

**CITY OF MARATHON, FLORIDA
RESOLUTION 2004-071**

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA, AUTHORIZING CITY MANAGER TO ENTER INTO CONTRACT WITH TOPPINO'S, INC., IN THE AMOUNT OF \$344,281 FOR COMPLETION OF THE 39TH STREET DRAINAGE PROJECT AND THE SOMBRERO BEACH DRAINAGE PROJECT

WHEREAS, the City of Marathon (the "City") extended an invitation to bid for the 39th Street Drainage Project and the Sombrero Beach Drainage Project which closed on June 17, 2004; and

WHEREAS, a pre-bid meeting was held with five (5) contractors present; and

WHEREAS, two (2) bid packages were submitted; by B.A.T. Construction, Inc. with a base bid of \$380,743 and Toppino's, Inc. with a base bid of \$302,781; and

WHEREAS, there was an add/alternate option on both drainage projects adding \$41,500 to Toppino's bid; and

WHEREAS, Toppino's, Inc. is the lowest most responsible and responsive bidder.

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

Section 1. The City Manager is authorized to enter into an agreement between the City of Marathon and Toppino's, Inc. for the 39th Street Drainage Project and the Sombrero Beach Drainage Project as delineated in ITB 05/2004-#1 in the amount of \$344,281, 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. This resolution shall take effect immediately upon its adoption.

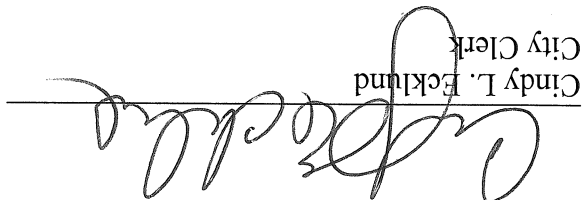
PASSED AND APPROVED by the City Council of the city of Marathon, Florida, this 13th day of July, 2004.

THE CITY OF MARATHON, FLORIDA

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

(City Seal)

Cindy L. Ecklund
City Clerk

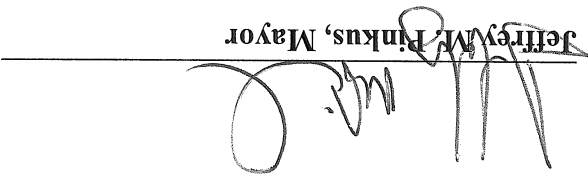


ATTEST:

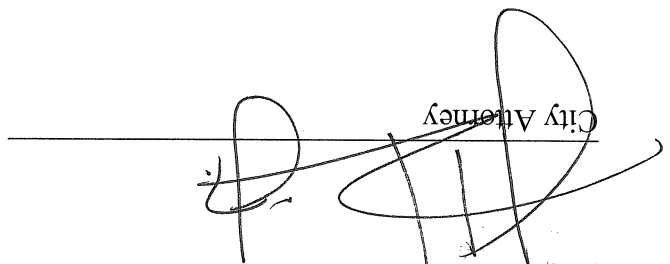
AYES: _____
NOES: _____
ABSENT: _____
ABSTAIN: _____
None

Bartus, Bull, Mearns, Miller, Pinkus

Jeffrey M. Pinkus, Mayor



City Attorney



CONTRACT

THIS CONTRACT is made this 13th day of July, 2004 by and between the City of Marathon, Florida (the "City") and Toppino's Inc. (the "Contractor").

The parties, for the consideration provided for below, mutually agree as follows:

1. **SCOPE OF WORK**- The Contractor shall furnish all labor, materials, supervision, equipment, supplies, and incidentals required to perform the Work included in Bid documents 05-2004-#1. (to include the add alternates for the 39th Street Drainage Project and the add alternates for the Sombrero Beach Drainage Project)
2. **COMPENSATION/PAYMENT**-
 - 2.1 The Contractor shall be compensated for final completion of the Work the total lump sum of Three hundred forty-four thousand, two hundred eighty-one dollars (\$344,281).
 - 2.2 The City shall make payment of approved amounts due, as required under the Florida Prompt Payment Act. No payments shall be due or payable for Work not performed or materials not furnished.
3. **TERM** -
 - 3.1 This Contract shall be effective upon execution by both parties and shall continue for 180 calendar days. The City may extend the Contract upon the sole discretion of the City Manager.
 - 3.2 The Contractor shall initiate work on the Project upon receipt of a written Notice to Proceed by the City Manager or his designee. The Contractor shall complete the Work within 120 days of the commencement date in the Notice to Proceed.
 - 3.3 In the event that the Contractor fails to complete the work within the time prescribed in Section 3.2 or any agreed upon extension, liquidated damages shall be paid at the rate of Two Hundred and 00/100 Dollars (\$200.00) per day.
 - 3.4 The Contractor shall not be entitled to seek any damages for delay, whether such damages are caused by the Contractor, the City, an act of God or for any other reason. The term may be extended by the City Manager in the event of an unforeseeable act of God.
 - 3.5 The Contractor shall request in writing for an extension of time to complete the Work, provided to the City Manager within seven (7) days of the events giving rise to the delay.
4. **CONTRACTOR'S DUTY TO INSPECT**- The Contractor has carefully examined the described areas for the Work contemplated in the Bid documents and has made sufficient tests and other investigations to fully satisfy itself as to site conditions, and assumes full responsibility therefore. The Contractor shall be responsible for the repair or replacement of any property damaged by the Contractor.
5. **NON-WAIVER**- The approval or acceptance of any part of the Work by the City shall not operate as a waiver by City of any other terms and conditions of the Contract.
6. **PROTECTION OF PROPERTY AND THE PUBLIC**- The Contractor shall continuously maintain adequate protection of all its Work from damage and shall protect public and private property from injury or loss arising in connection with this contract as follows:

6.1 The Contractor shall take all necessary precautions for the safety of employees in the performance of the Work on, about or adjacent to the premises where the Work is being performed, and shall comply with all applicable provisions of Federal, State, and local laws, including, but not limited to the requirements of the Occupational Safety and Health Act of 1970, and amendments thereto, the Construction safety Act of 1969, and amendments thereto, and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the Work is being performed.

6.2 The Contractor shall erect and properly maintain at all times, all necessary safeguards, including sufficient lights and danger signals on or near the Work, from sunset to sunrise, suitable railings, barricades, or other hazards or other protective devices about unfinished work, open trenches, embankments, or other hazards and obstructions to traffic; provide all necessary security staff on the Work by day or by night for the safety of the public; and take all necessary precautions to prevent accidents and injuries to persons or property on or near the Work.

6.3 The Contractor shall be completely responsible for, and shall replace and make good all loss, injury, or damage to any property (including landscaping, walks, drives, or structures of the City and of any land adjoining any work sites) which may be caused by Contractor. The Contractor shall, at all times while the Work is in progress, use extraordinary care to see that adjacent property, whether real or personal, is not endangered in any way by reason of fire, water, or construction operations, and shall take all necessary or directed steps, to protect the property. The same care shall be exercised by all Contractor's and subcontractor's employees.

6.4 Buildings, sidewalks, fences, shade trees, lawns and all other improvements shall be duly protected from damage by Contractor. Property obstructions, such as sewers, drains, water or gas lines, conduits, railroads, poles, walls, posts, galleries, bridges, manholes, valve boxes, meter boxes, street monuments, etc., shall be carefully protected from injury and shall not be displaced. The Contractor shall give due notice to any department or public service corporation controlling such items as manholes, valve boxes, meter boxes, street monuments, etc., prior to adjusting them to grade and shall be held strictly liable to the affected utility if any such appliances are disturbed, damaged or covered up during the course of the Work.

7. INDEMNIFICATION-

7.1 The Contractor shall indemnify and hold harmless the City, its officers, agents and employees from and against all liability, claims, damages, losses and expenses, including reasonable attorney's fees and costs at both trial and appellate levels arising out of or resulting from the performance of Work under this contract, caused by any act or omission of the Contractor or anyone directly or indirectly employed by Contractor or anyone for whose acts Contractor may be liable.

7.2 This indemnification obligation shall survive the termination of this Contract.

7.3 The Contractor shall defend the City or provide for such defense, at the City's option.

7.4 The Contractor shall be held responsible for any violation of laws, rules, regulations or ordinances affecting in any way the conduct of all persons engaged in or the materials or methods used by him, on the Work. Contractor shall give all notices and comply with all laws, ordinances, rules, regulations and orders of any public authority bearing on the performance of the Work under this contract. Contractor shall secure and pay for all permits, fees, licenses, and inspections necessary for the execution of the Work, and upon termination of this contract for any reason, Contractor shall transfer such permits, if any, and if allowed by law, to the City.

8. **CONTRACT DOCUMENTS**- The following documents shall, by this reference, be considered part of this Contract:

Instructions to Bidders;
All Addendums;
Contract;
Bid Form;
Scope of Work/Specifications;
Bidder's Qualifications;
General Conditions
Insurance Certificates; and
Bonds.

9. **CONTRACTOR'S EMPLOYEES-**

9.1 The Contractor shall at all times have a competent supervisor on site who thoroughly understands the Work, who shall, as the Contractor's agent, supervise, direct and otherwise conduct the Work. Contractor's employees shall serve the public in a courteous, helpful, and impartial manner.

9.2 Contractor's employees shall wear a clean uniform that provides identification of both the Contractor's company and the name of the employee.

9.3 Contractor shall, upon receipt of a written request from the City Manager, immediately exclude any employee of Contractor from providing Work under this Contract.

9.4 The Work contemplated in this Contract is on public property, accordingly no alcoholic beverages shall be allowed.

9.5 The same care shall be exercised by all Contractor's and subcontractor's employees.

10. **VEHICLES AND EQUIPMENT-** Contractor shall have on hand at all times and in good working order such vehicles, machinery, tools, accessories, and other items necessary to perform the Work under this Contract. All vehicles used by Contractor to provide services under this Contract shall be painted uniformly with the name of Contractor, business telephone number, and the number of the vehicle in letters legible by the public. The City Manager may require the repair or replacement of equipment as reasonably necessary. No other advertising shall be permitted on the vehicles.

10. **INSURANCE-** Contractor shall secure and maintain throughout the duration of this Contract, insurance of such type and in such amounts necessary to protect its interest and the interest of the City against hazards or risks of loss as specified below. The underwriter of such insurance shall be qualified to do business in Florida, be rated AB or better, and have agents upon whom service of process may be made in the State of Florida. The insurance coverage shall be primary insurance with respect to the City, its officials, employees, agents and volunteers, and naming the City as an additional insured. Any insurance maintained by the City shall be in excess of the Contractor's insurance and shall not contribute to the Contractor's insurance. The insurance coverages shall include a minimum of:

INSURANCE REQUIREMENTS

STATUTORY LIMIT

Worker's Compensation	WC3	\$1,000,000/\$1,000,000/\$1,000,000
General Liability	GL3	\$500,000 per Person; \$1,000,000 per Occurrence; \$100,000 Property Damage or \$1,000,000 Combined Single Limit
	GLXCU	
	*Required Endorsement	Underground, Explosion and Collapse (XCU)
Vehicle Liability	VL3	\$500,000 per Person;\$1,000,000 per Occurrence; \$100,000 Property Damage or \$1,000,000 Combined Single Limit

11.1 **Worker's Compensation and Employer's Liability Insurance:** Coverage to apply for all employees for statutory limits as required by applicable State and Federal laws. The policy(ies) must include Employer's Liability with minimum limits of \$500,000.00 each accident.

11.2 **Comprehensive Automobile and Vehicle Liability Insurance:** This insurance shall be written in comprehensive form and shall protect the Contractor and the City against claims for injuries to members of the public and/or damages to property of others arising from the Contractor's use of motor vehicles or any other equipment and shall cover operation with respect to onsite and offsite operations and insurance coverage shall extend to any motor vehicles or other equipment irrespective of whether the same is owned, non-owned, or hired. The limit of liability shall not be less than \$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 endorsement, as filed by the Insurance Services Office.

11.3 **Commercial General Liability.** This insurance shall be written in comprehensive form and shall protect the Contractor and the City against claims arising from injuries to members of the public or damage to property of others arising out of any act or omission to act of the Contractor or any of its agents, employees, or subcontractors. The limit of liability shall not be less than \$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 Commercial General Liability Policy, without restrictive endorsements, as filed by the Insurance Services Office, and must include: (1) Premises and/or Operations; (2) Independent contractors and Products and/or completed Operations; (3) Broad Form Property Damage, Personal Injury and a Contractual Liability Endorsement, including any hold harmless and/or indemnification agreement.

11.4 **Certificate of Insurance:** Contractor shall provide the City Manager with Certificates of Insurance for all required policies. The Certificates of Insurance shall not only name the types of policy(ies) provided, but also shall refer specifically to this Contract and shall state that such insurance is as required by this Contract. The City reserves the right to require the Contractor to provide a certified copy of such policies, upon written request by the City. If a policy is due to expire prior to the completion of the services, renewal Certificates of Insurance or policies shall be furnished thirty (30) calendar days prior to the date of their policy expiration. Each policy certificate shall be endorsed with a provision that not less than thirty (30) calendar days' written notice shall be provided to the City before any policy or coverage is cancelled or restricted. Acceptance of the Certificate(s) is subject to approval of the City Manager.

11.5 **Additional Insured** - The City is to be specifically included as an Additional Insured for the liability of the City resulting from operations performed by or on behalf of Contractor in performance of this Contract. Contractor's insurance, including that applicable to the City as an Additional Insured, shall apply on a primary basis and any other insurance maintained by the City shall be in excess of and shall not contribute to Contractor's insurance. Contractor's insurance shall contain a severability of interest provision providing that, except with respect to the total limits of liability, the insurance shall apply to each Insured or Additional Insured in the same manner as if separate policies had been issued to each.

11.6 All deductibles or self-insured retentions must be declared to and be approved by the City Manager. The Contractor shall be responsible for the payment of any deductible or self-insured retentions in the event of any claim.

12. **ASSIGNMENT AND AMENDMENT**- No assignment by the Contractor of this contract or any part of it, or any monies due or to become due, shall be made, nor shall the Contractor hire a subcontractor to perform its duties under this Contract without prior written approval of the City Manager. This Contract may only be amended by the parties with the same formalities as this Contract.

13. **TERMINATION**-

13.1 The City may terminate this Contract without cause upon 5 days written notice to the Contractor.

13.2 Upon notice of such termination, the City shall determine the amounts due to the Contractor for services performed up to the date of termination. The Contractor shall not be entitled to payment of any lost profits or for Work performed after the date of termination.

13.3 After receipt of a notice of termination, and except as otherwise directed, the Contractor shall stop all Work under this Contract, and shall do so on the date specified in the notice of termination.

13.4 The City may terminate this Contract upon five (5) days written notice if the Contractor defaults on any material term of this Contract.

14. **CHOICE OF LAW**- This Contract shall be governed by the laws of the State of Florida. Venue shall lie in Monroe County, Florida.

15. **ATTORNEY'S FEES**- In the event either party to this Contract is required to retain legal counsel to enforce any of its rights under this Contract, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs from the non-prevailing party together with court costs incurred in any litigation at any trial and appellate proceedings.

16. **ACCESS TO PUBLIC RECORDS**- Contractor shall comply with the applicable provisions of Chapter 119, Florida Statutes. The City shall have the right to immediately terminate this contract for the refusal by the Contractor to comply with Chapter 119, Florida Statutes. The Contractor shall retain all records associated with this Contract for a period of three (3) years from the date of Termination.

17. **INSPECTION AND AUDIT**- During the term of this Contract and for three (3) years from the date of Termination the Contractor shall allow City representatives access during reasonable business hours to Contractor's records related to this Contract for the purposes of inspection or audit of

such records. If upon audit of such records, the City determines the Contractor was paid for services not performed, upon receipt of written demand by the City, the Contractor shall remit such payments to the City.

18. **SEVERABILITY**- If a term, provision, covenant, contract or condition of this contract is held to be void, invalid, or unenforceable, the same shall not affect any other portion of this contract and the remainder shall be effective as though every term, provision, covenant, contract or condition had not been contained herein.
19. **WAIVER OF JURY TRIAL**. The parties irrevocably, knowingly agree to waive their rights to a trial by jury in any action to enforce the terms or conditions of this Contract.
20. **COUNTERPARTS**- This Contract may be signed in one or more counterparts, each of which when executed shall be deemed an original and together shall constitute one and the same instrument.
21. **NOTICES**- Whenever any party is required to give or deliver any notice to any other party, or desires to do so, such notices shall be sent via certified mail or hand delivery to:

For City:

City of Marathon
10045-55 Overseas Highway
Marathon, Florida 33050
Attention: Scott Janke, City Manager
Telephone: (305) 743-0033
Facsimile: (305) 743-3667

For Contractor:

Toppino's Inc

P.O. Box 787

Key West, Florida 33041

Attn: Frank Toppino

IN WITNESS WHEREOF the parties hereto have executed this Contract on the day and date first above written.

Attest:

CITY OF MARATHON

By: 
Cindy L. Ecklund, CMC, City Clerk

By: 
W. Scott Janke, City Manager


APPROVED AS TO FORM AND LEGALITY FOR THE USE

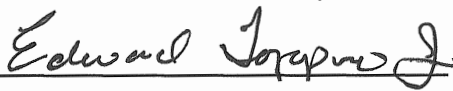
AND RELIANCE OF THE CITY OF MARATHON, FLORIDA ONLY:

By: 
City Attorney

Signed, sealed and witnessed in the presence of:

As to Contractor:

By: 

By: 

(*) In the event that the Contractor is a corporation, there shall be attached to each counterpart a certified copy of a resolution of the board of the corporation, authorizing the officer who signs the contract to do so in its behalf.

ACORD CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YY)
6/28/04

PRODUCER
SEITLIN
954-938-8788

6700 N ANDREWS AVENUE #300
FT LAUDERDALE, FL 33309

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURED
Toppino's, Inc.

P.O. Box 787
Key West FL 33041

COMPANIES AFFORDING COVERAGE

COMPANY A	Westchester Surplus Lines
COMPANY B	Twin City Fire Insurance
COMPANY C	Associated Industries
COMPANY D	National Casualty Co.

COVERAGES

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS
A	GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR OWNER'S & CONTRACTOR'S PROT	GLW774426	2/02/04	2/02/05	GENERAL AGGREGATE \$ 2000000 PRODUCTS - COMP/OP AGG \$ 2000000 PERSONAL & ADV INJURY \$ 1000000 EACH OCCURRENCE \$ 1000000 FIRE DAMAGE (Any one fire) \$ 50000 MED EXP (Any one person) \$ 5000
B	AUTOMOBILE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input checked="" type="checkbox"/> SCHEDULED AUTOS <input checked="" type="checkbox"/> HIRED AUTOS <input checked="" type="checkbox"/> NON-OWNED AUTOS	21UENTS2251	2/02/04	2/02/05	COMBINED SINGLE LIMIT \$ 1000000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE \$
	GARAGE LIABILITY <input type="checkbox"/> ANY AUTO				AUTO ONLY - EA ACCIDENT \$ OTHER THAN AUTO ONLY: \$ EACH ACCIDENT \$ AGGREGATE \$
A	EXCESS LIABILITY <input checked="" type="checkbox"/> UMBRELLA FORM OTHER THAN UMBRELLA FORM	CUW774426-0	2/02/04	2/02/05	EACH OCCURRENCE \$ 5000000 AGGREGATE \$ 5000000
C	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY THE PROPRIETOR/PARTNERS/EXECUTIVE OFFICERS ARE: <input type="checkbox"/> INCL <input type="checkbox"/> EXCL	9681435	4/16/04	4/16/05	<input checked="" type="checkbox"/> WC STATUTORY LIMITS <input type="checkbox"/> OTHER EL EACH ACCIDENT \$ 1000000 EL DISEASE - POLICY LIMIT \$ 1000000 EL DISEASE - EA EMPLOYEE \$ 1000000
D	OTHER BUSINESS AUTO SCHEDULED AUTOS	CA00180932	2/02/04	2/02/05	1000000 LIABILITY ONLY

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/SPECIAL ITEMS
RE: PROJECT: 39TH STREET ROADWAY IMPROVEMENTS. PROJECT #0327
CERTIFICATE HOLDER IS NAMED AS ADDITIONAL INSURED.

CERTIFICATE HOLDER

CITY OF MARATHON
10045-55 OVERSEAS HWY
MARATHON, FL 33050

CANCELLATION
SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES.
AUTHORIZED REPRESENTATIVE
M. St. John