RFP"), for the provision of design build services in connection with the development of the Project (as defined below).
2. In response to the RFP, Design/Builder submitted a proposal to be the Design/Builder for the Project.
3. City desires to engage Design/Builder, and Design/Builder agrees to design and build the Project, all as set forth below.

**NOW, THEREFORE**, for and in consideration of the mutual covenants and agreements set forth herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto, intending to be legally bound hereby, do covenant and agree as follows:

**1. PROJECT SUMMARY.**

The following summary (the "Project Summary") provides the pertinent facts and certain general terms with regard to the design and construction of the Project, which is the subject of this Agreement. Capitalized terms not defined in the text shall have the meanings ascribed to them in Article 2 of this Agreement.

**1.1 Project Description.** The "Project" consists of the design and construction of the City of Marathon Community Park Phase II Project including landscaping and facilities for the 7 acre park complex.

**1.2 Project Representatives.** For purposes of this Project, the following shall serve as the Project Representative for each party: City Susie Thomas. Design/Builder: Joseph Cerrone, III.

**1.3 Services.** The Design/Builder shall complete the design and construction of the Project in accordance with the terms and conditions of the Contract Documents. The parties acknowledge and agree that nothing in this Agreement shall be construed as to provide, grant,

confer any rights unto Design/Builder and its Subconsultants and Subcontractors with respect to the provision of any other services (whether design, construction or otherwise), except for Work expressly set forth in the Contract Documents.

**1.4 Schedule for Performance.** The Design/Builder shall complete the design and the construction of the Project pursuant to the schedules for each set forth in Exhibit "A" to this Agreement (the "Contract Times"); provided, however, that Design/Builder shall perform the design phase of the Work in accordance with said Contract Times as well as the schedule of performance set forth in Section 4.2. The Contract Times set forth in Exhibit "A" shall commence to run on the thirtieth (30<sup>th</sup>) day after the effective date of this Agreement or, if a Notice to Proceed is given, on the day indicated in the Notice to Proceed. A Notice to Proceed may be given at any time within thirty (30) days after the effective date of the Agreement.

**1.5 Compensation.** It is the intent and agreement of the parties that the City shall pay the Design/Builder for Design/Builder's performance of its obligations hereunder a lump sum for the Work that shall not exceed a guaranteed maximum price ("GMP") established for the Work, subject to additions and deductions by Change Order as provided in this Agreement. The GMP for the Work is Three Million Three Hundred Sixty-one Thousand Seven Hundred Eighty and 00/100 Dollars (\$3,361,780). Payment by the City of the GMP shall be deemed full compensation to the Design/Builder for the performance of the Work required by this Agreement. In the event additional labor, costs or expenses are necessary to complete the Work such amounts shall be the sole responsibility of Design/Builder; it being acknowledged and agreed that the GMP for the Work, shall be the maximum amount the City shall be required to pay for the Work.

## **2. DEFINITIONS.**

For the purposes of this Agreement, the following terms are defined as:

**2.1** "Addenda" and "Amendment" means a written modification to this Agreement and/or the Contract Documents executed by the Design/Builder and City covering changes, additions, or reductions in the terms of this Agreement.

**2.2** "Agreed Cost" is defined in Section 7.2.

**2.3** "Bonds" is defined in Section 12.1.

**2.4** "Building Department" means the City of Marathon Building Department.

**2.5** "Change Order" is defined in Section 7.1

**2.6** "Change Order Request" is defined in Section 7.2.

**2.7** "Contract Documents" means this Agreement, the RFP, the Design Criteria Package, the Plans and Specifications and all exhibits and documents related thereto or

contemplated thereby, as well as all Addenda and Amendments related to each with respect to the Project and all changes to said documents issued by City after execution of this Agreement.

**2.8** "Contract Times" is defined in Section 1.4.

**2.9** "Construction Documents" is defined in Section 4.1.1.

**2.10** "Construction Work" means the construction, operational testing and system operation until acceptance by the City of the Project required of the Design/Builder under the terms of this Agreement and the Contract Documents.

**2.11** "County" means Monroe County.

**2.12** "Date of Termination" is defined in Section 37.1.

**2.13** "Day" or "Days" or "day" or "days" means calendar days.

**2.14** "Design/Builder" means Recreational Design & Construction, Inc.

**2.15** "Design Consultant" means the design professional selected by City to act as City's owner's representative and interact with the Design/Builder.

**2.16** "Design/Builder's Estimate" is defined in Section 7.2.

**2.17** "Design/Builder's Representative" is defined in Section 30.2 and named in Section 1.2.

**2.18** "Design Criteria Package" means the set of documents contained in the RFP that describe the Project requirements and scope of Work, which are to be used by the Design/Builder in developing the design for the Project.

**2.19** "Design Development Documents" means the drawings and documents that establish and describe the size and character of the Project as to architectural, structural, mechanical, electrical, plumbing, and fire protection systems, materials and such other elements as may be appropriate, and shall also include a review of all applicable laws to determine compliance.

**2.20** "Design Services" are all design services performed by and required of the Design/Builder pursuant to this Agreement and includes services performed by the Design/Builder's Subconsultants.

**2.21** "Environmental Claims" is defined in Section 19.1.

**2.22** "Environmental Laws" is defined in Section 19.4.

**2.23** "Field Office" means a field office at the Project Location provided at the Project site by the Design/Builder. Expenses relating to the Field Office are included in the GMP for the Construction Work.

**2.24** "Final Completion" means that all Work required under the Contract Documents has been fully and properly completed, including punch list items, issuance of certificates of final occupancy and/or use, delivery of record drawings, electronic files, and manuals, and performance of all required training.

**2.25** "Final Completion Date" is defined in Section 6.4.

**2.26** "Final Payment" is defined in Section 8.6.

**2.27** "Final Request" is defined in Section 8.6.

**2.28** "GMP" or "Guaranteed Maximum Price" is defined in Section 1.5.

**2.29** "Hazardous Substance" is defined in Section 19.4.

**2.30** "Liquidated Damages" is defined in Section 6.6 and shown on Exhibit "A."

**2.31** "Materials" means materials, supplies, apparatus, appliances, equipment, fixtures, machinery, tools and all other items furnished or delivered in connection with the Project.

**2.32** "Notice to Proceed" means written notification by City to the Design/Builder authorizing commencement of any phase of the Work as may be required by this Agreement in the form attached hereto as Exhibit "K."

**2.33** "Plans and Specifications" is defined in Section 4.1.1.

**2.34** "Progress Schedule" is defined in Section 3.7.

**2.35** "Progress Sets" is defined in Section 4.3.1.

**2.36** "Project" is defined Section 1.1.

**2.37** "Project Location" or "Project Site" means the property owned by the City upon which the Project is to be constructed.

**2.38** "Project Summary" is defined in Section 1.

**2.39** "Schedule of Values" is defined in Section 8.2.

**2.40** "Schematic Design Documents" means the drawings and other documents illustrating the scale and relationship of Project components including the selection of

materials, systems, and equipment, and methods of Project delivery, as well as initial program documents, scheduling and construction budget information.

**2.41** “Subconsultant” means any person or entity, other than Design/Builder’s own employees, employed or retained by, or under contract with Design/Builder to perform a portion of the Design Services under this Agreement.

**2.42** “Subconsultant Contract” means any contract in writing between the Design/Builder and a Subconsultant.

**2.43** “Subcontractor” means any person or entity, other than the Design/Builder’s own employees, employed or retained by, or under contract with the Design/Builder to perform the non-design portion of the Work.

**2.44** “Subcontractor Contract” means any contract in writing between the Design/Builder and a Subcontractor.

**2.45** “Substantial Completion” is defined in Section 6.4.

**2.46** “Substantial Completion Date” is defined in Section 6.1.

**2.47** “City’s Project Representative” is defined in Section 30.1 and named in Section 1.2.

**2.48** “Work” means the Design Services and Construction Work of the Project required of the Design/Builder under the terms of this Agreement and the Contract Documents.

### **3. GENERAL RESPONSIBILITIES.**

**3.1** The Design/Builder agrees that all design documents prepared or furnished, including, without limitation, the Plans and Specifications, shall comply with all applicable laws, statutes, codes, rules and regulations including, without limitation, those adopted by the City, all Environmental Laws as defined in Section 19.4 and all design requirements established by the Florida Accessibility Code and the Americans with Disabilities Act (ADA).

**3.2** The Design/Builder agrees that the Design Services under this Agreement shall be performed in conformance with the standards of care and quality adopted or accepted by nationally recognized architectural and engineering organizations, and/or other applicable professional organizations for similar applications and in accordance with the Florida Building Code. Any designs, drawings, or specifications prepared or furnished by the Design/Builder that fail to meet the requirements of paragraph 3.1 above, or otherwise are defective or contain errors, conflicts or omissions, will be promptly corrected by the Design/Builder at no cost to City. The Design/Builder will promptly reimburse City for any and all damages, including fines, consequential and incidental damages, without limitation, resulting from the use of such defective designs, drawings, or specifications. City’s approval, acceptance, use of, or payment



for all or any part of the Design Services shall in no way alter the Design/Builder's obligations with respect to the design of the Project or City's rights hereunder.

**3.3** The Design/Builder shall be fully responsible for coordinating all the Work required under this Agreement regardless of whether performed by its own employees or a Subconsultant or Subcontractor so as to insure that the services required are performed in an efficient, timely and economical manner. The Design/Builder shall be responsible to City for the services furnished to the Design/Builder by a Subconsultant, or Subcontractor to the same extent as if the Design/Builder had furnished the service itself. All Subconsultant Contracts and Subcontractor Contracts shall be submitted to City for approval in accordance with Section 9 below. The Design/Builder shall require in such Contracts that the Subconsultant or Subcontractor be bound to, and to assume toward, the Design/Builder all the obligations and responsibilities which the Design/Builder, by this Agreement, assumes toward City. Failure by the Subconsultant or Subcontractor to comply with all of the Design/Builder's obligations and responsibilities set forth in this Agreement shall be a material breach of the Subconsultant's or Subcontractor's Contract. The Design/Builder also agrees to reasonably cooperate and reasonably coordinate with the Design Consultant or other consultants retained directly by City.

**3.4** The Design/Builder shall not specify in the Plans and Specifications a particular design, process or product that infringes upon any patent. The Design/Builder shall defend suits or claims for infringement of patent rights and indemnify and hold City harmless from any loss, cost or expense, including attorneys' fees and costs incurred (at both the trial and appellate levels), which results if the Design/Builder violates the requirements of this Section 3.4.

**3.5** The Design/Builder shall design and construct or cause to be designed and constructed the Project for City at the Project Location with supporting improvements, facilities and equipment as described or reasonably inferable from the Contract Documents. The Design/Builder shall provide, furnish and install all Materials and all Services except to the extent specifically indicated in the Contract Documents to be furnished by or the responsibility of others, as and when required for, or in connection with the design, construction, furnishing or equipping of, or for inclusion or incorporation in, the Project in accordance with the Contract Documents. Without limiting the foregoing, the Design/Builder's Work shall be in compliance with the Contract Documents. To the extent practicable, the Design/Builder shall utilize "value engineering" in connection with the Project.

**3.6** The Design/Builder agrees and represents that it possesses the requisite skills to perform the Work and that the Work shall be executed in a good and workmanlike manner, free from defects, and that all Materials shall be new and approved by or acceptable to City, except as otherwise expressly provided for in the Contract Documents. The Design/Builder shall cause all Materials and other parts of the Work to be readily available as and when required or needed for or in connection with the construction, furnishing and equipping of the Project.

**3.7** The Design/Builder shall provide, in a digital format acceptable to the City, a critical path schedule, or such other type of schedule as City may approve, and periodic updating thereof and other necessary schedules (all of which are hereinafter collectively referred to as the "Progress Schedule") in the interest of completing the Project in the most

expeditious and economical manner and in accordance with Section 1.4. Within twenty-one (21) calendar days after execution of this Agreement, the Design/Builder shall prepare and submit for City's approval the Progress Schedule for the Work. The Progress Schedule shall indicate the dates for the commencement and completion of the various stages of design and construction and shall be revised as required by the conditions of the Work, subject to approval by City. The Progress Schedule shall encompass the design and all of the trades necessary for the construction of the Project and shall be sufficiently complete and comprehensive to enable progress to be monitored on a weekly basis. The parties acknowledge and agree that notwithstanding any theoretical delays or theoretical extensions of time for Substantial Completion (as defined in Section 6.4) as may be shown on the Progress Schedule, the Substantial Completion Date (as defined in Section 6.1) shall be governed by this Agreement and shall be extended only in accordance with the procedures set forth in this Agreement.

**3.8** The Design/Builder shall provide competent supervision of all phases of the Work. The Design/Builder's Project Representative is set forth in Section 1.2. Any change in the Design/Builder's Project Representative must be approved by City, such approval not to be unreasonably withheld. The Design/Builder's Project Representative shall represent the Design/Builder and communications given to the Project Representative shall be as binding as if given to the Design/Builder.

**3.9** Neither City nor the Design Consultant makes any warranties to the Design/Builder, express or implied, that the Contract Documents are free of errors or omissions. Rather, the Design/Builder shall carefully study and compare Contract Documents with each other, with information furnished by City, and shall carefully inspect and verify field conditions, and shall at once report to the City all errors, inconsistencies or omissions discovered. If the Design/Builder proceeds with the design and performs any construction activity knowing it involves a recognized error, inconsistency or omission without such notice, the Design/Builder shall assume appropriate responsibility for such performance and shall bear an appropriate amount of the attributable costs for correction. The intent of the Contract Documents is to include all items necessary for the proper performance and completion of the Work. The Contract Documents are complementary, and what is required by any one shall be as binding as if required by all. Work not covered in the Contract Documents shall not be required unless it is reasonably inferable as being necessary to produce the intended results.

**3.10** If conditions are encountered at the site which are (a) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (b) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then written notice by the Design/Builder shall be given to City promptly before such conditions are disturbed. If the conditions differ materially from those indicated in the Contract Documents and were not known to the Design/Builder at the time this Agreement was executed, and cause a material increase or decrease in the Design/Builder's cost of, or time required for, performance of any part of the Work, an equitable adjustment in the GMP or Contract Time, or both, will be made with the approval of City.

**3.11** The Design/Builder shall prepare or cause to be prepared, as part of the Work, all shop drawings, samples, submittals and detail drawings not made a part of the Plans and Specifications, and Addenda which are required in the performance of the Design/Builder's obligations under this Agreement. All shop drawings, submittals, samples, and detail drawings shall be submitted to the City. Although the City will review all shop drawings, submittals, detail drawings, and samples, the City shall not be responsible to the Design/Builder for any failure of the shop drawings, submittals, detail drawings or samples to comply with the Contract Documents or any governing codes, laws or ordinances. The Design/Builder shall maintain copies of all shop drawings, submittals and detail drawings, and maintain all samples at the Project and shall afford City access to the documents at all times during regular working hours.

**3.12** The Design/Builder shall maintain one record set of Contract Documents in good order and marked currently to record all changes made during construction and an accurate location of all portions of the Work sufficient to prepare accurate as-built Plans and Specifications. All of these, including the as-built Plans and Specifications, shall be delivered to the City upon Final Completion of the Work for review and incorporation into the record set of documents.

**3.13** The Design/Builder shall deliver to the City all equipment data, along with its recommended spare parts list, maintenance manuals, manufacturers' warranties and operations manuals as may be required for City's employees, agents or contractors to maintain and operate any equipment delivered as part of the Work.

**3.14** Required certificates of inspection, testing or approval shall be obtained by the Design/Builder and promptly delivered to City. If City or the Design Consultant desire to observe said inspections, tests or approvals required by the Contract Documents, City shall notify the Design/Builder of that desire, and the Design/Builder shall notify the City and Design Consultant of the dates and times of said inspections, tests or other approvals.

**3.15** The Design/Builder shall pay all sales, consumer, use and other similar taxes for the Work or portions of each, which are legally required at any time during the Design/Builder's performance of the Work. Without limiting the foregoing, Design/Builder hereby agrees to indemnify and hold the City harmless from any liability, claims, costs, damages, fines, fees, and expenses of any kind whatsoever including, but not limited to, attorneys' fees and costs (at both the trial and appellate levels) caused, resulting or arising from, or related to the Design/Builder's failure to pay taxes.

**3.16** The Design/Builder shall pay all royalties and license fees that are legally required at any time during the Design/Builder's performance of the Work. The Design/Builder shall defend all suits or claims for infringement of any patent rights and shall hold City harmless from any loss, liability or expense on account thereof, including attorneys' fees (at both the trial and appellate levels) except that City shall be responsible for all such loss when a particular design, process or the product of a particular manufacturer or manufacturers is specified, but if the Design/Builder has reason to believe that the design, process or product specified is an infringement of a patent, the Design/Builder shall be responsible for such loss,

liability or expense unless the Design/Builder promptly gives such information in writing to City and the Design Consultant.

**3.17** The Design/Builder and any Subconsultants, or Subcontractors shall use their best efforts to cooperate with the City and Design Consultant during the period of design and construction of the Project in order to minimize disruption of services.

**4. DESIGN SERVICES.**

**4.1 Basic Services.**

**4.1.1** The Design/Builder shall provide or cause to be provided (a) the Schematic Design Documents, (b) the Design Development Documents, (c) those services, including, without limitation, architectural, structural, mechanical, electrical, plumbing, fire protection and any other engineering services necessary to produce a complete and accurate set of plans and specifications for the permitting and construction of the Project (collectively referred to as the “Plans and Specifications” or “Construction Documents”), and (d) all design services required to facilitate the complete integration of future phases to the Project. The Design/Builder warrants that at the time of completion, the Plans and Specifications will be adequate and fit to accomplish the intended purpose of the Project. City’s review and/or approval of the Plans and Specifications shall in no way diminish or release the foregoing warranty of adequacy and fitness for the intended purpose and/or the Design/Builder’s obligations in this respect.

**4.1.2** The Design Services shall be performed in accordance with the schedule for performance set forth in Exhibit “A” and Sections 4.2 and 4.3. Time is of the essence with respect to the performance of the Design Services. The Design/Builder shall not, except for cause beyond the reasonable control of the Design/Builder, exceed time limits established by this Agreement. Any adjustments to the schedule must be approved in writing by City and must be requested in writing by the Design/Builder within five (5) calendar days after the occurrence upon which the Design/Builder’s request for adjustment is based.

**4.1.3** The Design/Builder shall be responsible for preparing and filing the documents required for approval of governmental and/or governing authorities having jurisdiction over the Project to ensure that final approvals, permits, and licenses for the performance of the Work will be obtainable prior to the construction phase. Such documents shall be submitted to City for review and approval prior to filing with said authorities. The Design/Builder shall interface and coordinate with permitting agencies and shall participate in meetings with appropriate agencies and respond to and incorporate appropriate preliminary and final permit review comments. The City has waived the fees for all City issued approvals, permits, and licenses; provided, however, the Design/Builder is required to pay all fees for non-City approvals, permits, and licenses as part of the GMP.

**4.1.4** The Design/Builder shall procure surveys as required describing physical characteristics, legal limitations and utility locations for the Project Location. The surveys may include, as applicable, grades and lines of streets, alleys, pavements and adjoining structures;

adjacent drainage; rights-of-way, restrictions, easements, encroachments, boundaries and contours of the Project Site; locations, dimensions and necessary data pertaining to existing buildings, other improvements and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark.

**4.1.5** The Design/Builder shall establish an organization and lines of authority in order to coordinate, monitor, and report the progress of each phase of the design and shall furnish a competent staff for the administration, coordination, and supervision of the Design Services. All Design Services shall be performed by the Design/Builder's own staff or Subconsultants approved as part of the Design/Builder's team, unless otherwise authorized in writing by City. The employment of, contract with, or the use of the services of any Subconsultant shall be subject to City's written approval in accordance with Section 9 below. No such approval shall be construed as an agreement between City and any Subconsultant.

**4.1.6** The Design/Builder shall furnish to City for review and approval, a description of key personnel to be used on the Project. Such description shall include a current resume of academic training and professional experience. Design/Builder represents to the best of its knowledge that the descriptions and resumes submitted to City pursuant to this Agreement shall be true in all material respects. The Design/Builder shall not substitute any personnel without City's prior written consent. Before any such substitution, Design/Builder shall submit to City a detailed justification supported by the qualifications of any proposed replacement.

**4.1.7** The Design/Builder shall prepare and submit to the City a Design/Production Schedule and Work Plan, including a Proposed List of Drawings, a Quality Assurance Plan, and a schedule of key interface dates with the City, including milestone submittal dates. This information shall be defined as the Design Work Plan. Once approved by City, the Design Work Plan shall be updated as necessary and/or as requested by City. The Design Work Plan shall include at a minimum the following:

- a. Design Team Organization and Directory identifying all team members and contact information.
- b. Quality Assurance Plan detailing the duties and responsibilities of the Design Team.
- c. Design/Production Schedule including work force projections.

**4.1.8** The Design/Builder shall provide or cause to be provided detailed construction documents including architectural, structural, mechanical, electrical, plumbing, fire protection and others in accordance with Section 4.2 and 4.3 and the Contract Documents.

**4.1.9** The Design/Builder shall verify existing site conditions and conduct field investigations, as reasonably necessary to assure all documentation is accurate. The Design/Builder shall provide logs of field investigations to the City on a bi-weekly basis for review. Field verification logs shall consist of names of field investigators, date, time, area,

findings, issues and results. The Design/Builder’s responsibilities to field verify include, but are not limited to, developing as-built drawings from field surveys, site exploratory work, and any other means and methods necessary to ensure a complete verification of existing conditions.

**4.2 Schedule of Performance.**

4.2.1 On or before scheduled due dates for each phase, the Design Builder shall make milestone submittals to the City in accordance with the following table:

<u>Phase</u>	<u>Milestone</u>	<u>Due Date</u>
Schematic Design Documents Proceed	30% Submittal	<u>60</u> days from Notice to
Design Development Documents Review Comments	90% Submittal	<u>60</u> days from Receipt of 30%
Construction Documents Review Comments	100% Submittal	<u>30</u> days from Receipt of 90%

**4.3 Submittals and Review of Design Documents.**

4.3.1 **Progress Submittals.** The Design/Builder shall submit progress sets of the 30% Schematic Design Documents, 90% Design Development Documents, and 100% Construction Documents for review and approval by the City. Progress sets of the 100% Schematic Design Documents, 100% Design Development Documents and 100% Construction Documents shall be submitted a minimum of two (2) weeks prior to the milestone submittal due dates. Additionally, the Design/Builder will provide the City with progress plans and/or prints anytime the City requests such documents. Progress set submittals shall consist of a minimum of three (3) full-size drawing sets and with specifications on plans along with revised construction cost estimates (“Progress Sets”). Upon written approval by the City of the applicable Progress Set submittal, the Design/Builder shall transmit a complete package including plans with specifications, checklists and other requirements, as applicable. Reviews will not commence until the complete Progress Set submittal has been received.

4.3.2 **Review Procedures.** The following procedures shall be followed for review of the 30% Schematic Design Documents, 90% Design Development Documents, 100% Construction Documents, and any other Design Services submittals by Design/Builder.

- a. The Design/Builder shall submit Schematic Design Documents, Design Development Documents, and Construction Documents for review in accordance with the schedule established in Section 4.2
- b. The City will be required to provide all review comments to the Design/Builder within fourteen (14) calendar days from receipt of the milestone submittal.

- c. The Design/Builder shall respond to and incorporate milestone review comments transmitted by the City. Any budgetary overruns or discrepancies shall be resolved by design and engineering modifications to match the available funds. If substantial changes are made the Schematic Design time frame shall begin anew with the approval of the City Manager or his designee.
- d. Unless otherwise agreed to in writing, the Design/Builder shall respond in writing, on a form provided by the City, within seven (7) days of receipt of the review comments. The City or Design Consultant will log, transmit and facilitate the exchange of review comments. The Design/Builder shall also maintain a similar log and make it available to the City at all times.
- e. Replies to Responses: The City reviewers will reply within seven (7) days to any responses requiring confirmation and will advise the Design/Builder if any further reconciliation is required.
- f. Resolution of differences: The City will schedule a meeting between the Design/Builder team and the City, to take place within seven (7) days after review comments are issued to the Design/Builder, in order to resolve all issues between teams. The City or Design Consultant will arrange additional meetings or conference calls if necessary, in order to expedite resolution and avoid impact to the Project Schedule or the Contract Documents.
- g. Backcheck Review: If any comments remain unsatisfied, additional backcheck submittals shall be required until all comments have been satisfied. Any costs associated with Design/Builder's preparation of the backcheck submittals shall be the Design/Builder's responsibility and shall be taken into consideration for evaluation of Design/Builder's performance and progress payments.
- h. Resolution of all review comments is requisite for completion of any phase of the Design Services.

**4.3.3 Milestones Submittals and Reviews.** The Design/Builder shall submit the Schematic Design Documents, Design Development Documents, and Construction Documents in accordance with the dates set forth in Section 4.2.1 and participate in interim reviews for the milestone submittals as directed by the City in accordance with Section 4.3.2. The Schematic Design Documents 100% milestone submittal shall consist of ten (10) full size sets of drawings; three (3) 11" x 17" size sets of drawings and shall include such other information fully explaining and supporting the Schematic Design Documents. The City shall review this submittal pursuant to the review procedures set forth in Section 4.3.2. This set,

with full resolution of review comments, as determined by the City, shall establish compliance with completion of the Schematic Design Documents 30% milestone submittal. Once approved by the City, the 30% Schematic Design Documents shall become the "Approved 100% Schematic Design Documents" and shall not be altered, modified, or revised without the City's prior written approval. Any material design modifications to the Approved 100% Schematic Design Documents requested by City shall be an additional cost to the City and reflected in a Change Order, and shall not be included in the GMP.

The Design Development Documents 90% milestone submittal shall be based upon the Approved 100% Schematic Design Documents. The Design Development Documents 100% milestone submittal shall consist of ten (10) full size sets of drawings; three (3) 11" x 17" size sets of drawings and shall include such other information fully explaining and supporting the Design Development Documents. The City shall review this submittal pursuant to the review procedures set forth in Section 4.3.2. This set, with full resolution of review comments, as determined by the City, shall establish compliance with completion of the Design Development Documents 100% milestone submittal. Once approved by the City, the 100% Design Development Documents shall become the "Approved 100% Design Development Documents" and shall not be altered, modified, or revised without the City's prior written approval. Any material design modifications to the Approved 100% Design Development Documents requested by City shall be an additional cost to the City and reflected in a Change Order, and shall not be included in the GMP.

The 100% Construction Documents Progress Set submittal shall be based upon the Approved Design Development Documents. The Construction Documents 30% milestone submittal shall consist of ten (10) full size sets of drawings; three (3) 11" x 17" size sets of drawings and five (5) sets of Project manuals, and shall include design narratives for all disciplines, with calculations and other information fully explaining and supporting the Contract Documents including construction cost estimates. The City shall review this submittal pursuant to the review procedures set forth in Section 4.3.2. This set, with full resolution of review comments, as determined by City, shall establish compliance with completion of the Construction Documents 30% submittal milestone. Once approved by the City the 30% Construction Documents shall become the "Approved 30% Construction Documents" and shall not be altered, modified, or revised without the City's prior written approval. Any material design modifications to the Approved 30% Construction Documents requested by City shall be an additional cost to the City and reflected in a Change Order, and shall not be included in the GMP.

The 100% Construction Documents Progress Set submittal shall be based upon the Approved 100% Construction Documents. The Construction Documents 100% milestone submittal shall consist of ten (10) full size sets of drawings; three (3) 11" x 17" size sets of drawings and five (5) sets of Project manuals, and shall include design narratives for all disciplines, with calculations and other information fully explaining and supporting the Contract Documents including construction cost estimates. The City shall review this submittal pursuant to the review procedures set forth in Section 4.3.2. This set, with full resolution of review comments, as determined by City, shall establish compliance with completion of the Construction Documents 100% submittal milestone. Once approved by the City the 100%



Construction Documents shall become the “Approved 100% Construction Documents” and shall not be altered, modified, or revised without the City’s prior written approval. Any material design modifications to the Approved 100% Construction Documents requested by City shall be an additional cost to the City and reflected in a Change Order, and shall not be included in the GMP.

The 100% Construction Documents Progress Set submittal, which shall be based upon the Approved 100% Construction Documents, shall serve to monitor progress of the Work. All recommendations of the City from this review shall be incorporated into the Construction Documents prior to submission of the Construction Documents 100% submittal milestone. The Construction Documents 100% submittal milestone shall consist of ten (10) full size sets of drawings; 11” x 17” size sets of drawings and five (5) sets of Project manuals for the City to review pursuant to review procedures set forth in Section 4.3.2. This set with all resolution of comments from this review incorporated into the documents shall establish completion of the Construction Documents 100% submittal milestone. The 100% Construction Documents with full resolution and all comments pending from any previous reviews shall establish completion of the Construction Documents 100% submittal milestone. Once approved by the City the 100% Construction Documents shall become the “Approved 100% Construction Documents” and shall not be altered, modified, or revised without the City’s prior written approval. Any material design modifications to the Approved 100% Construction Documents requested by City shall be an additional cost to the City and reflected in a Change Order, and shall not be included in the GMP; provided, however, any changes or revisions to the Approved 100% Schematic Design Documents, Approved 100% Design Development Documents, and/or the Approved 100% Construction Documents necessary to (a) comply with applicable governmental requirements, (b) satisfy field conditions and/or (c) correct inconsistencies between various documents shall not be considered an additional cost and will be included in the GMP.

#### **4.4 Construction Phase.**

**4.4.1** The Design/Builder shall be responsible for coordinating with the City in order to prepare and file the documents required for the approval of governmental authorities having jurisdiction over the Project.

**4.4.2** Throughout the course of construction, the Design/Builder shall maintain an up-to-date set of Plans and Specifications and reproducible drawings, which show and/or describe all clarifications, addenda, substitutions and approved Change Orders. Upon Final Completion, the Design/Builder shall provide City with a set of record drawings and electronic files, as directed by City, showing the complete Project as built (incorporating data concerning as-built conditions) as well as specifications and other documents as may be required by City. This shall include all changes in the Work during the Construction Phase.

**4.4.3** During the construction phase, the Design/Builder shall reasonably cooperate with, and respond to, any reasonable requests or requirements of the Design Consultant.

## **5. DESIGN CONSULTANT'S RESPONSIBILITIES**

**5.1** The parties acknowledge and agree that the City may engage a Design Consultant to assist the City in the administration of this Agreement. The Design Consultant shall act as an "owner's representative" and shall have no authority to bind City or direct Design/Builder except as expressly set forth herein.

**5.2** The Design Consultant shall at all times have access to the Project Location and the Work wherever it is in preparation or progress.

**5.3** If requested by City, the Design Consultant shall prepare proposed Change Orders with supporting detailed cost documentation and data for City's approval and execution in accordance with the Contract Documents. If requested by City, the Design Consultant shall evaluate the detailed cost estimate and scope of the Design/Builder's proposals with respect to proposed Change Orders and substitutions proposed by a Design/Builder and make recommendations to City. The Design Consultant has no authority to authorize changes in the Contract Documents of any kind or to modify any deadlines for completion of Work specified in the Contract Documents.

## **6. TIME FOR PERFORMANCE FOR CONSTRUCTION.**

**6.1** Upon delivery of a Notice to Proceed from City to the Design/Builder for the Construction Work, the Design/Builder shall commence performance of the construction phase of the Work and shall diligently proceed with the performance of the construction phase of the Work to completion, and agrees to complete the performance of the entire Work within the number of calendar days shown on Exhibit "A" following Design/Builder's receipt of the Notice to Proceed. The Work shall be performed in strict accordance with the 100% Approved Construction Documents. If the Design/Builder is delayed in the performance of the Work by fire or unavoidable casualties not the fault of the Design/Builder or causes beyond the Design/Builder's control, then the "Substantial Completion Date" (defined as the date occurring the number of days equal to the Contract Time after Design/Builder's receipt of the Notice to Proceed), shall be extended for a period equal to the length of such delay to the extent that such delay impacts an activity of the Design/Builder that is a critical path activity and only if within ten (10) calendar days after the occurrence of such delay the Design/Builder delivers to City, a written request for extension for such delay, and such request is approved by City, which approval shall not be unreasonably withheld by City. In case of a continuing cause of delay of a particular nature, the Design/Builder shall be required to make only one such request.

**6.2** The Substantial Completion Date, the Contract Time and the GMP take into full consideration the effect of inclement weather during the construction period and such effect on both cost and time for completing the Work is accounted for in the GMP, and the Substantial Completion Date (as defined in Section 6.1). The Substantial Completion Date incorporates the Design/Builder's expectation that it will experience the number of working days of weather delay shown on Exhibit "A" during construction of the Project. An extension of the Contract Time for weather delays may be claimed only for delays caused by adverse weather which

affects scheduled working hours on scheduled work days (but excluding any legal holiday unless previously scheduled) and only after the Design/Builder has previously been delayed by weather for at least the number of anticipated working days of weather delays shown on Exhibit "A," and then only to the extent of the actual number of days' delay in those activities which are critical path activities. The Design/Builder shall provide City with written notice of all delays claimed due to weather, such written notice shall identify the critical path activity(ies) affected and shall be delivered within five (5) days of the delay. City shall determine whether extension of the Contract Time is justified. Extension of time shall be the Design/Builder's sole remedy for any such delay.

**6.3** Delays which affect those activities not identified on the Project's critical path shall not be considered for a Contract Time extension unless the delay shall have been caused by acts constituting intentional interference by City or the Design Consultant, and then, only to the extent that such acts continue after the Design/Builder has provided written notice to City of such interference. City's exercise of any of its rights under Article 7, regardless of the extent or number of such changes, or City's exercise of any of its remedies of suspension of the Work, or requirement of correction or replacement of any defective Work, or its strict adherence to the Contract Documents shall not under any circumstances be construed as intentional interference with the Design/Builder's performance of the Work.

**6.4** "Substantial Completion" shall be defined to include all work (exclusive of minor items of unfinished work which do not preclude beneficial use of the premises) required to complete the Work set forth in the Contract Documents. Substantial Completion shall be deemed to have occurred upon (a) the submission of a Certificate of Substantial Completion (in the standard AIA form) to the City by the architect of record and (b) the issuance of a Temporary Certificate of Occupancy or Temporary Certificate of Use, as applicable, for any portion of the Project requiring said Certificates. The Design/Builder shall have thirty (30) calendar days after the date of Substantial Completion (the "Final Completion Date") within which to complete all remaining Work required by the Contract Documents (the completion of all such Work, including any Work unfinished at the date of Substantial Completion, and the fulfillment of all requirements of the Contract Documents being referred to herein as "Final Completion"). Prior to the Design/Builder requesting the City and Design Consultant to perform the Substantial Completion review, the Design/Builder shall inspect the Project and prepare a list of all deficient and unfinished work. The list shall be submitted to the City for review. At Substantial Completion, a Final Punch List will be prepared and provided to the Design/Builder. The Final Punch List will contain a listing of all known remaining incomplete items of the Work, but is not to be considered by the Design/Builder as a waiver by City of the Design/Builder's obligation to complete all the Work in complete compliance with Contract Documents. In the event the remaining Work is not completed or the Design/Builder has not demonstrated to City that a "good faith" effort has been made within said thirty (30) calendar days, Liquidated Damages, as defined and explained in Section 6.6 herein, will be charged against the Design/Builder. Time is of the essence in the performance of the Work.

**6.5** The City may direct the Design/Builder to expedite the Work by whatever means the Design/Builder may use, including, without limitation, increasing manpower or working overtime to bring the work back within the currently submitted and approved Progress

Schedule. If the expediting of Work is required due to reasons within the control or responsibility of the Design/Builder, then the additional costs incurred shall not result in an increase to the GMP.

**6.6** If the Design/Builder shall neglect, fail, or refuse to complete the Work by the Substantial Completion Date and the Final Completion Date, subject to any proper extension granted by City, then the Design/Builder agrees to pay to City, or to cause the Design/Builder's surety to pay to City, the amounts specified on Exhibit "A", not as a penalty, but as liquidated damages for the damages ("Liquidated Damages") that would be suffered by City as a result of delay for each and every calendar day that the Design/Builder shall have failed to complete the Work by the Substantial Completion Date or the Final Completion Date. The amounts are fixed and agreed upon by and between the Design/Builder and City because of the difficulty of fixing and ascertaining the actual damages City would in such event sustain, and the amount is agreed to be the amount of damages that City would sustain. The amount may be retained by City from current periodic pay estimates or from retainage, but if the amount owing and/or retained is insufficient to fully pay City said Liquidated Damages, the Design/Builder agrees to pay, or cause the Design/Builder's surety to pay, said insufficiency to City.

## **7. CHANGE ORDERS.**

**7.1** From time to time, City may authorize changes in the Work, issue additional instructions, require additional Work or direct the omission of Work previously ordered. Only those changes in the Work that are approved on a Change Order in the form of Exhibit "B" and executed by an authorized representative of City ("Change Order"), shall be binding on City.

**7.2** City may order changes in the Work by initiating a change order request ("Change Order Request"), setting forth in detail the nature of the requested change. Upon receipt of a Change Order Request, the Design/Builder shall prepare a statement setting forth in detail, with a suitable detailed breakdown by trades and work classifications with respect to a change in the scope of the construction and a detailed breakdown of the time and expenses related to the design phase, the Design/Builder's estimate (the "Design/Builder's Estimate") of the changes in the GMP attributable to the changes set forth in such Change Order Request and proposed adjustments, if any, to the Substantial Completion Date resulting from such Change Order Request. If the City and the Design/Builder agree on a cost ("Agreed Cost"), a Change Order shall be processed by the City and/or Design Consultant and delivered to the Design/Builder for signature. Design/Builder shall not commence changes in the Work until it receives City's written Notice to Proceed or the Change Order is executed. Agreement on any Change Order shall constitute a final settlement on all items affected therein, including without limitation any adjustment in the GMP, the Substantial Completion Date, subject to performance thereof and payment therefore pursuant to the terms of this Agreement and such Change Order. Work provided by unit price may be increased or decreased in quantity as directed by the City approval, provided that the basis for adjustment of the GMP shall be the unit prices agreed upon by the City upon the date of this Agreement.

**7.3** In the event the City and the Design/Builder cannot agree on any adjustment in the GMP, extensions to the Contract Time, or adjustment to the Substantial Completion Date,

the Design/Builder shall nevertheless proceed to perform the Work required by City's Change Order Request upon receipt of City's written Notice to Proceed. The Design/Builder shall keep separate records of all costs and time required to perform the Work required by the Change Order Request, and an equitable adjustment will be made upon agreement between the Design/Builder and City. The Design/Builder shall submit its time and material costs that accrue as a result of the Change Order Request on a weekly basis. If the City does not approve such submittals within seven (7) days following submission, the Design/Builder may cease the work related to such Change Order Request until the parties agree upon the terms and conditions of such Change Order Request.

**7.4** In the event that changes in the Work are required on an emergency basis in order to protect the health and safety of the public, the Design/Builder shall proceed at the direction of the City without a written Change Order from City. The Design/Builder shall keep separate records of all costs and time required to perform the Work. After review and approval by the City, the Design/Builder shall invoice City in accordance on a time and materials basis. In the event that the work can be stopped without any further harm to the public but additional Work is necessary, the Design/Builder shall deliver the Design/Builder's Estimate to the City as soon as practical and the requirements of Sections 7.2 or 7.3 shall be met before the Design/Builder resumes the changes to the Work.

**7.5** It is understood and agreed that refinement and detailing will be accomplished from time to time with respect to the Plans and Specifications, and Addenda set forth in Exhibit "A." No adjustment in the GMP or the Substantial Completion Date, shall be made unless (a) such refinement or detailing results in changes in the scope, quality, function and/or intent of the Plans and Specifications, and Addenda not reasonably inferable or anticipatable by a Design/Builder of the Design/Builder's experience and expertise, (b) the Design/Builder advises City in writing within seven (7) calendar days of the Design/Builder's receipt of said refinements and details that an adjustment is required, and (c) City agrees to the adjustment.

## **8. PAYMENTS.**

**8.1** In full consideration of the full and complete performance of the Work and all other obligations of the Design/Builder hereunder, City shall pay to the Design/Builder the GMP, subject to additions and deductions as provided in this Agreement.

**8.2** On or before the first day of each month during the performance of the Work, or such other day of the month agreed to by the parties, the Design/Builder shall submit to the City for its approval an original Request for Payment in the form attached as Exhibit "C". Submission of any original certificates, waivers of liens and claims, or other documents required in this Agreement to be submitted, is a condition precedent to City's obligation to pay Design/Builder hereunder. Fifteen (15) days prior to the first Request for Payment, the Design/Builder shall prepare, and submit to City for its approval a schedule of values allocating the entire GMP among the various portions of the Work (the "Schedule of Values"). The Schedule of Values approved by City shall be used as a basis for reviewing the Design/Builder's Request for Payment. The Request for Payment shall show a complete breakdown of (a) the requested costs for planning, design, engineering and construction of the

Project components including all labor and Materials, (b) the actual portion of the Work completed and the amount due, (c) the share of the GMP allocated to that portion of the Work as set forth in Schedule of Values, (d) an itemization of all disbursements to Subconsultants and Subcontractors, materialmen, vendors and miscellaneous suppliers and shall be accompanied by originals of vendors' original invoices, certified payrolls and payroll registers, original payment requests of Subconsultants, Subcontractors, vendors and miscellaneous suppliers, and other original data and documentation satisfactory to the City substantiating actual expenditures, and (e) such supporting evidence as may be required by City including, but not limited to, the documents set forth in Section 8.9 below, all in a form and substance acceptable to the City and City Attorney. The Request for Payment shall constitute a representation to the City that (i) the Work has progressed to the point indicated, (ii) the quality of the Work is in accordance with the Plans and Specifications, and (iii) all monies previously reimbursed by the City to the Design/Builder have been disbursed to the appropriate Subconsultants, Subcontractors, materialmen, vendors and miscellaneous suppliers based upon the prior Request for Payment. Provided that the Design/Builder submits all required documentation as required herein, City shall tender all payments to the Design/Builder within thirty (30) calendar days of receipt of the Request for Payment less any retainage required by Section 8.5 below and minus amounts, if any, for which City has withheld funds pursuant to its rights under any portion of the Contract Documents. Inadequately supported charges are subject to disallowance, however, City will make payments of the balance of the Request for Payment when such amounts are approved. The Request for Payment shall also include the cost of Materials not incorporated in the Work, but delivered and suitably stored at the Project location or at some other location approved by City.

**8.3** The City and/or Design Consultant shall review each such Request for Payment and may make such exceptions as the City reasonably deem necessary or appropriate under the state of circumstances then existing. In no event shall City be required to make payment for items to which City reasonably takes exception.

**8.4** City shall make payment to the Design/Builder in the amount approved, subject to Section 8.2. The payment of any Request for Payment by City, including the Final Request, does not constitute approval or acceptance by City of any item of the Work in such Request for Payment, nor shall it be construed as a waiver of any of City's rights hereunder or at law or in equity.

**8.5** The Design/Builder agrees that ten percent (10%) of the amount due for Work, (including self-performed Work) as set forth in each Request for Payment shall be retained by City until Final Payment (as defined in Section 8.6). If the Design/Builder has furnished Bonds in accordance with Section 12.1, and the Design/Builder is performing satisfactorily, upon Substantial Completion, City may elect to reduce the amount retained in its sole and absolute discretion. All requests for retainage reductions must be made in writing prior to invoicing for same. City may, but shall not be obligated to, request consent of the Design/Builder's surety to such reduction. The Design/Builder may also apply for a release of retainage for Subcontractors, vendors, materialmen, and suppliers for portions of the Work that have been one hundred percent (100%) complete for thirty (30) days or more. In this case, the City has no obligation to release such retainage but may do so in its sole and absolute discretion. However,

the Design/Builder shall remain liable for Subcontractor's work and for any unpaid laborers, vendors, materialmen, suppliers or Subcontractors in the event it is later discovered that said work is deficient or that any of said laborers, vendors, materialmen, suppliers, or Subcontractors did not receive payments due them on the Project.

**8.6** Within thirty (30) days after Final Completion of the Work and acceptance thereof by City or as soon thereafter as possible, the Design/Builder shall submit a final request for payment ("Final Request") which shall set forth all amounts due and remaining unpaid to the Design/Builder (including the unpaid portion of the retainage) and upon approval thereof by City, City shall pay to the Design/Builder the amount due under such Final Request ("Final Payment") within thirty (30) days of the satisfaction of requirements for Final Payment as set forth in Section 8.7 below.

**8.7** The Final Request shall not be made until the Design/Builder delivers to the City complete original releases of all liens and claims signed by all Subcontractors, materialmen, suppliers, and vendors on the form Certificate of Subcontractor & Final Waiver of Liens and Claims attached hereto as Exhibit "D" and an affidavit that so far as the Design/Builder has knowledge or information, the releases include and cover all Materials and Work for which a lien or claim could be filed. The Design/Builder may, if any Subcontractor, materialmen, supplier or vendor refuses to furnish the required Final Waiver of Lien, furnish a bond satisfactory to City to defend and indemnify City and any other property owner, person or entity City may be required to indemnify against any lien or claim. In addition, and as a condition precedent to City's obligations to make Final Payment, the Design/Builder shall execute and deliver to the City (a) a Certificate of Design/Builder & Final Waiver of Liens and Claims of the Design/Builder on the form attached hereto as Exhibit "E," and (b) the written consent of Design/Builder's surety.

**8.8** Any provision hereof to the contrary notwithstanding, City shall not be obligated to make full payment to the Design/Builder if any one or more of the following conditions exists:

- a. the Design/Builder is in default of any of its obligations under any of the Contract Documents or is in default of any other obligation owed by Design/Builder to City under this Agreement or any other agreement or transaction between the Design/Builder and City in connection with the Project; and/or
- b. any part of such payment is attributable to Work which is defective or not performed in accordance with the Contract Documents; and/or
- c. the Design/Builder has failed to make payments within ten (10) days of receipt of payment from City to any Subcontractor or for Material or labor used in the Work for which City has made payment to the Design/Builder; and/or

- d. if City, in its good faith judgment, determines that the portion of the GMP then remaining unpaid will not be sufficient to complete the Work in accordance with the Contract Documents whereupon no additional payments will be due the Design/Builder hereunder unless and until the Design/Builder, at its sole cost, performs a sufficient portion of the Work so that such portion of the GMP then remaining unpaid is determined by City to be sufficient to so complete the Work.

City, in its reasonable discretion, shall determine the value associated with such conditions and shall act to reduce Design/Builder's payment by the determined amount.

**8.9** Design/Builder shall use the sums paid to it pursuant to this Article 8 solely for the purpose of performance of the Work and the construction, furnishing, and equipping of the Work in accordance with the Plans and Specifications, and Addenda and payment of bills incurred by the Design/Builder in performance of the Work. With the submission of each Request for Payment the Design/Builder shall furnish to the City a Certificate of Design/Builder & Partial Waiver of Lien on the form attached hereto as Exhibit "F" and a certified statement accounting for the disbursement of funds received from City. Such statement shall itemize all disbursements to Subconsultants, Subcontractors, materialman, and vendors, and if required by City, shall be accompanied by copies of subcontract payment vouchers, vendors' invoices, payrolls and other data substantiating actual expenditures, as well as a Certificate of Subcontractor & Partial Waiver of Lien, from each Subcontractor, material man, or vendor, on the form attached hereto as Exhibit "G." As a condition precedent to the receipt of Final Payment, all such parties shall submit a full and final waiver and release of mechanic's lien rights for all sums due under their respective Subcontractor Contracts, purchase orders or other agreements. However, no provision hereof shall be construed to require City to see to the proper disposition or application of the monies so advanced to the Design/Builder, except to the extent provided in Section 8.7.

**8.10** Design/Builder shall promptly pay all bills for labor and material performed and furnished by its Subconsultants, Subcontractors, suppliers, vendors, and materialmen, in connection with the construction, furnishing and equipping of the Project and the performance of the Work.

**8.11** Notwithstanding anything herein to the contrary the Work shall not include and Design/Builder shall not be reimbursed for the following:

**8.11.1** The services and related expenses, of any officers or general office supervisory personnel of the Design/Builder and of personnel in the Design/Builder's personnel, legal, advertising, data processing, scheduling, labor relations, insurance and tax departments and all other costs of doing business (including, but not limited to, copying, fax and computer charges), services and related expenses required to maintain and operate the Design/Builder's general offices and any established branch offices, other than the field office for the Work.



**8.11.2** The services and related expenses of the Design/Builder's purchasing, secretarial, estimating and accounting departments and clerical staff at the Design/Builder's general offices or any established branch offices. These services shall include all costs associated with computer equipment and related expenses, copying equipment, fax charges (either by page or machine costs), CADD equipment (unless approved in writing by City prior to invoicing for same), signage, professional association costs (including, but not limited to, AGC/ABC Fees), bonding charges (including, but not limited to, Fidelity Bonds on office and/or job site personnel), and/or other related expenses.

**8.11.3** The use of capital including interest employed for the Work.

**8.11.4** Amounts required to be paid by the Design/Builder for federal, state or local income or franchise taxes.

**8.11.5** Costs due to the negligence of the Design/Builder, any Subconsultant or Subcontractor or supplier employed by the Design/Builder or anyone directly or indirectly employed by any of them, or for whose acts any of them may be liable, including but not limited to the correction of defective work, disposal of materials and equipment wrongfully supplied, or making good any damage to property.

**8.11.6** Costs in excess of the sum of the GMP for the Work.

**8.11.7** Entertainment and meal expenses and charges of a personal nature.

**8.11.8** Travel charges unless approved in advance of trip in writing by City. If travel is authorized the charges are to be billed as a separate line item listing employee name, purpose of trip, dates traveled and the daily cost of individual items for which reimbursement is sought.

**8.11.9** Bonuses, profit-sharing or other special labor charges.

**8.11.10** Any legal fees and accounting fees.

**8.11.11** All losses resulting from lost, damaged, or stolen tools and/or equipment.

**9. SUBCONTRACTOR AND SUBCONSULTANT CONTRACTS AND PURCHASE ORDERS.**

**9.1** Within thirty (30) days after execution of this Agreement, the Design/Builder shall prepare and submit for City's approval the names of the persons or entities proposed by the Design/Builder to furnish materials, equipment, or services for each portion of the Work. The Design/Builder shall contract solely in its own name and behalf, and not in the name or behalf of City with the selected Subcontractor or Subconsultant. The Design/Builder's form of Subcontractor Contract and Subconsultant Contract shall be subject to approval of City, and once approved may be utilized by Design/Builder without further approval by the City provided

that no substantial deviations are made to the approved form of Subcontractor Contract and Subconsultant Contract. At a minimum, the Subcontractor Contract and Subconsultant Contract shall provide that the Subcontractor or Subconsultant, as applicable, shall perform its portion of the Work in accordance with all applicable provisions of this Agreement and the other Contract Documents, that Subcontractor or Subconsultant is bound to the Design/Builder to the same extent as the Design/Builder is bound to City, shall provide for a ten percent (10%) retainage for labor and materials, shall provide for termination of the Subcontractor Contract and Subconsultant Contract by the Design/Builder in the same manner and method as provided in Article 37 of this Agreement, and shall further provide that, in the event this Agreement is terminated for any reason, that the Subcontractor or Subconsultant shall, at City's option, perform its Subcontractor Contract or Subconsultant Contract for City without additional or increased cost, provided the Subcontractor or Subconsultant is paid in accordance with its Subcontractor Contract or Subconsultant Contract. The Design/Builder shall sign and cause each Subcontractor and Subconsultant to sign an Assignment of Rights Agreement in the form attached hereto as Exhibit "H" (any cost for execution of said assignment will be borne by the Design/Builder and included in the GMP). Nothing contained herein shall, however, create any obligation on City to assume any Subcontractor Contract or Subconsultant Contract or make any payment to any Subcontractor or Subconsultant unless City chooses to request Subcontractor or Subconsultant to perform pursuant to this Section 9.1 or as otherwise provided in this Agreement, and nothing contained herein shall create any contractual relationship between City and any Subcontractor or Subconsultant.

**9.2** The Design/Builder shall not contract with any Subcontractor, Subconsultant, materialman, vendor, or supplier to whom City has made reasonable objection or with whom the City could not lawfully enter into a contract.

**9.3** All Subcontractor Contracts and Subconsultant Contracts shall, so far as practicable, contain unit prices and any other feasible formula for use in determination of the cost of changes in the Work.

## **10. INSURANCE.**

**10.1** The Design/Builder shall provide or cause to be provided insurance of the type and on the terms and conditions as specified in Exhibit "I" attached hereto. The cost of this insurance is included in the GMP. The failure of the Design/Builder to provide such insurance shall be considered a material breach of this Agreement. Insurance purchased by the Design/Builder shall be purchased from a carrier acceptable to City.

**10.2** Design/Builder shall maintain the coverages for insurance as required by Exhibit "I" as set forth in this Section 10.2 and thereafter during any and every period when Design/Builder and/or any of its Subconsultants and/or Subcontractors are performing any Work or furnishing any services pursuant to the Contract Documents. Upon execution of this Agreement, Design/Builder shall provide or cause to be provided the workers' compensation insurance, comprehensive general liability insurance, business automobile insurance, and the umbrella liability insurance policies. Immediately following the issuance of the Notice to Proceed for the Construction Work, Design/Builder shall provide the professional liability and

builder's risk insurance policies; provided, however, no Construction Work shall be performed unless and until the builder's risk insurance policy is provided to the City in accordance with this Agreement.

## **11. INDEMNITY.**

**11.1** In consideration of the entry of this Agreement, and to the extent permitted by Chapter 725, Florida Statutes, as may be amended, the Design/Builder agrees to indemnify, protect, defend, and hold harmless the City its elected officials, officers, employees, consultants, and agents from liabilities, damages, losses, and costs including, but not limited to reasonable attorney's fees at both the trial and appellate levels to the extent caused by the negligence, recklessness, or intentionally wrongful conduct of the Design/Builder and other persons employed or utilized by the Design/Builder in the performance of the Contract.

**11.2** The indemnification obligation under this clause shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for the Design/Builder and/or any Subcontractor or Subconsultants under worker's compensation acts, disability benefit acts, or other employee benefit acts.

**11.3** In the event that any claims are brought or actions are filed against the City with respect to the indemnity contained herein, the Design/Builder agrees to defend against any such claims or actions regardless of whether such claims or actions are rightfully or wrongfully brought or filed. The Design/Builder agrees that the City may select the attorneys to appear and defend such claims or actions on behalf of the City. The Design/Builder further agrees to pay at the Design/Builder's expense the attorneys' fees and costs incurred by those attorneys selected by the City to appear and defend such claims or actions on behalf of the City at both the trial and appellate levels. The City, at its sole option, shall have the sole authority for the direction of the defense, and shall be the sole judge of the acceptability of any compromise or settlement of any claims or actions against the City.

**11.4** To the extent this indemnification clause or any other indemnification clause in this Agreement does not comply with Chapter 725, Florida Statutes, as may be amended, this provision and all aspects of the Contract Documents shall hereby be interpreted as the parties' intention for the indemnification clauses and Contract Documents to comply with Chapter 725, Florida Statutes, as may be amended.

## **12. BONDS.**

**12.1** Pursuant to and in accordance with Section 255.05, Florida Statutes, the Design/Builder shall obtain and thereafter at all times during the performance of the Construction Work maintain a separate performance bond and labor and material payment bond for the Construction Work each in an amount equal to one hundred percent (100%) of the GMP and each in the form attached hereto as Exhibits "J-1" and "J-2" or in other form satisfactory to City. Upon Substantial Completion, the Design/Builder shall provide the City with a maintenance bond for the Construction Work each in an amount equal to one hundred percent (100%) of the GMP in the form attached hereto as Exhibit "J-3" (all of the bonds referenced in

this Section 12.1 are collectively referred to herein as the "Bonds"). The surety providing such Bonds must be licensed, authorized and admitted to do business in the State of Florida and must be listed in the Federal Register (Dept. of Treasury, Circular 570). The cost of the premiums for such Bonds is included in the GMP. Within ten (10) days of issuance, Design/Builder shall record all bonds required by the Agreement in the Department of Public Records of Broward County.

**12.2** Prior to performing any portion of the Construction Work, the Design/Builder shall deliver to City the Bonds (except the maintenance bond) required to be provided by Design/Builder as set forth in Section 12.1.

**13. INDEPENDENT CONTRACTOR.** In performing its obligations hereunder, the Design/Builder shall be deemed an independent contractor and not an agent or employee of City. The Design/Builder shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under this Agreement, unless the Contract Documents give other specific instructions concerning these matters.

**14. INSPECTIONS AND AUDIT.**

**14.1** The Design/Builder represents that he has inspected the Project Location and has satisfied himself as to the condition thereof and that the GMP is just and reasonable compensation for all Work, including all foreseen or foreseeable risks, hazards, and difficulties in connection therewith.

**14.2** City and the Design Consultant at all times shall have access to the Work for inspection thereof, but shall not be obligated to conduct any such inspection. The Design/Builder shall provide proper and safe facilities for such access and inspection by City and the Design Consultant. If any of the Work is required to be inspected or approved by any public authority, the Design/Builder shall cause such inspection or approval to be performed.

**14.3** No inspection performed or failed to be performed by City, the Design Consultant, or both shall be a waiver of any of the Design/Builder's obligations or be construed as an approval or acceptance by City of the Work or any part thereof.

**14.4** To ascertain if the Scope of Work as detailed under this Agreement has been performed, City shall have access to the Work and the right to audit all of the Design/Builder's major Subcontractors and major Subconsultants books, records, correspondence, instructions, drawings, receipts, payment records, vouchers and memoranda relating to the Work, and the Design/Builder and all major Subcontractors, major Subconsultants shall preserve all such records and supporting documentation for a period of three (3) years after the Final Payment. The Design/Builder further grants to City the authority to enter its premises for the purpose of inspection of such records and supporting documentation or, at the Design/Builder's option, Design/Builder may make such records and supporting documentation available to City at a location satisfactory to City. For purposes of this Agreement, a major Subcontractor or major

Subconsultant is a Subcontractor or Subconsultant that performs more than ten percent (10%) of the Design Services or Construction Work, as applicable.

**14.5** Although the Design/Builder and the other parties are required to maintain its records, as set forth in 14.4, for a period of three (3) years from the date of Final Payment under this Agreement, City will audit Design/Builder's and the other parties' records for purpose of adjustment to Design/Builder's payments under this Agreement, if at all, within three (3) years after Final Payment under this Agreement.

**15. AS-BUILT PLANS AND SPECIFICATIONS.** Concurrent with the Final Request for Payment, the Design/Builder shall furnish final as-built Plans and Specifications including surveys, to the City in a format acceptable to the City, showing the exact locations of all structures and water, sewer, gas, fuel, telephone, security, and electric lines and mains and of all easements for such utilities then existing. Such as-built Plans and Specifications and surveys shall be prepared by, as applicable, a licensed architect or surveyor who shall certify that the Work is installed and erected entirely upon the Project Location and within the building restriction lines, if any, and does not overhang or encroach upon any easement or right-of-way of others.

**16. NO LIENS.**

**16.1** Design/Builder acknowledges and agrees that the Property is owned by the City and is therefore excluded from the definition of "real property" upon which liens may be placed as set forth in Section 713.01(24), Florida Statutes. Design/Builder further acknowledges and agrees that the Work to be performed hereunder is for the construction of a public building and that the Design/Builder shall comply with the requirements of Section 255.05, Florida Statutes, including but not limited to, the provision of bonds and payment of claims. The Design/Builder hereby waives, releases, and relinquishes any right to claim or file a mechanic's or materialmen's lien against the Work or any portion thereof, the Project Location or the County including, but not limited to, any rights the Design/Builder may have under Chapter 713, Florida Statutes. This waiver and relinquishment of Design/Builder's rights to claim a mechanic's lien is made for good and valuable consideration and in recognition that City would not enter into this Agreement without such waiver and relinquishment. The Design/Builder shall, if the Project is subject to the foregoing conditions, include a provision substantially similar to this Section 16.1 in each of its Subcontractor Contracts and purchase orders, requiring Subcontractors, materialmen, vendors and suppliers to waive any claim or entitlement to a mechanic's or materialmen's lien on the Project Location and to look solely to the credit of the Design/Builder or its surety for payment of any sums due on the Project.

**16.2** The Design/Builder shall not voluntarily permit any laborer's, materialmen's, mechanic's, or other similar lien to be filed or otherwise imposed on any part of the Work or the City's property. If any laborer's, materialmen's, mechanic's, or other similar lien or claim thereof is filed and if the Design/Builder does not cause such lien to be released and discharged forthwith, or file a bond in lieu thereof, City shall have the right to pay all sums necessary to obtain such release and discharge and deduct all amounts so paid from the next payment due the Design/Builder under this Agreement. If any such lien is filed or otherwise imposed, at the

request of City, the Design/Builder shall cause such lien to be released and otherwise discharged. The Design/Builder hereby indemnifies and holds harmless City and the County from all claims, losses, demands, causes of action, expenses including attorneys' fees, or suits of whatever nature arising out of any such lien.

**17. TITLE TO WORK.** Immediately upon delivery and payment by the City to Design/Builder or supplier, as applicable, of Materials to the Project Location or the performance of any part of the Work, as between the Design/Builder and City, title thereto shall vest in City; provided, however, the vesting of such title shall not impose any obligations on City or relieve the Design/Builder from any of its obligations hereunder.

**18. WORK IN PROGRESS.** The Design/Builder shall protect and prevent damage to all phases of the Work, and any existing facilities or improvements, including but not limited to the protection thereof from damage by the elements, theft, or vandalism. During the course of the Construction Work, the Design/Builder shall remain responsible for the risk of loss of the Work and shall promptly remedy, repair and replace all damage and loss (other than damage or loss insured under insurance required by the Contract Documents) to the Work caused in whole or in part by the Design/Builder, a Subcontractor, or anyone directly or indirectly employed or controlled by any of them, or by anyone for whose acts they may be liable and for which the Design/Builder is responsible, except to the extent such damage or loss is attributable to the negligence of the City or anyone directly or indirectly employed by the City, or by anyone for whose acts the City may be liable, and not attributable to the fault or negligence of the Design Builder.

**19. HAZARDOUS SUBSTANCES.**

**19.1** The Design/Builder agrees that it shall not transport to, use, generate, dispose of, or install at the Project Location any Hazardous Substance, as defined in Section 19.4, except in accordance with applicable Environmental Laws. Further, in performing the Work, the Design/Builder shall not cause any release of hazardous substances into, or contamination of, the environment, including the soil, the atmosphere, any watercourse or ground water, except in accordance with applicable Environmental Laws. In the event the Design/Builder engages in any of the activities prohibited in this Section 19.1, to the fullest extent permitted by law, the Design/Builder hereby indemnifies and holds harmless City and its officers, agents and employees from and against any and all claims, damages, losses, causes of action, suits and liabilities of every kind, including but not limited to expenses of litigation, court costs, punitive damages and attorneys' fees, arising out of, incidental to or resulting from the activities prohibited in this Section 19.1 (collectively "Environmental Claims").

**19.2** In the event the Design/Builder encounters on the Project Location any Hazardous Substance, or what the Design/Builder reasonably believes to be a Hazardous Substance, and which is being introduced to the Work, or exists on the Project Location, in a manner violative of any applicable Environmental Laws, the Design/Builder shall immediately stop Work in the area affected and report the condition to City in writing. The Work in the affected area shall not thereafter be resumed except by written authorization of City if in fact a Hazardous Substance has been encountered and has not been rendered harmless. In the event

the Design/Builder fails to stop the work upon encountering a Hazardous Substance at the Project, to the fullest extent permitted by law, the Design/Builder hereby indemnifies and holds harmless City and its officers, agents and employees from and against all claims, damages, losses, causes of action, suits and liabilities of every kind, including, but not limited to, expenses of litigation, court costs, punitive damages and attorneys' fees, arising out of, incidental to, or resulting from the Design/Builder's failure to stop the Work.

**19.3** An extension of time plus payment of reasonable itemized general conditions including demobilization costs shall be the Design/Builder's sole remedy for any delay arising out of the encountering and/or rendering harmless of any Hazardous Substance at the Project Site. City and the Design/Builder may enter into an agreement for the Design/Builder to remediate and/or render harmless the Hazardous Substance, but the Design/Builder shall not be required to remediate and/or render harmless the Hazardous Substance absent such agreement. Design/Builder shall not be required to resume work in any area affected by the Hazardous Substance until such time as the Hazardous Substance has been remediated and/or rendered harmless.

**19.4** For purposes of this Agreement, the term "Hazardous Substance" shall mean and include, but shall not be limited to, any element, constituent, chemical, substance, compound, or mixture, which are defined in or included under or regulated by any local, state, or federal law, rule, ordinance, by-law, or regulation pertaining to environmental regulation, contamination, clean-up or disclosure, including, without limitation, The Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), The Resource Conservation and Recovery Act ("RCRA"), The Toxic Substances Control Act ("TSCA"), The Clean Water Act ("CWA"), The Clean Air Act ("CAA"), and The Marine Protection Research and Sanctuaries Act ("MPRSA"), The Occupational Safety and Health Act ("OSHA"), The Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Chapters 161, 253, 373, 376 and 403, Florida Statutes, the rules and regulations of the Florida Department of Environmental Protection, or other state superlien or environmental clean-up or disclosure statutes including all state and local counterparts of such laws (all such laws, rules and regulations being referred to collectively as "Environmental Laws"). It is the Design/Builder's responsibility to comply with this Article 19 based on the law in effect at the time its services are rendered and to comply with any amendments to those laws for all services rendered after the effective date of any such amendments.

## **20. COMPLIANCE WITH LAWS.**

**20.1** The Design/Builder shall notify City in writing of all conflicts between the Contract Documents and any laws, ordinances, rules, regulations and restrictions that come to the attention of the Design/Builder or should have come to the Design/Builder's attention with the exercise of due care. If the Design/Builder performs any of the Work knowing, or when with the exercise of due care the Design/Builder should have known, it to be contrary to any such laws, ordinances, rules, regulations or restrictions and fails to give City written notice thereof prior to performance, the Design/Builder shall bear all related costs, liabilities, and expenses arising from such noncompliance including reasonable attorney's fees and costs.

20.2 The Design/Builder, at its sole cost, shall obtain all necessary licenses, building and other permits, and similar authorizations from governmental authorities required or necessary to perform its obligations hereunder, and shall give all notices required by, and otherwise comply with, all applicable laws, ordinances, rules, regulations and restrictions.

20.3 The Design/Builder agrees that all of the Design/Builder's Services and the Work shall comply with all applicable laws, statutes, ordinances, codes, executive orders, rules, regulations including without limitation, those adopted by the City, all Environmental Laws as defined in Section 19.4, and the federal and State of Florida "Right to Know" laws related to Hazardous Substances in the workplace.

20.4 The Design/Builder shall also comply with the Trench Safety Act set forth in Sections 553.60 through 553.64, inclusive, Florida Statutes, and OSHA Standard 29 C.F.R. § 1926.650 Subpart P. In order to evidence the Design/Builder's intent to comply with the foregoing, upon execution of this Agreement, Design/Builder shall also execute and deliver to the City a Trench Safety Act Compliance Statement attached hereto as Exhibit "L" and by this reference made a part hereof. Without limiting the foregoing, at all times during performance of the Work, under no circumstances shall any trench(es) remain open overnight.

20.5 With respect to any grant or funding agreements, the Design/Builder agrees that it shall (a) be bound by all applicable state and federal laws and regulations, and (b) hold the State of Florida, Department of Environmental Protection, Department of Community Affairs and any other grant or funding agencies harmless against all claims of whatever nature arising out of the Design/Builder's performance of the Work under this Agreement, to the extent allowed and acquired by applicable law. **[ONLY IF REQUIRED BY ANY GRANTS WE MIGHT GET]**

## 21. PERSONNEL.

21.1 All personnel used or employed by the Design/Builder in the performance of the Work shall to the best of Design/Builder's knowledge be qualified by training and experience to perform their assigned tasks. At the request of City, the Design/Builder shall not use in the performance of the Work any personnel deemed by City to be incompetent, careless or unqualified to perform the work assigned to him, or otherwise unsatisfactory to City.

21.2 The Design/Builder agrees that in the performance of the Work called for by this Agreement, it will employ only such labor, and engage Subconsultants and Subcontractors that employ only such labor, as will not delay or interfere with the speedy and lawful progress of the Project, and as will be acceptable to and work in harmony with all other workmen employed on the Project Location or on any other building, structure, or other improvement which the Design/Builder or any other Design/Builder may then be erecting or altering on behalf of City. The Design/Builder agrees that it shall not employ any labor that will interfere with labor harmony at the Project location or with the introduction and storage of materials and the execution of work by other Subconsultants and Subcontractors. In the event of a strike or stoppage of work resulting from a dispute involving or affecting the labor employed by the Design/Builder or any of its Subcontractors, City may, at its option and without demand,



terminate this Agreement for default unless the Design/Builder shall remedy the strike or work stoppage or other disruption within ten (10) calendar days after the dispute arises.

**21.3** Design/Builder shall furnish City, on request, resumes of Design/Builder's key personnel involved in the day-to-day Work on the Project.

## **22. SAFETY AND PROTECTION.**

**22.1** Design/Builder shall be solely responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work. Design/Builder shall take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury or loss to:

**22.1.1** all persons on Project Site or who may be affected by the construction;

**22.1.2** all Work and Materials and equipment to be incorporated therein, whether in storage on or off the Project Site; and

**22.1.3** other property at the Project Site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadway, structures, utilities and underground facilities not designated for removal, relocation or replacement in the course of construction.

**22.2** Design/Builder shall comply with applicable laws and regulations of any public body having jurisdiction for safety or persons or property to protect them from damage, injury or loss; and shall erect and maintain all necessary safeguards for such safety and protection. Design/Builder shall notify owners of adjacent property and of underground facilities and utility owners when prosecution of the Work may affect them, and shall cooperate with them in the protection, removal, relocation and replacement of property. All damage, injury or loss to any property caused, directly or indirectly, in whole or in part, by Design/Builder, any Subcontractor, materialman, supplier, vendor, or any other individual or entity directly or indirectly employed by any of them to perform or furnish any of the Work or anyone for whose acts any of them may be liable, shall be remedied by Design/Builder. Design/Builder's duties and responsibilities for safety and for protection of the construction shall continue until such time as all the Work is completed and City has issued a notice to Design/Builder that the Work is acceptable (except as otherwise expressly provided in connection with Substantial Completion in Section 6.2).

**22.3 Safety Representative.** Design/Builder shall designate a qualified and experienced safety representative at the Project Site whose duties and responsibilities shall be the prevention of accidents and the maintaining and supervising of safety precautions and programs.

**22.4 Hazard Communication Programs.** Design/Builder shall be responsible for coordinating any exchange of material safety data sheets or other hazard communication information required to be made available to or exchanged between or among employers at the site in accordance with laws or regulations.

**22.5 Emergencies.** In emergencies affecting the safety or protection of persons or the construction or property at the Project Site or adjacent thereto, Design/Builder, without special instruction or authorization from the City, is obligated to act to prevent threatened damage, injury or loss. Design/Builder shall give City prompt written notice if Design/Builder believes that any significant changes in the construction or variation from the Contract Documents have been caused thereby. If a change in the Contract Documents is required because of the action taken by Design/Builder in response to such an emergency, a Change Order will be issued to document the consequences of such action.

**23. USE OF SITE AND OTHER AREAS.**

**23.1** Design/Builder shall confine construction equipment, the storage of materials and equipment and the operations of construction workers to those lands and areas permitted by the City and other land and area permitted by laws and regulations, rights-of-way, permits and easements, and shall not unreasonably encumber any such land or area's with construction equipment or other materials or equipment. Design/Builder shall assume full responsibility for any damage to any such land or area, or to the owner or occupant thereof or any adjacent land or areas, resulting from the performance of the construction. Should any claim be made by any such owner or occupant because of the performance of the Work, Design/Builder shall promptly settle with such other party by negotiation or otherwise resolve the claim by arbitration or other dispute resolution proceedings or at law. Design/Builder shall, to the fullest extent permitted by law and regulations, indemnify and hold harmless the City, City's consultants and anyone directly or indirectly employed by any of them from and against all claims, costs, losses and damages (including, but not limited to, fees of engineers, architects, attorneys and other professionals and court and arbitration or other dispute resolution costs) arising out of or resulting from any claim or action, legal or equitable, brought by any such owner or occupant against City, or any other party indemnified hereunder to the extent caused by or based on Design/Builder's, or its Subconsultant's or Subcontractor's performance of the construction.

**23.2** During the performance of the Work, Design/Builder shall keep the Project Site free from accumulations of waste materials, rubbish and other debris resulting from the construction. At the completion of the construction Design/Builder shall remove all waste materials, rubbish and debris from and about the premises as well as all tools, appliances, construction equipment, temporary construction and machinery and surplus materials. Design/Builder shall leave the Project Site clean and ready for occupancy by City at Substantial Completion. Design/Builder shall restore to original condition all property not designated for alteration by the Contract Documents.

**23.3** Design/Builder shall not load nor permit any part of any structure to be loaded in any manner that will endanger the structure, nor shall Design/Builder subject any part of the Work or adjacent property to stresses or pressures that will endanger it.

**24. RELATED CONSTRUCTION AT SITE.**

**24.1** City may perform other work related to the Project at the Project Site by City's own forces, or let other direct contracts therefore or have other work performed by utility owners. If the fact that such other work is to be performed was not noted in the Contract Documents then (a) written notice thereof will be given to Design/Builder prior to starting any such other work and (b) Design/Builder may make a request for a Change Order as provided in Section 7 if Design/Builder believes that such performance will involve additional time and the parties are unable to agree as to the amount or extent thereof.

**24.2** Design/Builder shall afford each other contractor who is a party to such a direct contract with City and each utility owner (and City, if City is performing the additional work with its employees) proper and safe access to the Project Site and a reasonable opportunity for the introduction and storage of materials and equipment and the execution of such other work and shall properly connect and coordinate the construction with theirs. Such contractors and utility owners shall be required to comply with Design/Builder's rules and regulations applicable to the Project Site including without limitation all safety requirements. Unless otherwise provided in the Contract Documents, Design/Builder shall do all cutting, fitting, and patching of the Work that may be required to make its several parts come together properly and integrate with such other work. Design/Builder shall not endanger any work of others by cutting, excavating or otherwise altering their work and will only cut or alter their work with the written consent of City and the others whose work will be affected. The duties and responsibilities of Design/Builder under this Section 24 are for the benefit of such utility owners and other contractors to the extent that there are comparable provisions for the benefit of Design/Builder in said direct contracts between City and such utility owners and other contractors.

**24.3** If the proper execution or results of any part of Design/Builder's Work depends upon work performed or services provided by others under this Section 24, Design/Builder shall inspect such other work and appropriate instruments of service and promptly report to the City in writing any delays, defects or deficiencies in such other work or services that render it unavailable or unsuitable for the proper execution and results of Design/Builder's Work. Design/Builder's failure so to report will constitute an acceptance of such other work as fit and proper for integration with Design/Builder's Work except for latent or nonapparent defects and deficiencies in such other work.

**24.4 Coordination.** If City contracts with others for the performance of other work on the Project at the Project Site, the following information will be provided in writing to Design/Builder prior to the commencement of such work:

**24.4.1** the individual or entity who will have authority and responsibility for coordination of the activities among the various prime contractors will be identified;

**24.4.2** the specific matters to be covered by such authority and responsibility will be itemized; and

**24.4.3** the extent of such authority and responsibilities will be provided.

**25. DESIGN/BUILDER'S WARRANTIES.** The Design/Builder represents and warrants to the City:

**25.1** That it is financially solvent, able to pay its debts as they mature, and is possessed of sufficient working capital to perform this Agreement; that it is able to furnish the Materials, and Services; that it is experienced in and competent to perform the Work contemplated by this Agreement; and that it is qualified to do the Work herein and is authorized to do business in the state in which the Project is located.

**25.2** That the Design/Builder holds a license, permit or other special license to perform the services included in this Agreement, as required by law, or employs or works under the general supervision of the holder of such license, permit or special license.

**25.3** That the Work shall be constructed in a good and workmanlike manner, free from defects, and in strict compliance with the Contract Documents.

**26. DEFECTS.**

**26.1** The Design/Builder shall at its sole cost (a) replace any parts of the Work that fail to conform with the requirements of this Agreement that appear during progress of the Work on the Project; (b) remedy any defects in the Work due to faulty materials or workmanship which appear within a period of one (1) year from the time of Final Completion of the Work hereunder or within such longer period of time as may be set forth in the Plans, Specifications, and Addenda or other Contract Documents or as may be required by law; and (c) replace, repair or restore any parts of the Project or furniture, fixtures, equipment or other items placed therein (whether by City or any other party) that are injured or damaged by any such parts of the work that do not conform to the requirements of this Agreement or are due to defects in the work. The provisions of this Article 26 apply to work performed by Subcontractors as well as work performed directly by employees of the Design/Builder. In addition to the Design/Builder's responsibility to make repairs or redo work under this Article 26, the Design/Builder shall also be responsible to City for any damages suffered by City as a result of said defects, provided however the Design/Builder will not be liable for any consequential damages suffered by the City. The Design/Builder shall commence any work required under this Article 26 promptly after notice from City and shall diligently complete such work in a good and workmanlike manner in compliance with the terms of this Agreement applicable to the work generally.

**26.2** If City and the Design/Builder deem it inexpedient to require the correction of Work damaged or not performed in accordance with the Contract Documents, an equitable deduction from the GMP shall be made by agreement between the Design/Builder and City. If City and the Design/Builder fail to reach a settlement or the Design/Builder fails to perform and is not protected by surety (or the surety fails to perform), City retains the right to perform the Work after seven (7) days written notice to the Design/Builder and/or surety. City may withhold the cost of said work as deemed just and reasonable from monies, if any, due the Design/Builder. If no monies are held by City, reimbursement shall be made to City within thirty (30) days by the Design/Builder.

**26.3** The Design/Builder's express warranty herein shall be in addition to, and not in lieu of, any other warranties or remedies City may have under this Agreement, at law, or in equity for defective Work.

**26.4** If City elects to perform the work described in this Article 26, this shall not void or otherwise impair the Bonds required by this Agreement. If City elects to enforce the Bonds, the surety shall cause the work to be commenced within seven (7) days after notice from City and diligently completed thereafter in a good and workmanlike manner in accordance with the terms of this Agreement applicable to the Work generally.

**27. SIGNAGE.** Except for safety signage required by applicable laws which shall be installed in compliance with applicable laws, all construction signage, including, but not limited to that appearing on cranes and other construction equipment located at the Project Location, shall be subject to the prior written approval of City. The Design/Builder recognizes that all signage (except safety signage required by applicable laws) may be disallowed, in City's sole discretion, and that existing signage or advertising on construction equipment, field offices, trailers, construction fences, etc., may be required to be masked or deleted, all at no cost or expense to City. Notwithstanding the foregoing, the parties intend to erect a Project sign identifying the City, Design/Builder and key participants in the Project. Such Project sign shall be installed in compliance with the City's sign ordinance.

**28. PRESS RELEASES.** The Design/Builder shall coordinate any public announcement or publicity releases relating to the Project through the City Manager. The Design/Builder shall also require Subconsultants, Subcontractors, materialmen, suppliers, and vendors to comply with this requirement.

**29. OWNERSHIP OF CONTRACT DOCUMENTS.** All Schematic Design Documents, Design Development Documents, Plans and Specifications, detail drawings, cost estimates, and other drawings and documents prepared in connection with the Project, upon payment by City to Design/Builder therefore, shall be and remain the property of City and are not to be used by the Design/Builder on any other project and shall be relinquished to City at Final Completion or sooner if otherwise required by this Agreement, provided, however, that the Design/Builder may maintain one record set of as-built drawings.

**30. REPRESENTATIVES.**

**30.1** The name of the party who is to be the "City's Representative" is shown in the Project Summary unless and until City notifies the Design/Builder in writing that another individual shall be City's representative. City's Representative is authorized to recommend approval of Change Orders and increases in the GMP, but Change Orders and increases in the GMP shall be binding on City only if signed by the City Manager.

**30.2** The name of the party who is to be the "Design/Builder's Representative" is shown in the Project Summary. Unless a corporate officer of the Design/Builder advises City and the Design Consultant, in writing, of any limitations on the authority of Design/Builder's

Representative, Design/Builder's Representative shall have full authority to execute any and all instruments requiring the Design/Builder's signature and to act on behalf of the Design/Builder with respect to all matters arising out of this Agreement.

**31. ASSIGNMENT.** The Design/Builder shall not assign this Agreement or sublet it as a whole without the written consent of City, which consent may be withheld or conditioned by the City in its sole discretion; nor shall the Design/Builder assign any monies due or to become due to it hereunder, without the previous written consent of City, which consent may be withheld or conditioned by the City in its sole discretion. Subject to the foregoing, this Agreement shall inure to the benefit of and be binding on the parties hereto and their respective successors and assigns.

**32. NONDISCRIMINATION.** The Design/Builder agrees that it will not knowingly violate any applicable laws or regulations prohibiting discrimination in employment in the performance of its work under this Agreement.

**33. WAIVER.** No consent or waiver, express or implied, by either party to this Agreement to or of any breach or default by the other in the performance of any obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other or future breach or default by such party hereunder. Failure on the part of any party hereto to complain of any act or failure to act of the other party or to declare the other party in default hereunder, irrespective of how long such failure continues, shall not constitute a waiver of the rights of such party hereunder. Inspection by, payment by, or tentative approval or acceptance by City, or the failure of City to perform any inspection hereunder, shall not constitute a final acceptance of the Work or any part thereof and shall not release the Design/Builder from any of its obligations hereunder.

**34. CONSTRUCTION OF TERMS; CONFLICTS.**

**34.1** Unless the context clearly intends to the contrary, words singular or plural in number shall be deemed to include the other and pronouns having a masculine or feminine gender shall be deemed to include the other. The term "person" shall be deemed to include an individual, corporation, unincorporated organization, partnership, trust, government and governmental agency or subdivision, as the context shall require.

**34.2** The Contract Documents shall be interpreted so as to eliminate inconsistencies or conflicts, but in the event of any conflict, requirements for greater quantity and/or more expensive work shall govern; the terms of this Agreement shall prevail; and anything shown on the Plans and not mentioned in the Specifications or mentioned in the Specifications and not shown on the Plans shall have the same effect as if shown or mentioned respectively in both.

**35. CAPTIONS.** The captions used for the Sections in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope of the intent of this Agreement or any Section hereof.

**36. ENTIRE AGREEMENT; SEVERABILITY; AMENDMENTS.** The Contract Documents constitute the entire agreement between the parties hereto with respect to the matters covered thereby. All prior negotiations, representations and agreements with respect thereto not incorporated in such Contract Documents are hereby canceled. This Agreement can be modified or amended only by a document duly executed on behalf of the parties hereto. In the event any provision of the Contract Documents shall be determined to be illegal, invalid or otherwise unenforceable, the remainder of this Agreement shall not be affected thereby and each remaining provision, term, covenant or condition of the Contract Documents shall be enforced to the fullest extent permitted by law.

**37. TERMINATION.**

**37.1** City shall have the right at any time, on not less than seven (7) days prior written notice to the Design/Builder, to terminate this Agreement without cause and/or for City's convenience including, but not limited to termination in the event that (a) the Project is abandoned by City; and/or the City Commission terminates, suspends or modifies the Project. Upon receipt by the Design/Builder of such notice of termination (the "Date of Termination"), the Design/Builder shall immediately discontinue the Work and remove its equipment and employees from the Project location. In the event of termination under this Section 37.1, the Design/Builder shall have the right, as its sole and exclusive remedy, to recover from City payment for Work performed up to the Date of Termination (less any payment made to the Design/Builder by City). In addition, without terminating this Agreement as a whole, City may, for convenience, terminate a portion of this Agreement (by reducing, in such manner as City deems appropriate, the scope of the Work to be performed by the Design/Builder). In which event such termination of a portion of this Agreement shall be treated as a reduction in the scope of the Work, to which an equitable reduction shall be made to the GMP.

**37.2** In addition to City's right to terminate this Agreement for default under the terms of Section 21.2 and elsewhere in this Agreement, if the Design/Builder shall fail to commence the Work in accordance with the provisions of this Agreement, fail to perform the Work or portions thereof to completion thereof in a diligent, efficient, workmanlike, skillful and careful manner and in strict accordance with the provisions of the Contract Documents, fail to use an adequate quantity or quality of personnel, equipment, or material to complete the Work within the Contract Time, fail to perform any of its obligations under the Contract Documents, be adjudged a bankrupt, make a general assignment for the benefit of its creditors, permit a receiver to be appointed on account of its insolvency, otherwise insolvent, or fail to make prompt payments to its Subcontractors, materialmen or laborers, City shall provide the Design/Builder with written notice thereof, stating the nature of the default complained of. If Design/Builder does not cure such default within seven (7) days after receipt of such notice (or such longer period agreed to by the parties if the nature of the default is such that it cannot be cured within seven [7] days and Design/Builder has commenced and is diligently proceeding to cure within the original seven [7] day period), the City shall have the right, on forty-eight (48) hours written notice thereof to the Design/Builder to terminate this Agreement.

In the event of termination under this Section 37.2, City shall notify the Design/Builder's surety, and the Design/Builder's surety shall take over and perform this Agreement. The

Design/Builder's surety shall continue to perform, on at least an interim basis, until such time as it makes other satisfactory arrangements for completion pursuant to the Bond obligations. If the Design/Builder's surety does not commence performance with adequate quantity and quality of personnel, equipment, and material to maintain the Contract Time, within five (5) days from the date of receipt of such notice of termination, City may, without further notice to the Design/Builder or its surety, take possession of and use, without any rental obligation to the Design/Builder or any third party, all or any part of the Design/Builder's Materials and other property of every kind used by the Design/Builder in the performance of the Work and use such property in the completion of the Work, and complete the Work with its own forces or by engaging the services of other parties therefore. Any such act by City shall not be deemed a waiver of any other right or remedy of City under this Agreement, the Bonds or otherwise. If after exercising any such remedy the cost to City of the performance of the balance of the Work is in excess of that part of the GMP which has not previously been paid to the Design/Builder hereunder, the Design/Builder and the Design/Builder's surety shall be liable for and shall reimburse City for such excess costs and all delay and damages suffered by City as a result thereof. If after termination of this Agreement under this Section 37.2, it is determined that the Design/Builder was not in default or that sufficient cause to terminate under Section 37.2 did not exist, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of City under Section 37.1, and that the Design/Builder agreed to City's use of its materials and other property, in which case the Design/Builder shall be entitled to be paid a reasonable sum for City's use of the Design/Builder's Materials and/or other property of the Design/Builder

**37.3** If City fails to perform any of its obligations hereunder, the Design/Builder shall have the right to give City written notice thereof, stating the nature of the default complained of. If City does not cure such default within fifteen (15) days after receipt of such notice (or such longer period agreed to by the parties if the nature of the default is such that it cannot be cured within fifteen [15] days and City has commenced and is diligently proceeding to cure within the original fifteen [15] day period), the Design/Builder shall have the right, on forty-eight (48) hours written notice thereof to City to terminate this Agreement. The Design/Builder shall have the right to terminate this Agreement upon thirty (30) days written notice if the Work is suspended for a period of ninety (90) consecutive days or more due to causes not the fault of the Design/Builder.

**37.4** City may, if the Design/Builder neglects to perform the Work properly or to perform any provision of the Contract Documents, or does, or omits to do, anything whereby safety or proper construction may be endangered or whereby damage or injury may result to person or property, after forty-eight (48) hours written notice to the Design/Builder, without prejudice to any other remedy City may have, make good all Work, material, omissions or deficiencies, and may deduct the cost therefore from the amount included in the GMP due or which may thereafter become due the Design/Builder, but no action taken by City hereunder shall affect any of the other rights or remedies of City granted by this Agreement or by law relieve the Design/Builder or the Design/Builder's surety from any consequences or liabilities arising from such acts or omissions.



37.5 The rights and remedies of City under this Section 37 shall be non-exclusive, and shall be in addition to all the other remedies available to City at law or in equity.

**38. DISPUTE RESOLUTION.**

38.1 This Agreement shall be governed by the laws of the State of Florida and the applicable laws of the United States of America. Any proceeding seeking to enforce any provision of, or based on any rights arising out of, this Agreement may be brought against any of the parties in the courts of the State of Florida, County of Monroe, or if it has or can acquire jurisdiction in the United States District Court of the Southern District of Florida and each of the parties consents to the jurisdiction of such courts (and of the appropriate appellate courts) in any such action. THE PARTIES HEREBY WAIVE ANY RIGHTS TO A JURY TRIAL OR PROCEEDING AND WAIVE ANY OBJECTION TO VENUE, PROVIDED, HOWEVER, THAT SUCH VENUE SHALL BE CONSISTENT WITH THE REQUIREMENTS OF SECTION 47.025, FLORIDA STATUTES.

38.2 Pending resolution of any dispute arising under this Agreement, other than termination hereof, the Design/Builder shall diligently proceed with performance of this Agreement and City shall continue to make payments in accordance with the Contract Documents, except for performance and payment related to the disputed matter.

39. **NOTICES.** All notices to be given hereunder shall be in writing, and shall be given, served, or made by facsimile transmission followed by one of the following methods: (a) depositing the same in the United States Mail addressed to the party to be notified, postpaid and first class mail, (b) by nationally recognized overnight courier service such as Federal Express or United Parcel Service, or (c) by delivering the same in person to such party. Notices of an alleged default and/or any termination of this Agreement shall be hand-delivered or sent by certified mail, return receipt requested, postpaid, to the recipient party. Notice given in any other manner shall be effective only if and when received by the party to be notified. All notices to be given to the parties hereto shall be sent to or made to the addresses shown in Section 41 below. By giving the other party at least fifteen (15) days written notice thereof, the parties hereto shall have the right to change their respective addresses and specify as its address for the purposes hereof any other address in the United States of America.

40. **COUNTERPARTS.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

41. **ADDRESSES.** All invoices, contracts, copies of notices and other correspondence should be addressed to City and the Design/Builder as follows:

If to City:

Scott Janke, City Manager  
City of Marathon  
10045-55 Overseas Highway

Marathon, FL 33050  
Telephone No. (305) 743-0033  
Fax No. (305) 743-3667

With a copy to:

City Attorney  
Weiss Serota Helfman Pastoriza Guedes  
Cole & Boniske, P.A.  
Attn: Nina L. Boniske  
2665 South Bayshore Drive  
Suite 420  
Miami, Florida 33133  
Telephone No. (305) 854-0800  
Fax No. (305) 854-2323

If to Design/Builder:

Steven L. Siems  
Chief Executive Officer  
3990 North Powerline Road  
Ft. Lauderdale, Florida 33309

Telephone No. 954-566-3885  
Fax No. 954-566-3335

**42. ATTORNEYS' FEES.** In the event of any litigation arising out of this Agreement, the prevailing party shall be entitled to recover its attorneys' fees and costs, including the fees and expenses of any paralegal, law clerks, and legal assistants, and including fees and expenses charged for representation at the trial level, in all appeals, and in any bankruptcy proceedings.

**43. PUBLIC ENTITY CRIMES ACT.** Design/Builder represents that the execution of this Agreement will 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 agreements 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 any monies paid by City, and may result in debarment from City's competitive procurement activities. In addition to the foregoing, Design/Builder further


represents that there has been no determination, based on an audit, that it 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 Design/Builder has been placed on the convicted vendor list.

**44. TRUTH-IN-NEGOTIATION CERTIFICATE.** Signature on this Agreement by Design/Builder 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 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 year following the end of this Agreement.

[THE REST OF THIS PAGE LEFT INTENTIONALLY BLANK]

IN WITNESS WHEREOF, this Agreement is hereby executed as of the date first above set forth:

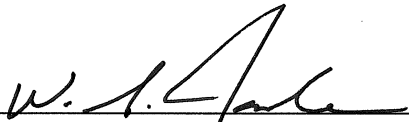
DESIGN/BUILDER

By:  C.E.O.  
Name: STEVEN L. SIEMS  
Title: C.E.O

Dated: 5-20, 2004

CITY:

**CITY OF MARATHON,  
a Florida municipal corporation**

By:   
W. Scott Janke, City Manager

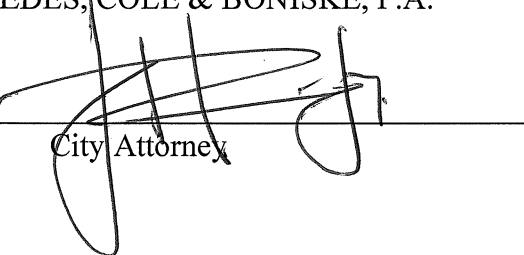
Dated: 5/26/04, 2004

ATTEST:

By:   
Cindy L. Ecklund, City Clerk

Approved as to form and legality for the use and reliance of the City of Marathon, Florida only:

WEISS SEROTA HELFMAN PASTORIZA,  
GUEDES, COLE & BONISKE, P.A.

By:   
City Attorney

## EXHIBIT "A"

### CONTRACT TIMES

**A. Design Services.** Unless otherwise agreed to in writing by the parties, the Design Services shall be commenced pursuant to a Notice to Proceed from the City's Project Representative to Design/Builder's Project Representative and completed within one hundred ninety-two (192) days from the date set forth therein. Additionally, Section 4.2 of the Agreement contains certain milestone submittal dates for 30% Schematic Design Documents, 90% Design Development Documents and 100% Construction Documents. Time is of the essence in the performance of the Design Services.

**B. Construction Work.** Unless otherwise agreed to in writing by the parties, the Construction Work shall be commenced pursuant to receipt of construction permit from the City's Project Representative to Design/Builder's Project Representative with Substantial Completion to occur within two hundred twenty-two (222) days from the date set forth therein. Pursuant to Section 6.4 of the Agreement, Final Completion shall occur within thirty (30) calendar days following Substantial Completion. Time is of the essence in the performance of the Construction Work.

**C. Liquidated Damages.** Pursuant to Section 6.6 of the Agreement, if the Design/Builder shall neglect, fail, or refuse to complete the Work by the Substantial Completion Date and the Final Completion Date, subject to any proper extension granted by City, then the Design/Builder shall agree to pay to City, or to cause the Design/Builder's surety to pay to City, Liquidated Damages in the amount of (a) Two Hundred Fifty and 00/100 Dollars (\$250.00) per diem commencing upon the first day following expiration of the Substantial Completion Date and continuing until the actual date of Substantial Completion, and (b) Two Hundred Fifty and 00/100 Dollars (\$ 250.00) per diem commencing upon the first day following expiration of the Final Completion Date and continuing until the actual date of Final Completion.

**EXHIBIT "B"**

**CHANGE ORDER**

## CHANGE ORDER

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**TO: City of Marathon**

**PROJECT: City of Marathon Community Park Phase II**

**DESIGN/BUILDER:**

**DATE:** \_\_\_\_\_

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This Change Order will authorize the following change to the Agreement:

The Work as set forth in the Agreement is hereby amended to include the items set forth on Exhibit "A" attached hereto and by this reference made a part hereof.

This Change Order constitutes full, final, and complete compensation to the Design/Builder for all costs, expenses, overhead, and profit, and any damages of every kind that the Design/Builder may incur in connection with the above referenced changes in the Work, and any other effect on any of the Work under this Agreement. The Design/Builder acknowledges and agrees that (a) the Guaranteed Maximum Price of \$ \_\_\_\_\_ under the Agreement will be [unchanged] [changed] by this Change Order, and (b) the schedule for performance of Work will be [unchanged] [changed] by this Change Order. Design/Builder expressly waives any claims for any additional compensation, damages or time extensions in connection with the above-referenced changes. Except as herein or heretofore expressly modified, all terms of the Agreement shall remain in full force and effect and shall cover the performance of, and payment for, any work authorized hereunder. Any defined terms not defined in this Change Order shall have the meanings set forth in the Agreement.

By signing below the parties indicate acceptance of this Change Order as set forth herein.

---

**CITY OF MARATHON**  
a Florida municipal corporation

**DESIGN/BUILDER**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**EXHIBIT "C"**

**REQUEST FOR PAYMENT FORM**



# REQUEST FOR PAYMENT

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**PROJECT TITLE: City of Marathon Community Park Phase II**

**DESIGN/BUILD AGREEMENT DATED:**

**PROJECT NO:**

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Invoice #: \_\_\_\_\_

Date: \_\_\_\_\_

Application is made for payment as shown below, in connection with the Design/Build Agreement (additional sheets are attached to provide a complete breakdown of the requested payment):

- |    |  |                   |
|----|--|-------------------|
| 1. | Guaranteed Maximum Price   | \$ _____          |
| 2. | Net Change by Change Orders  | \$ _____          |
| 3. | Guaranteed Maximum Price to date (Line 1 + 2)                        | \$ _____          |
| 4. | Total Completed and Stored to date (see continuation sheet)          | \$ _____          |
| 5. | Retainage to date (see continuation sheet)                           | \$ _____          |
| 6. | Total Earned less Retainage (Line 4 less Line 5 total)               | \$ _____          |
| 7. | Less Previous Requests for Payment<br>(line 6 from previous Request) | \$ _____<br>_____ |
| 8. | Current Payment Due  | \$ _____          |
| 9. | Balance to Finish (Line 1 less Line 4)                               | \$ _____          |

The undersigned Design/Builder certifies that to the best of the Design/Builder's knowledge, information, and belief the Work covered by this Request for Payment has been completed in strict accordance with the contract Documents, that all amounts have been paid by the Design/Builder for work for which previous Requests for Payment were issued and payment received from the City and that the current payment requested herein represents a just estimate of reimbursements to the contractors, subcontractors, materialmen, vendors, and

suppliers for Work performed and material delivered. The Design/Builder further certifies that there are no known mechanic's or materialmen's liens outstanding at the date of this request, that all due and payable bills with respect to the Work and materials have been paid to date or are included in the amount requested herein and that, except for such bills not paid but so included, there is no known basis for the filing of any mechanic's or materialmen's liens on the Work, and that waivers from all contractors, subcontractors, materialmen, vendors and suppliers have been obtained in such form required by the Design/Build Agreement.

DESIGN/BUILDER

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**EXHIBIT "D"**  
**CERTIFICATE OF SUBCONTRACTOR &**  
**FINAL WAIVER OF LIEN**

**CERTIFICATE OF SUBCONTRACTOR &  
FINAL WAIVER OF LIEN**

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**TO:**

**DESIGN/BUILDER:**

**PROJECT: City of Marathon Community Park Phase II**

**DESIGN/BUILD AGREEMENT DATE:**

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**The undersigned, being duly sworn, on oath deposes and says under penalty of perjury:**

I am the \_\_\_\_\_ of the corporation or other entity identified below as the Subcontractor, which entity has executed the attached Release and Waiver, and I hereby certify that said Subcontractor has paid all employees, contractors and materialmen in full for all labor and materials supplied by them to, for or under the Subcontractor in connection with the attached described Project through and including the date of this instrument, except for such persons listed on the attached sheet in the amount indicated opposite their names, who shall be paid in full within ten (10) days after the date hereof.

On behalf of and in the name of the Subcontractor, I hereby further covenant, warrant and represent that should any claim or lien be filed against the City of Marathon, a Florida municipal corporation (the "City"), the Project, the real property upon which the Project is located or against the Design/Builder for material or labor supplied by, to, for or under the Subcontractor in connection with the Subcontractor's participation in the construction of the Project, the Subcontractor will immediately pay and satisfy such claim or lien or furnish a sufficient bond, pursuant to Section \_\_\_\_\_, *et seq.*, Florida Statutes, for the release of such lien, and obtain settlement of any such liens and furnish the City and the Design/Builder a signed instrument fully releasing any such liens. The Subcontractor further agrees to fully indemnify and hold harmless the City, its agents and employees, and the Design/Builder, its sureties, agents and employees, for any loss, cost or damage, including but not limited to attorneys' fees, which they may incur by reason of any such claim or lien by, through or under the Subcontractor.

I further certify on behalf of and in the name of the Subcontractor that the Subcontractor has complied with all federal, state and local tax laws, including social security laws, and unemployment compensation laws and workers' compensation laws, insofar as same are applicable to the performance of the Subcontractor's obligations in connection with the Project.

THAT the undersigned Subcontractor, in consideration of payment made to the undersigned of all sums due the undersigned for labor and/or materials supplied prior to, through and including the date of this release, and in connection with that certain project (the "Project") known as City of Marathon Community Park Phase II, which Project is owned or leased by the City, does hereby fully and finally waive and release any and all liens, claims, actions, and demands, and all rights to same, against the City, the Project, the real property upon which the Project is located and any and all other property owned by the City, in connection with labor and/or services supplied by the undersigned to the Project prior to and through the date hereof; and

THAT the undersigned Subcontractor does hereby acknowledge and represent that:

1. Through the date hereof, the undersigned has received total payments in the amount of \$\_\_\_\_\_ for labor and/or materials supplied to or for the Project; and
2. The undersigned Subcontractor hereby acknowledges receipt of payment in full of all sums agreed and required to be paid to the undersigned in connection with the Project for all labor and/or materials supplied by the undersigned to or for the Project prior to, through and including the date hereof.

This instrument has been executed as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

SUBCONTRACTOR:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

STATE OF FLORIDA     )  
  )  
COUNTY OF MONROE    )

This instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_ by \_\_\_\_\_ who [ ] is personally know to me or [ ] produced \_\_\_\_\_ as identification.

Notary Public: \_\_\_\_\_  
  \_\_\_\_\_  
(name typed)

My Commission Expires: \_\_\_\_\_

**EXHIBIT "E"**

**CERTIFICATE OF DESIGN/BUILDER &  
FINAL WAIVER OF LIEN**

**CERTIFICATE OF DESIGN/BUILDER &  
FINAL WAIVER OF LIEN**

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**TO: City of Marathon**

**DESIGN/BUILDER:**

**PROJECT: City of Marathon Community Park Phase II**

**DESIGN BUILD AGREEMENT DATE:**

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**The undersigned, being duly sworn, on oath deposes and says under penalty of perjury:**

I am the \_\_\_\_\_ of the corporation or other entity identified herein as the Design/Builder, which entity has executed the attached Release and Waiver, and I hereby certify that said Design/Builder has paid all employees, subcontractors and materialmen in full for all labor and materials supplied by them to, for or under the Design/Builder in connection with the above described Project through and including the date of this instrument, except for such persons listed on the attached sheet in the amount indicated opposite their names, who shall be paid in full within ten (10) days after the date hereof.

On behalf of and in the name of the Design/Builder, I hereby further covenant, warrant and represent that should any claim or lien be filed against the City of Marathon, a Florida municipal corporation (the "City"), the Project, the real property upon which the Project is located or any other property owned by the City of Marathon, a Florida municipal corporation for material or labor supplied by, to, for or under the Design/Builder in connection with the Design/Builder's participation in the construction of the Project, the Design/Builder will immediately pay and satisfy such claim or lien or furnish a sufficient bond, for the release of such lien, and obtain settlement of any such liens and furnish the City a signed instrument fully releasing any such liens. The Design/Builder further agrees to fully indemnify and hold harmless the City, its agents and employees, from any loss, cost or damage, including but not limited to attorneys' fees, which they may incur by reason of any such claim or lien by, through or under the Design/Builder.

I further certify on behalf of and in the name of the Design/Builder that the Design/Builder has complied with all federal state and local tax laws, including social security laws, and unemployment compensation laws and workers' compensation laws, insofar as same are applicable to the performance of the Design/Builder's obligations in connection with the Project.

**THAT** the undersigned Design/Builder, in consideration of payment made to the undersigned of all sums due the undersigned for labor and/or materials supplied prior to, through and

including the date of this release, and in connection with that certain project (the "Project") known as City of Marathon Community Park Phase II, located at \_\_\_\_\_, which Project is owned or leased by the City, does hereby fully and finally waive and release any and all liens, claims, actions, and demands, and all rights to same, against the City, the Project, the real property upon which the Project is located and any and all other property owned by the City, in connection with labor and/or services supplied by the undersigned to the Project prior to and through the date hereof; and

**THAT** the undersigned Design/Builder does hereby acknowledge and represent that:

1. Through the date hereof, the undersigned has received total payments in the amount of \$\_\_\_\_\_ for labor and/or materials supplied to or for the Project; and
2. The undersigned Design/Builder hereby acknowledges receipt of payment in full of all sums agreed and required to be paid to the undersigned in connection with the Project for all labor and/or materials supplied by the undersigned to or for the Project prior to, through and including the date hereof.

This instrument has been executed as of the \_\_\_ day of \_\_\_\_\_, 20\_\_.

DESIGN/BUILDER:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

STATE OF FLORIDA     )  
  )  
COUNTY OF MONROE    )

This instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_ by \_\_\_\_\_ who [ ] is personally know to me or [ ] produced \_\_\_\_\_ as identification.

Notary Public: \_\_\_\_\_  
\_\_\_\_\_  
(name typed)

My Commission expires: \_\_\_\_\_



**EXHIBIT "F"**

**CERTIFICATE OF DESIGN/BUILDER &  
PARTIAL WAIVER OF LIEN**

**CERTIFICATE OF DESIGN/BUILDER &  
PARTIAL WAIVER OF LIEN**

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**TO: City of Marathon**

**DESIGN/BUILDER:**

**PROJECT: City of Marathon Community Park Phase II**

**AGREEMENT DATE:**

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**The undersigned, being duly sworn, on oath deposes and says under penalty of perjury:**

I am the \_\_\_\_\_ of the corporation or other entity identified herein as the Design/Builder, which entity has executed the attached Release and Waiver, and I hereby certify that said Design/Builder has paid all employees, subcontractors and materialmen in full for all labor and materials supplied by them to, for or under the Design/Builder in connection with the above described Project through and including the date of this instrument, except for such persons listed on the attached sheet in the amount indicated opposite their names, who shall be paid in full within ten (10) days after the date hereof.

On behalf of and in the name of the Design/Builder, I hereby further covenant, warrant and represent that should any claim or lien be filed against the City of Marathon, a Florida municipal corporation (the "City"), the Project, the real property upon which the Project is located or any other property owned by the City of Marathon, for material or labor supplied by, to, for or under the Design/Builder in connection with the Design/Builder's participation in the construction of the Project, the Design/Builder will immediately pay and satisfy such claim or lien or furnish a sufficient bond, for the release of such lien, and obtain settlement of any such liens and furnish the City a signed instrument fully releasing any such liens. The Design/Builder further agrees to fully indemnify and hold harmless the City, its agents and employees, from any loss, cost or damage, including but not limited to attorneys' fees, which they may incur by reason of any such claim or lien by, through or under the Design/Builder.

I further certify on behalf of and in the name of the Design/Builder that the Design/Builder has complied with all federal state and local tax laws, including social security laws, and unemployment compensation laws and workers' compensation laws, insofar as same are applicable to the performance of the Design/Builder's obligations in connection with the Project.

**THAT** the undersigned Design/Builder, in consideration of payment made to the undersigned of all sums due the undersigned for labor and/or materials supplied prior to, through and including the date of this release, and in connection with that certain project (the "Project")

known as City of Marathon Community Park Phase II located at \_\_\_\_\_, which Project is owned or leased by the City, does hereby fully and finally waive and release any and all liens, claims, actions, and demands, and all rights to same, against the City, the Project, the real property upon which the Project is located and any and all other property owned by the City, in connection with labor and/or services supplied by the undersigned to the Project prior to and through the date hereof; and

**THAT** the undersigned Design/Builder does hereby acknowledge and represent that:

- 3. Through the date hereof, the undersigned has received total payments in the amount of \$ \_\_\_\_\_ for labor and/or materials supplied to or for the Project; and
- 4. The undersigned Design/Builder hereby acknowledges receipt of payment in full of all sums agreed and required to be paid to the undersigned in connection with the Project for all labor and/or materials supplied by the undersigned to or for the Project prior to, through and including the date hereof, it being understood that retainage in the amount \$ \_\_\_\_\_ of is being withheld pursuant to the terms of the Agreement.

This instrument has been executed as of the \_\_\_ day of \_\_\_\_\_, 20\_\_.

DESIGN/BUILDER:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

STATE OF FLORIDA     )  
  )  
COUNTY OF MONROE    )

This instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_ by \_\_\_\_\_ who [ ] is personally know to me or [ ] produced \_\_\_\_\_ as identification.

Notary Public: \_\_\_\_\_  
\_\_\_\_\_  
(name typed)

My Commission expires: \_\_\_\_\_

**EXHIBIT "G"**

**CERTIFICATE OF SUBCONTRACTOR &  
PARTIAL WAIVER OF LIEN**

**CERTIFICATE OF SUBCONTRACTOR &  
PARTIAL WAIVER OF LIEN**

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**TO: City of Marathon**

**DESIGN/BUILDER:**

**PROJECT: City of Marathon Community Park Phase II**

**AGREEMENT DATE:**

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**The undersigned, being duly sworn, on oath deposes and says under penalty of perjury:**

I am the \_\_\_\_\_ of the corporation or other entity identified below as the Subcontractor, which entity has executed the attached Release and Waiver, and I hereby certify that said Subcontractor has paid all employees, contractors and materialmen in full for all labor and materials supplied by them to, for or under the Subcontractor in connection with the attached described Project through and including the date of this instrument, except for such persons listed on the attached sheet in the amount indicated opposite their names, who shall be paid in full within ten (10) days after the date hereof.

On behalf of and in the name of the Subcontractor, I hereby further covenant, warrant and represent that should any claim or lien be filed against the City of Marathon, a Florida municipal corporation (the "City"), the Project, the real property upon which the Project is located or against the Design/Builder for material or labor supplied by, to, for or under the Subcontractor in connection with the Subcontractor's participation in the construction of the Project, the Subcontractor will immediately pay and satisfy such claim or lien or furnish a sufficient bond, pursuant to Section \_\_\_\_\_, *et seq.*, Florida Statutes, for the release of such lien, and obtain settlement of any such liens and furnish the City and the Design/Builder a signed instrument fully releasing any such liens. The Subcontractor further agrees to fully indemnify and hold harmless the City, its agents and employees, and the Design/Builder, its sureties, agents and employees, for any loss, cost or damage, including but not limited to attorneys' fees, which they may incur by reason of any such claim or lien by, through or under the Subcontractor.

I further certify on behalf of and in the name of the Subcontractor that the Subcontractor has complied with all federal, state and local tax laws, including social security laws, and unemployment compensation laws and workers' compensation laws, insofar as same are applicable to the performance of the Subcontractor's obligations in connection with the Project.

THAT the undersigned Subcontractor, in consideration of payment made to the undersigned of all sums due the undersigned for labor and/or materials supplied prior to, through and including

the date of this release, and in connection with that certain project (the "Project") known as City of Marathon Community Park Phase II, which Project is owned or leased by the City, does hereby waive and release any and all liens, claims, actions, and demands, and all rights to same, against the City, the Project, the real property upon which the Project is located and any and all other property owned by the City, in connection with labor and/or services supplied by the undersigned to the Project prior to and through the date hereof; and

THAT the undersigned Subcontractor does hereby acknowledge and represent that:

1. Through the date hereof, the undersigned has received total payments in the amount of \$ \_\_\_\_\_ for labor and/or materials supplied to or for the Project; and
2. The undersigned Subcontractor hereby acknowledges receipt of payment in full of all sums agreed and required to be paid to the undersigned in connection with the Project for all labor and/or materials supplied by the undersigned to or for the Project prior to, through and including the date hereof, it being understood that retainage in the amount of \$ \_\_\_\_\_ is being withheld pursuant to the terms of the Agreement.

This instrument has been executed as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

SUBCONTRACTOR:

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

STATE OF FLORIDA     )  
  )  
COUNTY OF MONROE    )

This instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_ by \_\_\_\_\_ who [ ] is personally know to me or [ ] produced \_\_\_\_\_ as identification.

Notary Public: \_\_\_\_\_  
\_\_\_\_\_  
(name typed)

My Commission Expires: \_\_\_\_\_

**EXHIBIT "H"**

**ASSIGNMENT**

## ASSIGNMENT

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**TO: City of Marathon**

**DESIGN/BUILDER:**

**PROJECT: City of Marathon Community Park Phase II**

**DESIGN BUILD AGREEMENT DATE:**

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### ASSIGNMENT OF RIGHTS UNDER SUBCONTRACTOR CONTRACT/SUBCONSULTANT CONTRACT

For and in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration, \_\_\_\_\_, whose mailing address is \_\_\_\_\_ (the "Design/Builder"), does hereby TRANSFER, ASSIGN and CONVEY unto the CITY OF MARATHON, a Florida municipal corporation, whose mailing address is 10045-55 Overseas Highway, Marathon, FL 33050 (the "City"), all of the rights, interests, benefits and privileges of the Design/Builder under (a) that certain Subcontractor Contract/Subconsultant Contract (the "Subcontract") dated \_\_\_\_\_ 20\_\_\_\_, by and between the Design/Builder, and

\_\_\_\_\_ ("the Subcontractor"), a copy of said Subcontract is attached hereto as Exhibit "A" and made a part hereof, providing for a portion of the design services, labor and/or materials that the Design/Builder is obligated to provide the City under that certain Design Build Agreement (the "Agreement") dated \_\_\_\_\_, 20\_\_\_\_, for the design and construction of a project and related improvements in 10045-55 Overseas Highway, Marathon, FL 33050 Monroe County, Florida (the "Project"), and (b) any and all payment and performance bonds issued in conjunction with the Subcontract. However, the City does not hereby assume any of the Design/Builder's liabilities, duties or obligations under the Subcontract.

The foregoing Assignment constitutes a part of the security given to the City by the Design/Builder to secure the Design/Builder's performance of the Agreement. Notwithstanding anything in this instrument to the contrary, the City shall not exercise any rights under this instrument unless an event of default or other termination shall have occurred under the provisions of the Agreement. The City shall have the right, but not the duty, in the event of a default and/or termination pursuant to the terms of the Agreement, to exercise all of its rights, interests, benefits and privileges under the Subcontract.

Subcontractor hereby agrees with the City as follows:



That Subcontractor hereby consents to the foregoing assignment and agrees to notify the City in writing at the same time Subcontractor notifies the Design/Builder of the occurrence of any failure of payment under the provisions of the Subcontract or of the occurrence of any other default by the Design/Builder under the provisions of the Subcontract.

That if the City notifies the Subcontractor in writing that an event of default by the Design/Builder, or other termination, has occurred under the Agreement, the Subcontractor shall, at the City's request, waive the Design/Builder's default and continue performance on the City's behalf under the Subcontract in accordance with the terms thereof, provided that the Subcontractor shall be paid in accordance with the Subcontract for the following as and when they are due under the Subcontract:

- (a) all services, work, labor and materials rendered on the Design/Builder's behalf prior to the City's request;
- (b) all services, work, labor and materials rendered on the City's behalf following the City's request; and
- (c) the amount of retainage, if any, withheld by the City from payments to the Design/Builder made by the City prior to the City's request.

That in the event any of Subcontract proceeds are disbursed by the City directly to the Subcontractor, the Subcontractor will receive any such advances and will hold the same as a trust and for the purpose of paying the costs of the labor performed and equipment and supplies used in connection with the Project, and the Subcontractor will apply the same only to payment of such costs and for no other purpose.

That upon the City's request, the Subcontractor shall furnish to the City a current list of all persons or firms with whom the Subcontractor has entered into subcontracts or other agreements relating to the performance of work or furnishing of materials in connection with the Project which have a value of \$1,000 or more, together with a statement as to the status of each of such subcontracts or agreements and the respective amounts, if any, owed by the Subcontractor. The Design/Builder hereby consents to the furnishing to the City of such list and statement.

Subcontractor consents to the City assigning the City's rights hereunder to anyone whom the City may choose to complete the Design/Builder's obligations, including without limitation, the Design/Builder's surety.

That the City has no obligation to exercise its rights under this Assignment and furthermore has no obligation to pay Subcontractor unless the City exercises its rights as set forth herein.

That this Assignment does not create third party beneficiary rights under the Agreement

in favor of anyone, including Subcontractor.

IN WITNESS WHEREOF, this instrument shall be effective as of the date of the Subcontract.

CITY OF MARATHON  
a Florida municipal corporation

DESIGN/BUILDER

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

STATE OF FLORIDA     )  
  )  
COUNTY OF MONROE    )

This instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_ by \_\_\_\_\_, on behalf of CITY OF MARATHON, a Florida municipal corporation, who [ ] is personally know to me or [ ] produced \_\_\_\_\_ as identification.

Notary Public: \_\_\_\_\_  
  \_\_\_\_\_  
(name typed)

My Commission Expires: \_\_\_\_\_

STATE OF FLORIDA     )  
  )  
COUNTY OF MONROE    )

This instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_ by  
\_\_\_\_\_ who [ ] is personally know to me  
or [ ] produced \_\_\_\_\_ as identification.

Notary Public: \_\_\_\_\_  
  \_\_\_\_\_  
  (name typed)

My Commission Expires: \_\_\_\_\_

## EXHIBIT "I"

### INSURANCE REQUIREMENTS

Design/Builder shall provide or cause to be provided the following insurance and shall also ensure that the following insurance language shall be included in the Subconsultant Contracts and Subcontractor Contracts. Prior to commencement of Work certificates of insurance shall be provided evidencing Design/Builder's and its Subconsultant's and Subcontractor's compliance with these insurance requirements; provided, however, builder's risk insurance shall not be required unless and until the Construction Work commences. Without limiting any of the other obligations or liabilities of Design/Builder and the Subconsultants and Subcontractors, Design/Builder, Subconsultants, and Subcontractor shall provide, pay for, and maintain in force until all of the Work is completed and accepted by the City (or for such duration as otherwise specified hereinafter), the insurance coverages set forth herein.

1. Professional Liability Insurance with minimum limits of One Million Dollars (\$1,000,000) with respect to Design/Builder, and One Million Dollars (\$1,000,000) with per occurrence respect to Subconsultants, with a deductible of no more than \$25,000.00.
2. Workers' Compensation insurance to apply for all employees in compliance with the "Workers' Compensation Law" of the State of Florida and all applicable federal laws. In addition, the policy(ies) must include:
  - (a) Employers' Liability with a limit of One Hundred Thousand Dollars (\$100,000) each accident.
  - (b) If any operations are to be undertaken on or about navigable waters, coverage must be included for the U.S. Longshoremen & Harbor Workers Act and Jones Act.
3. Comprehensive General Liability with minimum limits of One Million Dollars (\$1,000,000) per occurrence combined single limit for Bodily Injury Liability and Property Damage Liability with respect to Design/Builder, and Two Million Dollars (\$2,000,000) with per occurrence respect to Subcontractors, combined single limit for Bodily Injury Liability and Property Damage Liability. Coverage must be afforded on a form no more restrictive than the latest edition of the Comprehensive General Liability policy, without restrictive endorsements, as filed by the Insurance Services Office, and must include:
  - (a) Premises and/or Operations;

- (b) Independent Contractors;
  - (c) Products and/or Completed Operations for contracts over Fifty Thousand Dollars (\$50,000.00) contractor shall maintain in force until at least three (3) years after completion of all work required under the Agreement, coverage for Products and Completed Operations, including Broad Form Property Damage;
  - (d) Explosion, Collapse and Underground Coverages;
  - (e) Broad Form Property Damage;
  - (f) Broad Form Contractual Coverage applicable to this specific Agreement, including any hold harmless and/or indemnification agreement;
  - (g) Personal Injury Coverage with Employee and Contractual Exclusions removed, with minimum limits of coverage equal to those required for Bodily Injury Liability and Property Damage Liability; and
  - (h) City and Design/Builder are to be expressly included as "Additional Insureds" with respect to liability arising out of operations performed for City and Design/Builder by or on behalf of Design/Builder and Subcontractors or acts or omissions of City or Design/Builder in connection with general supervision of such operation.
4. Umbrella Liability, general aggregate of Three Million Dollars (\$3,000,000).
5. Business Automobile Liability with minimum limits of One Million Dollars (\$1,000,000.00) per occurrence, combined single limit for Bodily Injury Liability and Property Damage Liability. Coverage must be afforded on a form no more restrictive than the latest edition of the Business Automobile Liability policy, without restrictive endorsements, as filed by the Insurance Services Office, and must include:
- (a) Owned Vehicles.
  - (b) Hired and Non-Owned Vehicles.
6. Builder's Risk Insurance for the construction of above ground buildings and/or structures is required. The coverage shall be "All Risk" form for One Hundred Percent of the completed value, including City and Design/Builder as named

insureds, with a deductible of not more than Ten Thousand Dollars (\$10,000) each claim.

- (a) Waiver of Occupancy Clause or Warranty-Policy must be specifically endorsed to eliminate any “occupancy clause” or similar warranty or representation that the building(s), addition(s) or structure(s) in the course of construction shall not be occupied without specific endorsement of the policy. The policy must be endorsed to provide that the Builder’s Risk Coverage will continue to apply until the Substantial Completion Date.
- (b) When the buildings or structures are located within an identified special flood hazard area, flood insurance must be afforded for the lesser of the total insurable value of such buildings or structures, or, the maximum amount of flood insurance coverage available under the National Flood Program.

All required insurance shall be evidenced by valid and enforceable policies issued by a company licensed to do business in the State of Florida and otherwise acceptable to the City. The Design/Builder shall not cancel (or permit any lapse under) any policy of required insurance. Each policy of required insurance shall: (i) contain the agreement of the insurer that the insurer shall not cancel or materially alter the same without thirty (30) days’ prior written notice to City except in the case of non-payment by the Design/Builder for which ten (10) days’ prior written notice will be provided to City; (ii) provide for third party vicarious liability; (iii) delete the insured versus insured exclusion with respect to claims brought by the City; and (iv) be effective for a period from the date of this Agreement through at least one (1) year after completion of the Work provided hereunder, except for professional liability insurance which shall be effective for a period from the date of this Agreement through at least five (5) years after completion of the Work provided hereunder and builder’s risk insurance which shall be effective through Substantial Completion. Insurance shall be provided to the City at the times required by Section 10.2 of this Agreement at which time the Design/Builder shall deliver to City a certificate of insurance naming City as an additional insured as required hereunder for each policy of required insurance except for professional liability insurance. The minimum coverages and time periods specified above are not intended, and shall not be construed, to limit any liability of the Design/Builder to City under this Agreement. Neither party shall be liable to the other for loss or damage covered by insurance to the extent that insurance proceeds are actually available with respect to such loss or damage and to the extent that the applicable policies of such insurance include the waiver or subrogation (which the parties shall obtain if available without additional premium). Design/Builder is responsible for the payment of all deductibles in connection with any claims made under the insurance policies required by this Agreement. The cost of deductibles paid by Design/Builder shall be included in the GMP.

**EXHIBIT "J-1"**  
**PERFORMANCE BOND**

**PERFORMANCE BOND**

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**TO: City of Marathon**

**DESIGN/BUILDER:**

**PROJECT: City of Marathon Community Park Phase II**

**DESIGN BUILD AGREEMENT DATE:**

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STATE OF FLORIDA        )  
  )  
COUNTY OF MONROE    )

KNOW ALL MEN BY THESE PRESENTS: That \_\_\_\_\_, of \_\_\_\_\_, of the County of \_\_\_\_\_, and State of Florida, as Principal, and \_\_\_\_\_, authorized, licensed and admitted to do business under the laws of the State of Florida to act as surety on bonds, as Surety, are held and firmly bound unto the City of Marathon, a Florida municipal corporation (the "City"), as obligee, in the penal sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) for the payment whereof, the said Principal and Surety bind themselves, and their heirs, administrators, executors, successors and assigns, jointly and severally, by these presents:

WHEREAS, the Principal has entered into that certain Design Build Agreement with the City, dated the \_\_\_\_\_ day of 2003, for the construction of the City of Marathon Community Park Phase II (the "Agreement"), which Agreement is by reference made a part hereof as fully and to the same extent as if copied at length herein.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION, IS SUCH THAT, if the said Principal shall faithfully perform the Agreement and shall in all respects duly and faithfully observe and perform all and singular the covenants, conditions, warranties and agreements in and by the Agreement agreed and covenanted by the Principal to be observed and performed, and according to the true intent and meaning of the Agreement, then this obligation shall be void; otherwise to remain in full force and effect,

Whenever Principal shall be, and declared by the City to be in default under the Agreement, the City having performed the City's obligations thereunder, the Surety may promptly remedy the default, or shall promptly:

- (1) Complete the Agreement in accordance with the terms and conditions; or
- (2) Obtain a bid or bids for completion of the Agreement in accordance with its terms and conditions, and upon determination by Surety of the lowest responsible bidder, or, if the City



elects, upon determination by the City and the Surety jointly of the lowest responsible bidder, arrange for a contract between such bidder and Surety for completion of the Agreement in accordance with the terms and conditions, and make available as work progresses (even though there should be a default or a succession of defaults under the contract or contracts of completion arranged under this contract or contracts of completion arranged under this Paragraph) sufficient funds to pay the cost of completion less the balance of the Agreement price; but not exceeding, including other costs and damages for which Surety may be liable hereunder, the amounts set forth in the first paragraph hereof. The term "balance of the Agreement price" as used in this Paragraph, shall mean the total amount payable by the City to Design/Builder under the Agreement and amendments thereto, less the amount paid by the City to Design/Builder and less amounts withheld by the City pursuant to its rights under the Agreement.

Surety, for value received, stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Agreement, or to the work performed thereunder, or the plans, specifications, or drawings accompanying the same, shall in any way affect its obligation on this bond, and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the Agreement, or to the work to be performed thereunder and further agrees to all of the terms contained in the Agreement.

**IN WITNESS WHEREOF, the said Principal and Surety have signed and sealed this instrument this \_\_\_\_\_ day of \_\_\_\_\_, 2004.**

PRINCIPAL

SURETY

DESIGN/BUILDER

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

**EXHIBIT "J-2"**

**PAYMENT BOND**

**LABOR AND MATERIAL PAYMENT BOND**

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**TO: City of Marathon**

**DESIGN/BUILDER:**

**PROJECT: City of Marathon Community Park Phase II**

**DESIGN BUILD AGREEMENT DATE:**

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STATE OF FLORIDA                    )  
  )  
COUNTY OF MONROE                )

KNOW ALL MEN BY THESE PRESENTS: That \_\_\_\_\_, of \_\_\_\_\_, of the County of \_\_\_\_\_, and State of Florida, as Principal, and \_\_\_\_\_, authorized, licensed and admitted to do business under the laws of the State of Florida to act as surety on bonds, as Surety, are held and firmly bound unto the City of Marathon, a Florida municipal corporation (the "City"), as obligee, in the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) for the payment of which we bind ourselves, our heirs, personal representatives, successors, and assigns, jointly and severally:

WHEREAS, the Principal has entered into that certain Design Build Agreement with the City, dated the \_\_\_\_\_ day of 2003, for the construction of the City of Marathon Community Park Phase II (the "Agreement"), which Agreement is by reference made a part hereof as fully and to the same extent as if copied at length herein.

NOW, THEREFORE, THE CONDITION OF THIS BOND IS THAT PRINCIPAL:

1. Promptly makes payments to all lienors supplying labor, material, and supplies used directly or indirectly by Principal in the prosecution of the work provided in the Agreement; and
2. Pays the City all loss, damage, expenses, costs, and attorney's fees, including appellate proceedings, that the City sustains because of default by Principal hereunder;

Then this bond is void; otherwise, it remains in full force.

Any changes, extensions of time, alterations or additions in or under the Agreement, contract documents, plans, specifications and/or drawings, or the work to be performed thereunder, and compliance or noncompliance with formalities connected with the Agreement or with the changes do not affect Surety's obligations under this Bond, and Surety does hereby waive notice of any such changes, extensions of time, alterations or additions in or under the

Agreement, contract documents, plans, specifications and/or drawings, or the work to be performed thereunder.

This Bond is filed in accordance with Section 713.23, Florida Statutes, and/or Section 255.05, Florida Statutes, whichever or both as may be applicable.

**IN WITNESS WHEREOF, the said Principal and Surety have signed and sealed this instrument this \_\_\_\_\_ day of \_\_\_\_\_, 2003.**

PRINCIPAL

SURETY

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

**EXHIBIT "K"**

**NOTICE TO PROCEED**

**NOTICE TO PROCEED**

Dated \_\_\_\_\_, 200\_\_

TO:

ADDRESS:

PROJECT: City of Marathon Community Park Phase II

CONTRACT: Design Build Agreement

You are hereby notified that the Contract Times with respect to the Work under the above Design Build Agreement will commence to run on \_\_\_\_\_, 20\_\_\_. By that date, you are to start performing your obligations under the Contract Documents. In accordance with the Agreement, the following are certain dates relative to the Work: Insert milestone submittal dates for Design services and Substantial Completion Date for Construction Work as appropriate.

Before you may start any Work at the site, Section 10.2 of the Agreement requires you and all Subcontractors and Subconstulants, as applicable, each deliver to the City, who shall be listed as an additional insured, certain Certificates of Insurance that each is required to secure and maintain in accordance with the Contract Documents.

Also before you may start any Work at the site, you must

(if necessary, add other requirements)

**CITY OF MARATHON,  
a Florida municipal corporation**

By: \_\_\_\_\_  
City's Project Representative