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**CITY OF MARATHON, FLORIDA  
RESOLUTION 2005-111**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA AUTHORIZING THE CITY MANAGER TO ENTER INTO A PROFESSIONAL SERVICES AGREEMENT WITH JAMES NICHOLAS FOR AN IMPACT FEE STUDY IN AN AMOUNT NOT TO EXCEED \$40,000**

**WHEREAS**, the City of Marathon (the "City") wishes to create an impact fee program (the "Program"); and

**WHEREAS**, the City, wishes to enter into a professional services agreement with James C. Nicholas (the "Consultant") for the creation of the Program; and

**WHEREAS**, the services to be rendered by Consultant are professional consulting services and, therefore, exempt from the competitive bidding requirements in the City's Policies and Procedures for City Employees and Officials Regarding Purchasing.

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

**Section 1.** The above recitals are true and correct and are incorporated herein by this reference.

**Section 2.** The professional services agreement between the City and James Nicholas for an impact fee study in an amount not to exceed \$40,000, 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 3.** This resolution shall take effect immediately upon its adoption.

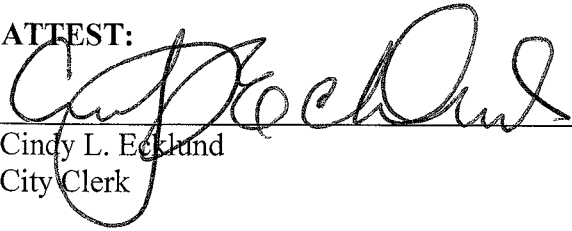
**PASSED AND APPROVED** by the City Council of the City of Marathon, Florida, this 13th day of September 2005.

**THE CITY OF MARATHON, FLORIDA**

  
\_\_\_\_\_  
**John Bartus, Mayor**

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

ATTEST:



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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:**



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City Attorney

**PROFESSIONAL SERVICES AGREEMENT BETWEEN  
THE CITY OF MARATHON  
AND  
JAMES C. NICHOLAS**

**THIS AGREEMENT** is made between **JAMES C. NICHOLAS**, (hereinafter the "Consultant"), and the **CITY OF MARATHON, FLORIDA**, a Florida municipal corporation, (hereinafter the "City").

**WHEREAS**, the Consultant and City, through mutual negotiation, have agreed upon a scope of services, schedule, and fee for an impact fee study (the "Project"); and

**WHEREAS**, the City desires to engage the Consultant to perform the services specified below (the "Services").

**NOW, THEREFORE**, in consideration of the mutual covenants and conditions contained herein, the Consultant and the City agree as follows.

1. **Scope of Services/Deliverables.**

1.1 The Consultant shall furnish an affordable housing study and mitigation program to the City as set forth in the Scope of Services for the Project as specified in Exhibit "A," attached to this Agreement.

1.2 The "Scope of Services" includes a Project Schedule for the Project which includes a breakdown of tasks and a timeline.

1.1. Consultant agrees that City may terminate the Agreement upon the completion of any task listed in the Scope of Services by giving written notice to Consultant. City and Consultant may agree to add additional tasks to the Scope of Services through the issuance of a written work order issued at the discretion of City staff, provided that the amount of any additional work is less than \$25,000 and the additional work has been property budgeted.

2. **Term/Commencement Date.**

2.1. This Agreement shall become effective upon execution by both parties and shall remain and continue in effect until its completion, unless earlier terminated in accordance with Paragraph 7 of this Agreement (the "Term").

2.2. Consultant agrees that time is of the essence in the performance of this Agreement and Consultant shall complete the Project within the timeframes mutually agreed to by Consultant and the City Manager as set forth in the Scope of Services. The Scope of Services may only be modified through written mutual agreement.

3. **Compensation and Payment.**

3.1. City shall pay Consultant for the tasks set forth in Exhibit A, "Scope of Services," a total fee of \$40,000 (the "Contract Price"). The compensation schedule is set down,

by task, in Exhibit B, Compensation Schedule, which is attached hereto and incorporated herein by reference. Except as provided for in Section 3.3, the Contract Price shall constitute full payment and includes all sub-consultant fees, labor, overhead, reproduction costs, review fees, travel, mileage, telephone expenses, other costs, and profit.

3.2. The Consultant shall invoice the City for actual hours worked and costs expended, on a monthly basis. The invoice shall include a summary description of services provided by Consultant for the task(s) being billed together with proof that payment has been made to any subconsultant(s). Payment for a particular task may be less than the amount for the task established in the Compensation Schedule, but in no event shall the total compensation schedule and reimbursement paid for services exceed the amounts designated for each particular task on the Compensation Schedule. By mutual agreement, City and Consultant may reallocate the budget among tasks as long as the total project budget of \$40,000 remains unchanged.

3.3. At the request of the City Manager, the City may request additional Services in excess of those contained in the Scope of Services, the City shall compensate the Consultant at a rate of \$ 150 per hour plus reasonable expenses for James C. Nicholas. The consultant shall invoice the City on a monthly basis for any Additional Services. The invoice shall include a summary description of services provided by the Consultant for the month being billed.

3.4. The City shall pay Consultant in accordance with the Florida Prompt Payment Act. The City may request additional information, including but not limited to, all invoices, time records, expense records, accounting records, and payment records of the Consultant. If a dispute should occur regarding an invoice submitted, the City, at its sole discretion may pay to the Consultant the undisputed portion of the invoice. The parties shall endeavor to resolve the dispute in a mutually agreeable fashion.

3.5. Except as provided for in Paragraph 3.3, Consultant shall not be entitled to an increase in the Contract Price or payment or compensation of any kind from the City for direct, indirect, consequential, impact of other costs, expenses or damages arising because of delay, disruption, interference or hindrance from any cause whatsoever, whether such delay, disruption, interference be reasonable or unreasonable, foreseeable or unforeseeable, or avoidable or unavoidable.

#### 4. Contractor's Employees.

4.1. During the installation phase the Consultant shall at all times have a competent supervisor on site who thoroughly understands the Services, who shall, as the Consultant's agent, supervise, direct and otherwise conduct the Services. Consultant's employees shall serve the public in a courteous, helpful, and impartial manner.

4.2. Consultant shall, upon receipt of a written request from the City Manager, immediately exclude any employee of Consultant from providing Services under this Agreement.

4.3. The Services contemplated in this Agreement is on public property, accordingly no alcoholic beverages shall be allowed.

4.4. The same care shall be exercised by all Consultant's and subcontractor's employees.

4.5. The Consultant shall be responsible for all payments to any sub-consultants and shall maintain responsibility for all work related to the provision of Services.

4.6. Any sub-consultants used must have the prior written approval of the City Manager. The City Manager approves Clarion's use of sub-consultants Dr. James C. Nicholas and RRC.

5. **City's Responsibilities.**

5.1. Assist Consultant by placing at its disposal all available information as may be requested in writing by the Consultant and allow reasonable access to all pertinent information, hardware and software relating to the Services to be performed by Consultant.

5.2. Arrange for access to and make all provisions for Consultant to enter upon real property as required for Consultant to perform services as may be requested in writing by the Consultant.

5.3. Complete those responsibilities of City identified in Exhibit "A," Scope of Work and Specifications.

6. **Consultant's Responsibilities.**

6.1. The Consultant shall exercise the same degree of care, skill and diligence in the performance of the Services as is ordinarily provided by a professional under similar circumstances. If at any time during the term of this Agreement it is determined that the Consultant's work is incorrect, defective or fails to conform to the Scope of Services, upon written notification from the City, the Consultant shall immediately proceed to correct the work, re-perform services which failed to satisfy the foregoing standard of care, and shall pay all costs and expenses associated with correcting said incorrect or defective work, including any additional testing, inspections, and reimbursements to the City for any other services and expenses made necessary thereby, save and except any costs and expenses which the City would have otherwise paid absent the Consultant's error or omission. The City's rights and remedies under this section are in addition to, and are cumulative of, any and all other rights and remedies provided by this Agreement, by law, equity or otherwise.

6.2. The Consultant's obligations under Paragraph 6.1 of this Agreement shall survive termination of this Agreement.

7. **Termination.**

7.1. The City Manager without cause may terminate this Agreement upon thirty (30) days written notice to the Consultant, or immediately with cause.

7.2. Upon receipt of the City's written notice of termination, Consultant shall stop all work unless directed otherwise in writing by the City Manager.

7.3. In the event of termination by the City, the Consultant shall be paid for all work accepted by the City Manager up to the date of termination, provided that the Consultant has first complied with the provisions of Paragraph 7.4.

7.4. The Consultant shall transfer all plans, drawings, books, records, reports, working drafts, documents, hardware, software, and data pertaining to the provision of the Services to the City, in a hard copy and electronic format within 14 days from the date of the written notice of termination or the date of expiration of this Agreement.

7.5. Consultant may terminate this Agreement by giving the City written notice at least 30 calendar days prior to the effective date of termination, for City's failure to perform its responsibilities under Exhibit A..

7.6. In the event of termination or expiration of this Agreement, Consultant and the City shall cooperate in good faith in order to effectuate a smooth and harmonious transition from Consultant to the City, or to any other person or entity the City may designate, and to maintain during such period of transition the same services provided to the City pursuant to the terms of the Agreement.

7.7. Subsequent to the complete or partial termination of this Agreement, Consultant shall continue to provide all necessary services to assist the City Auditors with the preparation of the annual audit for the fiscal year in which this Agreement is terminated. Consultant shall be compensated for any such post-termination services on an hourly basis not to exceed \$97.50 per hour.

8. **Insurance.** Consultant shall secure and maintain throughout the duration of this Agreement, insurance of such type and in such amounts as set forth herein. The underwriter of such insurance shall be qualified to do business in the State of Florida and have agents upon whom service of process may be made in the State of Florida. If requested by the City Manager, the insurance coverage shall be primary insurance with respect to the City, its officials, employees, agents and volunteers. The insurance coverages shall include a minimum of:

8.1. Worker's Compensation and Employer's Liability Insurance: Coverage to apply for all employees at minimum statutory limits as required by Florida Law. Consultant with Worker's Compensation exemption shall not hold the City liable for employee injury or claims.

8.2. Comprehensive Automobile and Vehicle Liability Insurance: Motor vehicle liability insurance, including applicable no-fault coverage, with limits of liability of not less than \$500,000 per occurrence, combined single limit for Bodily Injury Liability and

Property Damage Liability. Coverage shall include all owned vehicles, all non-owned vehicles, and all hired vehicles.

8.3. Commercial General Liability: Commercial general liability coverage with limits of liability of not less than \$500,000 per occurrence, combined single limit for Bodily Injury Liability and Property Damage Liability.

8.4. Professional Liability: ~~The Consultant shall furnish professional liability errors and omissions insurance coverage in an amount not less than \$1,000,000.00 with a deductible of no more than \$1,000,000.00 per claim. The Consultant shall be responsible for maintaining this professional liability insurance for a minimum of five (5) years from the date of execution of this Agreement. Upon request of the City, the Consultant shall make available for inspection copies of any claims filed or made against the policy during the policy term. The Consultant shall additionally notify the City, in writing, within thirty (30) calendar days of any claims filed or made against this policy in excess of \$1,000,000.00 during the policy term.~~ *JCM*

8.5. Certificates of Insurance shall be provided to the City at the time of execution of this Agreement and certified copies provided if requested. Certificates of Insurance shall include the City as additional insured or certificate holder. 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.

9. **Nondiscrimination.**

9.1. During the term of this Agreement, Consultant shall not discriminate against any of its employees or applicants for employment because of their race, color, religion, sex, or national origin, and will abide by all Federal and State laws regarding nondiscrimination

10. **Attorneys Fees and Waiver of Jury Trial.**

10.1. 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 paralegals, law clerks and legal assistants, and including fees and expenses charged for representation at both the trial and appellate levels.

10.2. In the event of any litigation arising out of this Agreement, each party hereby knowingly, irrevocably, voluntarily and intentionally waives its right to trial by jury.

11. **Indemnification.**

11.1. Consultant shall indemnify and hold harmless the City and its officers and employees, from liabilities, damages, losses, and costs, including, but not limited to, reasonable attorneys' fees, to the extent such liabilities, damages, losses, and costs are caused by the negligence, recklessness, or intentionally wrongful conduct of the Consultant or any persons employed or utilized by the Consultant in the performance of this Agreement. This provision shall be subject to the limitations set forth in Section 725.08, Florida Statutes, to the extent applicable to the performance of this Agreement.

11.2. The provisions of this section shall survive termination of this Agreement.

12. **Notices/Authorized Representatives.**

12.1. Any notices required by this Agreement shall be in writing and shall be deemed to have been properly given if transmitted by hand-delivery, by registered or certified mail with postage prepaid return receipt requested, or by a private postal service, addressed to the parties (or their successors) at the following addresses:

For the City:           City Manager  
                              City of Marathon, Florida  
                              10045-55 Overseas Highway  
                              Marathon, Florida 33050

With a copy to:       John R. Herin, Esq.  
                              City Attorney  
                              Stearns Weaver Miller Weissler  
                              Alhadeff & Sitterson, P.A.  
                              150 W. Flagler Street, Suite 2300  
                              Miami, FL 33131  
                              Telephone: (305) 789-3427  
                              Facsimile: (305) 789-3395

For the Consultant: James C. Nicholas  
                              313 Holland Hall  
                              University of Florida  
                              Gainesville, FL 32611  
                              Telephone: (352)392-8832  
                              Facsimile: (352)392-3005

13. **Governing Law.**

13.1. This Agreement shall be construed in accordance with and governed by the laws of the State of Florida. Exclusive venue for any litigation arising out of this Agreement shall be in Monroe County, Florida, Middle Keys Division of the Circuit Court or the Southern District of Florida.



14. **Entire Agreement/Modification/Amendment.**

14.1. This writing contains the entire Agreement of the parties and supercedes any prior oral or written representations. No representations were made or relied upon by either party, other than those that are expressly set forth herein.

14.2. No agent, employee, or other representative of either party is empowered to modify or amend the terms of this Agreement, unless executed with the same formality as this document.

15. **Ownership and Access to Records and Audits.**

15.1. All plans, drawings, records, books, documents, data, deliverables, papers and financial information (the "Records") that result from the Consultant providing the Services to the City under this Agreement shall be the property of the City.

15.2. The City Manager or his designee shall, during the term of this Agreement and for a period of three (3) years from the date of termination of this Agreement, have access to and the right to examine and audit any Records of the Consultant involving transactions related to this Agreement.

15.3. The City may cancel this Agreement for refusal by the Consultant to allow access by the City Manager or his designee to any Records pertaining to work performed under this Agreement that are subject to the provisions of Chapter 119, Florida Statutes.

15.4. All hardware purchased for the City by Consultant under the terms of this Agreement shall be the sole property of the City. In the event of termination or upon the expiration of this Agreement, the City shall continue to retain sole ownership of all hardware.

15.5. All software purchased for the City by Consultant under the terms of this Agreement shall be the sole property of the City. All software shall be registered and licensed to the City. Consultant shall be responsible for providing the City with proper registration and licenses for all software purchased under the terms of this Agreement.

15.6. All finished or unfinished documents, including but not limited to, detailed reports, studies, digital files and other data prepared for the City by or through Consultant under the terms of this Agreement shall be the sole property of the City, and shall be delivered to the City within fourteen (14) calendar days after receipt of written notice requesting delivery of said documents or digital files. The Consultant shall have the right to keep one records set of the documents upon completion of the services. However, in no event shall the Consultant, without the City's prior written authorization, use, or permit to be used, any of the documents or digital files prepared for the City.

16. **Nonassignability.**

16.1. The City is relying upon the apparent qualifications and expertise of the Consultant, and such firm's familiarity with the City's area, circumstances and desires. This

Agreement shall not be assignable by Consultant unless such assignment is first approved by the City Manager.

17. **Severability.**

17.1. If any term or provision of this Agreement shall to any extent be held invalid or unenforceable, the remainder of this Agreement shall not be affected thereby, and each remaining term and provision of this Agreement shall be valid and be enforceable to the fullest extent permitted by law.

18. **Independent Contractor.**

18.1. The Consultant and its employees, volunteers and agents shall be and remain independent consultants and not agents or employees of the City with respect to all of the acts and services performed by and under the terms of this Agreement. This Agreement shall not in any way be construed to create a partnership, association or any other kind of joint undertaking, enterprise or venture between the parties.

19. **Compliance with Laws.**

19.1. The Consultant shall comply with all applicable laws, ordinances, rules, regulations, and lawful orders of public authorities relating to the provision of the Services.

20. **Waiver.**

20.1. The failure of either party to this Agreement to object to or to take affirmative action with respect to any conduct of the other which is in violation of the terms of this Agreement shall not be construed as a waiver of the violation or breach, or of any future violation, breach or wrongful conduct.

21. **Survival of Provisions.**

21.1. Any terms or conditions of either this Agreement that require acts beyond the date of the term of the Agreement, shall survive termination of the Agreement, shall remain in full force and effect unless and until the terms or conditions are completed and shall be fully enforceable by either party.

22. **Prohibition Of Contingency Fees.**

22.1. The Consultant warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for the Consultant, to solicit or secure this Agreement, and that it has not paid or agreed to pay any person(s), company, corporation, individual or firm, other than a bona fide employee working solely for the Consultant, any fee, commission, percentage, gift, or any other consideration, contingent upon or resulting from the award or making of this Agreement.

23. Counterparts.

23.1. This Agreement may be executed in several counterparts, each of which shall be deemed an original and such counterparts shall constitute one and the same instrument.

**IN WITNESS WHEREOF**, the parties execute this Agreement on the respective dates under each signature: The City, signing by and through its City Manager, attested to by its City Clerk, duly authorized to execute same and by Consultant by and through its President, whose representative has been duly authorized to execute same.

Attest:

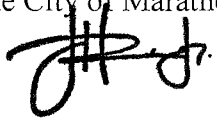
  
Cindy L. Ecklund, City Clerk

CITY OF MARATHON

By: Michael H. Puto  
Michael H. Puto,  
City Manager

Date: 9-19-05

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

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

CONSULTANT

By: James C. Nicholas  
James C. Nicholas

Date: Sept 8 2005

**EXHIBIT "A"**

**SCOPE OF WORK AND SPECIFICATIONS**

**SCOPE OF SERVICES**

Because there are legal, policy, and potentially data and feasibility issues involved in the development and implementation of an impact fee program for development (both new development and remodels or expansions), the project involves three primary tasks: data collection and review along with preparation of a Support Study (Task 1); and preparation of Implementing Legislation (Task 2).

**TASK 1: PROJECT INITIATION AND SCOPING**

**A. Initial Review of Key Documents; Development of Impact Fees along with Preparation of Supporting Documentation**

After reviewing all relevant local housing data, real estate data, codes, ordinances, plans, and other documents, Consultant will meet with City planning staff and other City staff and officials, as appropriate, to discuss overall project goals, discuss data deficiencies. (If Consultant identifies any data deficiencies that need to be remedied prior to completion of Task 2, they shall be remedied by City staff prior to initiation of Task 2.)

The interviews will be conducted with key staff, elected and appointed officials (if appropriate), and members of the development community (if appropriate). These discussions will give Consultant a better understanding of project goals, existing data, and the existing regulations.

<b><u>TASK 1: RESPONSIBILITIES AND WORK PRODUCT</u></b>	
<b>Consultant:</b>	<ul style="list-style-type: none"><li>• Preliminary data, plan, code, ordinance, and other documents</li><li>• Meetings with key City staff</li><li>• Draft impact fees along with supporting documentation</li></ul>
<b>City Staff:</b>	<ul style="list-style-type: none"><li>• Send copies of current data, plans, regulations, and other relevant documents to Consultant</li></ul>
<b>Schedule:</b>	Completed by six (6) weeks after execution of Contract

**TASK 2: DEVELOPMENT OF SUGGESTED COMPREHENSIVE PLAN CHANGES NEEDED FOR IMPACT FEE IMPLEMENTATION**

In Task 2, the Consultant will finalize the impact fee schedule and supporting documentation. If, after consideration of the impact fee analysis the City Council directs City staff and the Consultant to move forward with implementation, Consultant will prepare Implementing Legislation that will be based on the analysis. It will be drafted so it can be incorporated into the City's development regulations.

After completion of a draft of the Implementing Legislation by Consultant, it will be circulated to City staff for review and comment. Subsequently, Consultant will conduct a conference call with City staff to receive comments and reach consensus about revisions to the draft Implementing Legislation, and then make the agreed upon changes. It shall then be forwarded to City staff for public review.

<b><u>TASK 2: RESPONSIBILITIES AND WORK PRODUCT</u></b>	
<b>Consultant</b>	<ul style="list-style-type: none"> <li>• Preparation of final impact fees and supporting documentation</li> <li>• Preparation of implementing legislation</li> </ul>
<b>City Staff</b>	<ul style="list-style-type: none"> <li>• Review and comment on draft impact fees and documentation</li> <li>• Provide Employer Address File (detailed employer database for analysis purposes)</li> <li>• If determined appropriate, provide Cover Letter for mail-out survey</li> </ul>
<b>Trips</b>	Two trips to Marathon to present impact fee legislation to the City of Marathon Planning Commission and to the City Council.
<b>Schedule</b>	Completed by twelve (12) weeks after execution of Contract

**EXHIBIT B: COMPENSATION SCHEDULE**

In consideration of the services to be performed by the Subcontractor under this Subcontract, Clarion agrees to pay the Subcontractor an amount not to exceed \$40,000. See table below for compensation by task.

<b><u>TASK</u></b>	<b><u>COMPENSATION</u></b>
<b>Task 1: Project Initiation and Scoping</b>	<b>\$10,000</b>
<b>Task 2: Survey</b>	<b>\$ 15,000</b>
<b>Completion of all tasks</b>	<b>\$ 15,000</b>
<b>TOTAL COMPENSATION</b>	<b>\$40,000</b>