

**CITY OF MARATHON, FLORIDA
RESOLUTION 2006-052**

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA, AUTHORIZING THE CITY TO ENTER INTO A CONTINUING SERVICES CONSTRUCTION MANAGEMENT AGREEMENT WITH B. W. SPRAGUE, INC.; AUTHORIZING THE CITY MANAGER AND CITY ATTORNEY TO FINALIZE THE TERMS AND CONDITIONS OF THE AGREEMENT; AUTHORIZING THE MANAGER TO EXECUTE THE AGREEMENT

WHEREAS, on January 27, 2006, the City of Marathon (the “City”) issued a request for proposals (the “RFP”) for a continuing services construction manager to serve on a citywide basis; and

WHEREAS, after submittals were received, the City Council authorized staff to negotiate a contract with B. W. Sprague, Inc. (the “Manager”) on March 9, 2006; and

WHEREAS, City staff has met with the Manager to finalize the terms of a mutually acceptable continuing services construction management agreement.

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

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

Section 2. The Continuing Services Construction Management Agreement between the City of Marathon and B. W. Sprague, Inc., 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 hereby approved.

Section 3. The City Manager is authorized to sign the agreement.

Section 4. This resolution shall take effect immediately upon its adoption.

PASSED AND APPROVED by the City Council of the city of Marathon, Florida, this 9th day of May, 2006.


THE CITY OF MARATHON, FLORIDA



Christopher M. Bull, Mayor

AYES: Mearns, Pinkus, Tempest, Worthington, Bull
NOES: None
ABSENT: None
ABSTAIN: None

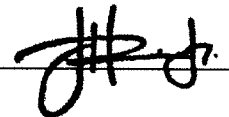
ATTEST:



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

CONTINUING SERVICES

CONSTRUCTION MANAGEMENT AGREEMENT

between

CITY OF MARATHON, FLORIDA

and

B.W. SPRAGUE, INC.

May 9, 2006

CONTINUING SERVICES
CONSTRUCTION MANAGEMENT AGREEMENT

THIS CONTINUING SERVICES CONSTRUCTION MANAGEMENT AGREEMENT (this "Agreement"), dated as of May 9, 2006, but effective as of April 1, 2006 (the "Effective Date"), between the City of Marathon, Florida, a Florida municipal corporation (the "City") and B.W. Sprague, Inc., a Florida corporation authorized to do business in the State of Florida (the "Construction Manager").

R E C I T A L S:

WHEREAS, the City requested proposals from qualified construction professionals and selected the Construction Manager to provide construction management services; and

WHEREAS, the Construction Manager is willing and able to perform such services for the City within the basic terms and conditions set forth in this agreement (hereinafter referred to as "Continuing Services Agreement" or "Agreement"); and

WHEREAS, the purpose of this Continuing Services Agreement is not to authorize the Construction Manager to perform a Specific Project, but to set forth certain terms and conditions which shall be incorporated into subsequent supplemental agreements for Specific Projects or services when required.

A G R E E M E N T:

NOW, THEREFORE, for valuable consideration, the Construction Manager and the City hereby agree as follows:

1 APPOINTMENT OF CONSTRUCTION MANAGER

1.1 The City hereby engages the Construction Manager to provide construction management services to the City for Specific Projects as authorized from time to time by the City Council or the City Manager as authorized by Section 1.4 and the City's purchasing manual.

1.2 When the need for services for a Specific Project occurs, the City Manager may enter into negotiations with the Construction Manager for that Specific Project under the terms and conditions of this Agreement. The City shall initiate said negotiations by providing the Construction Manager with a "Scope of Services Request," requesting from the Construction Manager a proposal to provide professional services for the Specific Project. The Construction Manager shall prepare a proposal which includes those subjects specified in subsection 1.3 (a) through (f). The City Manager and Construction Manager shall negotiate the terms of the Specific Project in accordance with the provisions of Section 1.3.

1.3 The City and the Construction Manager shall utilize as the agreement for each Specific Project a Standard Project Agreement ("Project Agreement"), a copy of which is attached and incorporated into this Agreement as Exhibit "A". Each Project Agreement for a Specific Project will, by mutual agreement, set forth, among other things, the following:

- a. The Scope of Services;
- b. The Deliverables;
- c. The Time and Schedule of Performance and Term;
- d. The Compensation for the Basic Services;
- e. The Personnel assigned to the Specific Project; and
- f. Any modifications to this Agreement, if mutually agreed upon by the parties.

The professional services to be rendered by the Construction Manager shall commence subsequent to the execution of each Project Agreement.

1.4 The Contract Documents for each Specific Project shall incorporate this Continuing Services Agreement. In the event that any of the terms or conditions of this Agreement conflict with the Project Agreement, the provisions of the Project Agreement shall apply.

1.5 The Construction Manager shall provide a project team to perform its duties hereunder (as existing from time to time, the "Project Team"), the members of which shall be employees of the Construction Manager. The Construction Manager shall designate from time to time an individual to act as representative of Construction Manager. Bill Sprague is hereby designated as such representative until Construction Manager otherwise notifies the City. Construction Manager may, from time to time upon notice to the City, make changes in and deletions and additions to the Project Team; provided, however, the City shall have the right to approve any new or replacement member of the Project Team. The City shall have the right from time to time to reasonably request that a member or members of the Project Team be removed and replaced by a person or persons acceptable to the City in its reasonable discretion.

1.6 The City shall designate from time to time an individual to act as representative of the City. Susie Thomas is hereby designated as such representative until the City, in its sole discretion, otherwise notifies Construction Manager.

1.7 The Construction Manager and the City acknowledge that a variety of third-party contractors and consultants will be involved with each Specific Project. All of such contractors and consultants (including general contractors, architects, structural engineers, mechanical, electrical and plumbing engineers, civil engineers, theatre consultants, acoustical consultants, specialty consultants and traffic consultants) will execute contracts directly with the City (or the architect and/or engineer (A/E) or general contractors, as the case may be). To minimize the City's and Construction Manager's exposure to liability, all agreements with third party contractors (including subcontractors) and consultants shall, to the extent feasible, contain an indemnification in favor of the City and the Construction Manager acceptable to both of them and, to the extent feasible, such contractors and consultants shall be required to maintain errors and omissions insurance acceptable to the City and the Construction Manager. Furthermore, if the City is named as an insured on any such party's liability insurance policy, the Construction

Manager shall also be named. Construction Manager shall advise the City on the selection of contractors and consultants and shall, at the request and on behalf of the City, negotiate contracts for their engagement by the City. Additionally, Construction Manager shall review and make recommendations with respect to the terms and conditions that are contained, or recommended to be included, within such draft contracts.

2 TERM AND TERMINATION

2.1 This Continuing Services Agreement, when fully executed by all parties, shall be effective as of April 1, 2006 and shall continue in full force and effect, unless and until terminated pursuant to Section 2.2 or other applicable sections of this Agreement. Each Project Agreement shall specify the period of service agreed to by the City and the Construction Manager for services to be rendered under said Project Agreement.

2.2 This Continuing Services Agreement may be terminated by the City for convenience upon thirty (30) calendar days written notice to the Construction Manager.

2.3 Nothing in this section shall be construed to create a right by either party to terminate any ongoing Project Agreement(s). Termination of a Project Agreement shall be exclusively through the termination provisions of the specific Project Agreement and as set forth in Section 8 hereof.

2.4 Notwithstanding the provisions of Subsection 2.1, the City Manager may issue requests for proposals for this professional discipline at any time and may utilize the services of any other consultants retained by the City under similar continuing services agreements. Nothing in this Agreement shall be construed to give the Construction Manager a right to perform services for a specific project.

3 SCOPE OF CONSTRUCTION MANAGER'S BASIC SERVICES

3.1 Definition. In connection with each Specific Project, the Construction Manager's Basic Services consist of those described in Sections 3.2 and 3.3 and any other services identified in this Agreement or the Project Agreement as part of Basic Services.

3.2 Pre-Construction Phase

3.2.1 The Construction Manager shall review the program furnished by the City to ascertain the requirements of the Specific Project and shall arrive at a mutual understanding of such requirements with the City.

3.2.2 The Construction Manager shall provide a preliminary evaluation of the City's program, schedule and construction budget requirements, each in terms of the other.

3.2.3 Based on early schematic designs and other design criteria prepared by the A/E, the Construction Manager shall assist in preparing preliminary estimates of Construction Cost for program requirements using area, volume or similar conceptual estimating techniques. The Construction Manager shall provide cost evaluations of alternative materials and systems.

3.2.4 The Construction Manager shall expeditiously review design documents during their development and advise on proposed site use and improvements, selection of

materials, building systems and equipment, and methods of Project delivery. The Construction Manager shall provide recommendations on relative feasibility of construction methods, availability of materials and labor, time requirements for procurement, installation and construction, and factors related to construction cost, including, but not limited to, costs of alternative designs or materials, preliminary budgets, and possible economies.

3.2.5 The Construction Manager shall prepare and periodically update a Project Schedule for the A/E's review and the City's acceptance. The Construction Manager shall obtain the A/E's approval for the portion of the preliminary project schedule relating to the performance of the A/E's services. In the Project Schedule, the Construction Manager shall coordinate and integrate the Construction Manager's services, the A/E's services and the City's responsibilities with anticipated construction schedules, highlighting critical and long-lead-time items.

3.2.6 As the A/E progresses with the preparation of the Schematic, Design Development and Construction Documents, the Construction Manager shall prepare and update, at appropriate intervals agreed to by the City, Construction Manager and A/E, estimates of Construction Cost of increasing detail and refinement. The estimated cost of each Contract shall be indicated with supporting detail. Such estimates shall be provided for the A/E's review and the City's approval. The Construction Manager shall advise the City and A/E if it appears that the Construction Cost may exceed the latest approved Project budget and make recommendations for corrective action.

3.2.7 The Construction Manager shall consult with the City and A/E regarding the Construction Documents and make recommendations whenever design details adversely affect constructability, cost or schedules.

3.2.8 The Construction Manager shall provide recommendations and information to the City and A/E regarding the assignment of responsibilities for temporary Project facilities and equipment, materials and services for common use of the Contractors. The Construction Manager shall verify that such requirements and assignment of responsibilities are included in the proposed Contract Documents.

3.2.9 The Construction Manager shall provide recommendations and information to the City regarding the allocation of responsibilities for safety programs among the Contractors.

3.2.10 The Construction Manager shall advise on the division of the Project into individual Contracts for various categories of Work, including the method to be used for selecting Contractors and awarding Contracts. If multiple Contracts are to be awarded, the Construction Manager shall review the Construction Documents and make recommendations as required to provide that (1) the Work of the Contractors is coordinated, (2) all requirements for the Project have been assigned to the appropriate Contract, (3) the likelihood of jurisdictional disputes has been minimized, and (4) proper coordination has been provided for phased construction.

3.2.11 The Construction Manager shall assist in preparing a Project construction schedule providing for the components of the Work, including phasing of construction, times of commencement and completion required of each Contractor, ordering and delivery of products requiring long lead time, and the occupancy or utilization requirements of the City. The

Construction Manager shall assist in providing a current Project construction schedule for each set of bidding documents.

3.2.12 The Construction Manager shall assist in expediting and coordinating the ordering and delivery of materials requiring long lead-time.

3.2.13 The Construction Manager shall assist the City in selecting, retaining and coordinating the professional services of surveyors, special consultants and testing laboratories required for the Project.

3.2.14 The Construction Manager shall assist in providing an analysis of the types and quantities of labor required for the Project and review the availability of appropriate categories of labor required for critical phases. The Construction Manager shall make recommendations for actions designed to minimize adverse effects of labor shortages.

3.2.15 The Construction Manager shall assist the City in obtaining information regarding applicable requirements for equal employment opportunity programs for inclusion in the Contract Documents.

3.2.16 Following the City's approval of the Construction Documents, the Construction Manager shall update and submit the latest estimate of Construction Cost and the Project construction schedule for the A/E's review and the City's approval.

3.2.17 The Construction Manager shall submit the list of prospective bidders for the A/E's review and the City's approval.

3.2.18 The Construction Manager shall assist in developing bidders' interest in the Project and establish bidding schedules. The Construction Manager, with the assistance of the A/E, shall issue bidding documents to bidders and conduct pre-bid conferences with prospective bidders. The Construction Manager shall assist the A/E with regard to questions from bidders and with the issuance of addenda.

3.2.19 The Construction Manager shall receive bids, prepare bid analyses and make recommendations to the City for the City's award of Contracts or rejection of bids.

3.2.20 The Construction Manager shall assist the City in preparing Construction Contracts and advise the City on the acceptability of Subcontractors and material suppliers proposed by Contractors.

3.2.21 The Construction Manager shall assist the City in obtaining building permits and special permits for permanent improvements, except for permits required to be obtained directly by the various Contractors. The Construction Manager shall verify that the City has paid applicable fees and assessments. The Construction Manager shall assist the City and A/E in connection with the City's responsibility for filing documents required for the approvals of governmental authorities having jurisdiction over the Project.

3.3 Construction Phase

3.3.1 The Construction Phase will commence with the award of the initial Construction Contract or purchase order and, together with the Construction Manager's obligation to provide Basic Services under this Agreement and the Project Agreement, will end 30 days after final payment to all Contractors is due.

3.3.2 The Construction Manager shall assist in providing administration of the Contracts for Construction in cooperation with the A/E as set forth below.

3.3.3 The Construction Manager shall assist in providing administrative, management and related services to coordinate scheduled activities and responsibilities of the Contractors with each other and with those of the Construction Manager, the City and the A/E to endeavor to manage the Project in accordance with the latest approved estimate of Construction Cost, the Project Schedule and the Contract Documents.

3.3.4 The Construction Manager shall assist in scheduling and conducting meetings to discuss such matters as procedures, progress and scheduling. The Construction Manager shall prepare and promptly distribute minutes to the City, A/E and Contractors.

3.3.5 Utilizing the Construction Schedules provided by the Contractors, the Construction Manager shall assist in updating the Project construction schedule incorporating the activities of the Contractors on the Project, including activity sequences and durations, allocation of labor and materials, processing of Shop Drawings, Product Data and Samples, and delivery of products requiring long lead time and procurement. The Project construction schedule shall include the City's occupancy or utilization requirements showing portions of the Project having occupancy or utilization priority. The Construction Manager shall assist in updating and reissuing the Project construction schedule as required to show current conditions. If an update indicates that the previously approved Project construction schedule may not be met, the Construction Manager shall recommend corrective action to the City and A/E.

3.3.6 Consistent with the various bidding documents, and utilizing information from the Contractors, the Construction Manager shall assist in coordinating the sequence of construction and assignment of space in areas where the Contractors are performing Work.

3.3.7 The Construction Manager shall endeavor to obtain satisfactory performance from each of the Contractors. The Construction Manager shall recommend courses of action to the City when requirements of a Contract are not being fulfilled.

3.3.8 The Construction Manager shall assist in monitoring the approved estimate of Construction Cost. The Construction Manager shall assist in showing actual costs for activities in progress and estimates for uncompleted tasks by way of comparison with such approved estimate.

3.3.9 The Construction Manager shall assist in developing cash flow reports and forecasts for the Project and advise the City and A/E as to variances between actual and budgeted or estimated costs.

3.3.10 The Construction Manager shall assist in maintaining accounting records on authorized Work performed under unit costs, additional Work performed on the basis of actual costs of labor and materials, and other Work requiring accounting records.

3.3.11 The Construction Manager shall assist in developing and implement procedures for the review and processing of applications by Contractors for progress and final payments.

3.3.11.1 Based on the Construction Manager's observations and evaluations of each Contractor's Application for Payment, the Construction Manager shall review and certify the amounts due the respective Contractors.

3.3.11.2 The Construction Manager shall assist in preparing a Project Application for Payment based on the Contractors' Certificates for Payment.

3.3.11.3 The Construction Manager's certification for payment shall constitute a representation to the City, based on the Construction Manager's determinations at the site as provided in Section 3.3.13 and on the data comprising the Contractors' Applications for Payment, that, to the best of the Construction Manager's knowledge, information and belief, the Work has progressed to the point indicated and the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to minor deviations from the Contract Documents correctable prior to completion and to specific qualifications expressed by the Construction Manager. The issuance of a Certificate for Payment shall further constitute a representation that the Contractor is entitled to payment in the amount certified.

3.3.11.4 The issuance of a Certificate for Payment shall not be a representation that the Construction Manager has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences for the Contractor's own Work, or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the City to substantiate the Contractor's right to payment or (4) ascertained how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

3.3.12 The Construction Manager shall review the safety programs developed by each of the Contractors for purposes of coordinating the safety programs with those of the other Contractors. The Construction Manager's responsibilities for coordination of safety programs shall not extend to direct control over or charge of the acts or omissions of the Contractors, Subcontractors, agents or employees of the Contractors or Subcontractors, or any other persons performing portions of the Work and not directly employed by the Construction Manager.

3.3.13 The Construction Manager shall determine in general that the Work of each Contractor is being performed in accordance with the requirements of the Contract Documents, endeavoring to guard the City against defects and deficiencies in the Work. As appropriate, the Construction Manager shall have authority, upon written authorization from the City, to require additional inspection or testing of the Work in accordance with the provisions of the Contract

Documents, whether or not such Work is fabricated, installed or completed. The Construction Manager, in consultation with the A/E, may reject Work which does not conform to the requirements of the Contract Documents.

3.3.14 The Construction Manager shall assist in scheduling and coordinating the sequence of construction in accordance with the Contract Documents and the latest approved Project construction schedule.

3.3.15 With respect to each Contractor's own Work, the Construction Manager shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work of each of the Contractors, since these are solely the Contractor's responsibility under the Contract for Construction. The Construction Manager shall not be responsible for a Contractor's failure to carry out the Work in accordance with the respective Contract Documents. The Construction Manager shall not have control over or charge of acts or omissions of the Contractors, Subcontractors, or their agents or employees, or any other persons performing portions of the Work not directly employed by the Construction Manager.

3.3.16 The Construction Manager shall assist in transmitting to the A/E requests for interpretations (RFI) of the meaning and intent of the Drawings and Specifications, and assist in the resolution of questions that may arise.

3.3.17 The Construction Manager shall assist in reviewing requests for changes, assist in negotiating Contractors' proposals, submit recommendations to the A/E and the City, and, if they are accepted, assist in preparing Change Orders and Construction Change Directives which incorporate the A/E's modifications to the Documents.

3.3.18 The Construction Manager shall assist the A/E in the review, evaluation and documentation of Claims.

3.3.19 The Construction Manager shall assist in receiving certificates of insurance from the Contractors and forward them to the City with a copy to the A/E.

3.3.20 In collaboration with the A/E, the Construction Manager shall establish and implement procedures for expediting the processing and approval of Shop Drawings, Product Data, Samples and other submittals.

3.3.21 The Construction Manager shall assist in recording the progress of the Project. The Construction Manager shall assist in submitting monthly written progress reports to the City and A/E including information on each Contractor and each Contractor's Work, as well as the entire Project, showing percentages of completion. The Construction Manager shall review the Contractors daily log containing a record of weather, each Contractor's Work on the site, number of workers, identification of equipment, Work accomplished, problems encountered, and other similar relevant data as the City may require and shall be included in the Construction Managers monthly report.

3.3.22 The Construction Manager shall review and insure that the Contractor maintains, at the Project site for the City, one record copy of all Contracts, Drawings, Specifications, addenda, Change Orders and other Modifications, in good order and marked

currently to record changes and selections made during construction, and in addition, approved Shop Drawings, Product Data, Samples and similar required submittals. The Construction Manager shall maintain records, in duplicate, of principal building layout lines, elevations of the bottom of footings, floor levels and key site elevations certified by a qualified surveyor or professional engineer. The Construction Manager shall assist in making all such records available to the A/E and upon completion of the Project shall deliver them to the City.

3.3.23 The Construction Manager shall assist in arranging for the delivery, storage, protection and security of the City-purchased materials, systems and equipment that are a part of the Project until such items are incorporated into the Project.

3.3.24 With the A/E and the City's maintenance personnel, the Construction Manager shall assist in observing the Contractors' final testing and start-up of utilities, operational systems and equipment.

3.3.25 When the Construction Manager considers each Contractor's Work or a designated portion thereof substantially complete, the Construction Manager shall, jointly with the Contractor, prepare for the A/E a list of incomplete or unsatisfactory items and a schedule for their completion. The Construction Manager shall assist the A/E in conducting inspections to determine whether the Work or designated portion thereof is substantially complete.

3.3.26 The Construction Manager shall assist in coordinating the correction and completion of the Work. Following issuance of a Certificate of Substantial Completion of the Work or a designated portion thereof, the Construction Manager shall evaluate the completion of the Work of the Contractors and make recommendations to the A/E when Work is ready for final inspection. The Construction Manager shall assist the A/E in conducting final inspections.

3.3.27 The Construction Manager shall secure and transmit to the A/E warranties and similar submittals required by the Contract Documents for delivery to the City and deliver all keys, manuals, record drawings and maintenance stocks to the City. The Construction Manager shall forward to the A/E a final Project Application for Payment upon compliance with the requirements of the Contract Documents.

3.3.28 Duties, responsibilities and limitations of authority of the Construction Manager as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the City, Construction Manager, A/E and Contractors. Consent shall not be unreasonably withheld.

4 ADDITIONAL SERVICES; CHANGES IN THE SCOPE OF SERVICES

4.1 General

4.1.1 The services described in this Article 4 are not included in Basic Services unless so identified in the Project Agreement, and they shall be paid for by the City as provided in this Agreement, in addition to the compensation for Basic Services. The Optional Additional Services described under Section 4.3 shall only be provided if authorized or confirmed in writing by the City. If services described under Contingent Additional Services in Section 4.2 are required due to circumstances beyond the Construction Manager's control, the Construction Manager shall notify the City prior to commencing such services. If the City deems that such

services described under Section 4.2 are not required, the City shall give prompt written notice to the Construction Manager. If the City indicates in writing that all or part of such Contingent Additional Services are not required, the Construction Manager shall have no obligation to provide those services.

4.2 Contingent Additional Services

4.2.1 Providing services required because of significant changes in the Project including, but not limited to, changes in size, quality, complexity or the City's schedule.

4.2.2 Providing consultation concerning replacement of Work damaged by fire or other cause during construction, and furnishing services required in connection with the replacement of such Work.

4.2.3 Providing services made necessary by the termination or default of the A/E or a Contractor, by major defects or deficiencies in the Work of a Contractor, or by failure of performance of either the City or Contractor under a Contract for Construction.

4.2.4 Providing services in evaluating an extensive number of claims submitted by a Contractor or others in connection with the Work.

4.2.5 Providing services in connection with a public hearing, arbitration proceeding or legal proceeding except where the Construction Manager is party thereto.

4.3 Optional Additional Services

4.3.1 Providing services relative to future facilities, systems and equipment.

4.3.2 Providing services to investigate existing conditions or facilities or to provide measured drawings thereof.

4.3.3 Providing services to verify the accuracy of drawings or other information furnished by the City.

4.3.4 Providing services required for or in connection with the City's selection, procurement or installation of furniture, furnishings and related equipment.

4.3.5 Providing services for tenant improvements.

4.3.6 Providing any other services not otherwise included in this Agreement.

4.4 Changes in the Scope of Services

Changes in the Scope of Services of a Project Agreement consisting of additions, deletions, revisions, or any combination thereof, may be ordered by the City by Change Order without invalidating the Project Agreement. Change Order shall mean a written order to the Construction Manager executed by the City, issued after execution of a Project Agreement, authorizing and directing a change in the Scope of Services or an adjustment in the Contract

Price or the Contract Time, or any combination thereof. The Contract Price and/or the Contract Time may be changed only by Change Order.

4.5 Execution of Change Order

The execution of a Change Order by the City and the Construction Manager shall constitute conclusive evidence of the Construction Manager's agreement to the ordered changes in the Scope of Services or an adjustment in the Contract Price or the Contract Time, or any combination thereof. The Construction Manager, by executing the Change Order, waives and forever releases any claim against the City for additional time or compensation for matters relating to or arising out of or resulting from the Services included within or affected by the executed Change Order.

4.6 Council Approval

All Change Orders, regardless of amount, must be approved by the City Council.

5 CITY'S RESPONSIBILITIES

5.1 The City shall provide full information regarding requirements for each Specific Project, including a program which shall set forth the City's objectives, schedule, constraints and criteria, including space requirements and relationships, flexibility, expandability, special equipment, systems, and site requirements.

5.2 The City shall establish and update an overall budget for each Specific Project based on consultation with the Construction Manager and architect and/or engineer (A/E) which shall include the Construction Cost, the City's other costs and reasonable contingencies related to all of these costs.

5.3 The City shall retain an A/E for each Specific Project. The Terms and Conditions of the Agreement Between the City and A/E shall be furnished to the Construction Manager and shall not be modified without written consent of the Construction Manager, which consent shall not be unreasonably withheld. The Construction Manager shall not be responsible for actions taken by the A/E.

5.4 The City shall furnish structural, mechanical, chemical, air and water pollution tests, tests for hazardous materials, and other laboratory and environmental tests, inspections and reports required by law or the Contract Documents.

5.5 The City shall furnish all legal, accounting and insurance counseling services as may be necessary at any time for each Specific Project, including auditing services the City may require to verify the Contractors' Applications for Payment or to ascertain how or for what purposes the Contractors have used the money paid by or on behalf of the City.

5.6 The City shall furnish the Construction Manager with a sufficient quantity of Construction Documents.

5.7 The services, information and reports required by Sections 5.3 through 5.6 shall be furnished at the City's or Construction Contractor's expense, and the Construction Manager shall be entitled to rely upon the accuracy and completeness thereof.

5.8 Prompt written notice shall be given by the City to the Construction Manager and A/E if the City becomes aware of any fault or defect in the Project or nonconformance with the Contract Documents.

5.9 The City reserves the right to perform construction and operations related to each Specific Project with the City's own forces, and to award contracts in connection with the Project which are not part of the Construction Manager's responsibilities under this Agreement. The Construction Manager shall notify the City if any such independent action will interfere with the Construction Manager's ability to perform the Construction Manager's responsibilities under this Agreement. When performing construction or operations related to the Project, the City agrees to be subject to the same obligations and to have the same rights as the Contractors.

5.10 Information or services under the City's control shall be furnished by the City with reasonable promptness to avoid delay in the orderly progress of the Construction Manager's services and the progress of the Work.

6 COMPENSATION

6.1 Direct Personnel Expense

Direct Personnel Expense is defined as the direct salaries of the Construction Manager's personnel engaged on the Specific Project and the portion of the cost of their mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, pensions and similar contributions and benefits.

6.2 Reimbursable Expenses

6.2.1 Reimbursable Expenses are in addition to compensation for Basic and Additional Services and include expenses incurred by the Construction Manager and Construction Manager's employees and consultants in the interest of the Specific Project, as identified in the following Clauses:

6.2.1.1 Expense of transportation in connection with the Specific Project, expenses in connection with authorized out-of-town travel; long-distance communications; and fees paid for securing approval of authorities having jurisdiction over the Specific Project.

6.2.1.2 Expense of reproductions, postage, express deliveries, electronic facsimile transmissions and handling of Drawings, Specifications and other documents.

6.2.1.3 If authorized in advance by the City, expense of overtime work requiring higher than regular rates.

6.3 Payments on Account of Basic Services

6.3.1 The Project Agreement will provide the formula for the compensation for the Basic Services.

6.3.2 Payments for Basic Services shall be made monthly and, where applicable, shall be in proportion to services performed within each phase of service, on the basis set forth in the Project Agreement.

6.3.3 When compensation is based on a percentage of Construction Cost and any portions of the Specific Project are deleted or otherwise not constructed, compensation for those portions of the Specific Project shall be payable to the extent services are performed on those portions, in accordance with the Project Agreement, based on (1) the lowest bona fide bids or negotiated proposals, or (2) if no such bids or proposals are received, the latest approved estimate of such portions of the Specific Project.

6.4 Payments on account of Additional Services and Reimbursable Expenses

Payments on account of the Construction Manager's Additional Services and for Reimbursable Expenses shall be made monthly upon presentation of the Construction Manager's statement of services rendered or expenses incurred.

6.5 Payments Withheld

No deductions shall be made from the Construction Manager's compensation on account of penalty, liquidated damages or other sums withheld from payments to Contractors, or on account of the cost of changes in Work other than those for which the Construction Manager has been found to be liable.

6.6 Construction Manager's Accounting Records

Records of Reimbursable Expenses and expenses pertaining to Additional Services and services performed on the basis of a multiple of Direct Personnel Expense shall be available to the City or the City's authorized representative at mutually convenient times.

7 INSURANCE AND INDEMNITY

The Construction Manager shall secure and maintain throughout the duration of this Agreement and any Project Agreement, 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 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. Any insurance maintained by the City shall be in excess of the Construction Manager's insurance and shall not contribute to the Construction Manager's insurance. The insurance coverages shall include a minimum of:

7.1 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 \$100,000.00 each accident. (The Construction Managers State Exemption will be acceptable by the City)

7.2 Comprehensive Automobile and Vehicle Liability Insurance: This insurance shall be written in comprehensive form and shall protect the Construction Manager and the City against claims for injuries to members of the public and/or damages to property of others arising from the Construction Manager'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. Additional Insurance required by the City will be reimbursable to the Construction Manager.

7.3 Commercial General Liability. This insurance shall be written in comprehensive form and shall protect the Construction Manager 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 Construction Manager 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. Additional Insurance required by the City will be reimbursable to the Construction Manager.

(a) 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.

(b) 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 Construction Manager in performance of this or any Project Agreement. Construction Manager'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 Construction Manager's insurance. Construction Manager'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.

7.4 Certificate of Insurance: Prior to the execution of this Agreement, Construction Manager shall provide the City's Risk Manager with evidence of insurability from the Construction Manager's Insurance Carrier or a Certificate of Insurance. Prior to execution of any Project Agreement, the Construction Manager shall provide to the City, Certificates of Insurance evidencing the required insurance coverages. The Certificates of Insurance shall not only name the types of policy(ies) provided, but also shall refer specifically to this and any Project Agreement and shall state that such insurance is as required by this and any Project Agreement. The City reserves the right to require the Construction Manager 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.

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

7.6 Indemnity. The Construction Manager 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 Construction Manager or any persons employed or utilized by the Construction Manager in the performance of this or any Project Agreement. Additional insurance requirements by the City shall be reimbursable to the Construction Manager.

8 DEFAULT, TERMINATION AND SUSPENSION OF A PROJECT AGREEMENT

8.1 Termination by the City for Default. The City may, in addition to its other remedies, terminate a Project Agreement by notice to the Construction Manager following the occurrence of a Manager Event of Default. Any breach of this Agreement and the applicable Project Agreement by Construction Manager which remains uncured for more than 30 days following notice from the City (plus, with respect to breaches which cannot reasonably be cured within 30 days, such additional period as is reasonably required to cure such breach) shall be a "Manager Event of Default." Upon the date of such termination specified in the City's notice, the City shall pay to Construction Manager all sums earned by or payable to Construction Manager as of such date, less the actual damages incurred by the City as a result of such breach, including Reimbursable Expenses (subject to the limitations on damages provided for in this Agreement).

8.2 Termination by the City for Other Reasons. If the City abandons the Specific Project, the City shall have the right to terminate the Project Agreement on thirty (30) days' prior written notice to Construction Manager. Upon the date of such termination, the City shall pay to Construction Manager all sums earned by or payable to Construction Manager as of such date (as to the Basic Fee, only the installments payable on or prior to such date being deemed "earned"). As used herein, "abandon" shall mean that the City stops all work on the Specific Project, releases its rights to the Specific Project and does not engage in any activity with respect to the Specific Project or reacquire such rights for a period of at least twelve (12) months.

8.3 Termination by Construction Manager Construction Manager may, in addition to its other remedies, terminate this Agreement by notice to the City following the occurrence of a City Event of Default. If the City (i) fails to timely pay any sum owed to Construction Manager which remains unpaid for more than thirty (30) days after notice from Construction Manager, or (ii) breaches any other obligation of the City under this Agreement and the applicable Project Agreement which continues for more than 30 days after notice from Construction Manager (plus, in the case of breaches which cannot reasonably be cured within 30 days, such additional time as is reasonably required to cure such breach), such failure or breach shall constitute a "City Event of Default". Upon the date of termination specified in Construction Manager's notice, the City shall pay to Construction Manager upon the effective date of termination all sums earned by or payable to Construction Manager as of such date including Reimbursable Expenses.

8.4 Other Termination by Construction Manager. Construction Manager may also terminate the Project Agreement by notice to the City in the event the City stops funding the cost of work on the Specific Project or orders that work stop on the Specific Project and work is stopped for ninety (90) days or more. In such event, the City shall pay to Construction Manager upon the effective date of termination all sums earned by or payable to Construction Manager as of such date including Reimbursable Expenses.

9 POLICY OF NON-DISCRIMINATION/WAGES

9.1 The Construction Manager shall comply with all federal, state and local laws and ordinances applicable to the work or payment for work and shall not discriminate on the grounds of race, color, religion, sex, age, marital status, national origin, physical or mental disability in the performance of work under this Agreement.

9.2 The Construction Manager shall comply with the wage provisions of Section 287.055, Florida Statutes. If the project is subject to federal or state grant funding that requires specific wage and non-discrimination provisions, the Construction Manager shall be required to comply with the same.

10 THE OWNERSHIP OF DOCUMENTS/DELIVERABLES

10.1 All finished or unfinished documents, including but not limited to, detailed reports, studies, plans, drawings, surveys, maps, models, photographs, specifications, digital files, and all other data prepared for the City or furnished by the Construction Manager pursuant to any Project Agreement, shall become the property of the City, whether the Specific Project for which they are made is completed or not, and shall be delivered by Construction Manager to the City within five (5) calendar days after receipt of written notice requesting delivery of said documents or digital files. The Construction Manager shall have the right to keep one record set of the documents upon completion of the Specific Project, however, in no event shall the Construction Manager, without the City's prior written authorization, use, or permit to be used, any of the documents except for client or educational presentations or seminar use.

10.2 All subcontracts for the preparation of reports, studies, plans, drawings, specifications, digital files or other data, entered into by the Construction Manager for each Specific Project shall provide that all such documents and rights obtained by virtue of such contracts shall become the property of the City.

11 RECORDS/AUDITS

11.1 Construction Manager shall maintain and require Subconsultants to maintain, complete and correct records, books, documents, papers and accounts pertaining to the Specific Project. Such records, books, documents, papers and accounts shall be available at all reasonable times for examination and audit by the City Manager or any authorized City representative with reasonable notice and shall be kept for a period of three (3) years after the completion of each Project Agreement. Incomplete or incorrect entries in such records, books, documents, papers or accounts will be grounds for disallowance by or reimbursement to the City of any fees or expenses based upon such entries. Disallowed fees will be paid when incomplete or incorrect entries are remedied to the satisfaction of the City.

11.2 The Construction Manager shall comply with Chapter 119, Florida Statutes, as applicable.

11.3 Refusal of the Construction Manager to comply with the provisions of Sections 11.1 or 11.2 shall be grounds for immediate termination for cause by the City of this Agreement or any Project Agreement.

12 NO CONTINGENT FEE

Construction Manager warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for Construction Manager, to solicit or secure this Agreement and that it has not paid or agreed to pay any person, company, corporation, individual or firm, other than a bona fide employee working solely for Construction Manager, any fee, commission, percentage, gift, or other consideration contingent upon or resulting from the award or making of this Agreement. In the event the Construction Manager violates this provision, the City shall have the right to terminate this Agreement or any Project Agreement, without liability, and at its sole discretion, to deduct from the contract price, or otherwise recover, the full amount of such fee, commission, percentage, gift or consideration.

13 INDEPENDENT CONTRACTOR

The Construction Manager is an independent contractor under this Agreement and any Project Agreements. Personal services provided by the Construction Manager shall be by employees of the Construction Manager and subject to supervision by the Construction Manager, and not as officers, employees, or agents of the City, Personnel policies, tax responsibilities, social security, health insurance, employee benefits, purchasing policies and other similar administrative procedures applicable to services rendered under this Agreement or any Project Agreements shall be those of the Construction Manager.

14 TRUTH-IN-NEGOTIATION CERTIFICATE

Signature of this Agreement by the Construction Manager 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 or any Project Agreement are accurate, complete, and current at the time of contracting. Each Project Agreement's contract prices and any additions shall be adjusted to exclude any significant sums by which the City determines the Project's contract price was increased due to inaccurate, incomplete, or non-current wage rates and other factual

unit costs. All such adjustments shall be made within one year following the end of each Project Agreement.

15 MISCELLANEOUS

15.1 Assignment. The City may not assign this Agreement. Construction Manager may not assign or otherwise transfer all or any portion of its interest in this Agreement or delegate its duties hereunder without the prior consent of The City. The foregoing shall not prevent Construction Manager from pledging to any person or entity Construction Manager's right to receive the Basic Fee under this Agreement.

15.2 Survival. Upon the expiration or earlier termination of this Agreement, neither party shall have any further rights or obligations under this Agreement, except that Articles 2, 6, 7, 8 and 15 shall survive the expiration or termination of this Agreement.

15.3 Notices. Any notice provided for in or permitted under this Agreement shall be made in writing, and may be given or served by (i) delivering the same in person or by facsimile transmission to the party to be notified, or (ii) depositing the same in the United States mail, postage prepaid, registered or certified with return receipt requested, and addressed to the party to be notified at the address herein specified, or (iii) by depositing same with a reputable overnight courier service with proof of delivery. If notice is deposited in the United States mail pursuant to clause (ii) of this Section 15.3, it will be effective from and after the day it is received by the addressee or receipt thereof is refused by the addressee, unless such day is not a business day, and then it shall be deemed received on the next business day. Notice given in any other manner shall be effective only if and when received by the party to be notified unless the day it is received is not a business day, and then it shall be deemed received on the next business day. For the purpose of notice, the address of the party shall be, until changed as hereinafter provided for, as follows:

If to the City:	Michael H. Puto, City Manager City of Marathon 10045-55 Overseas Highway Marathon, Florida 33050
With a copy to:	John R. Herin, Esq. Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A. 150 W. Flagler Street, Suite 2200 Miami, Florida 33130
If to the Construction Manager:	Bill Sprague B.W. Sprague, Inc. 825 Duval Street Key West, Florida 33040
With a copy to:	

or to such other address as the City may specify in a written notice to the Construction Manager or the Construction Manager may specify in a written notice to the City in accordance with this Section 15.3.

Each party shall have the right from time to time and at any time to change its respective address and each shall have the right to specify as its address any other address by at least fifteen (15) days' written notice to the other party. Each party shall have the right from time to time to specify additional parties to whom notice hereunder must be given by delivering to the other party fifteen (15) days' written notice thereof setting forth the address of such additional party or parties; provided, however, that no party shall have the right to designate more than three (3) such additional parties. Notice required to be delivered hereunder to either party shall not be deemed to be effective until the additional parties, if any, designated by such party have been given notice in a manner deemed effective pursuant to the terms of this Section 15.3.

15.4 Authority. Each party represents to the other that it has the power and authority to enter into this Agreement and that the person executing on its behalf has the power to do so and to bind it to the terms of this Agreement.

15.5 Entire Agreement; Amendments; Governing Law; Consent to Jurisdiction; Venue This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements and negotiations with respect thereto. This Agreement may be amended only by a written instrument signed by both parties. This Agreement shall be governed by the laws of the state of Florida. The parties submit to the jurisdiction of any Florida state or federal court in any action or proceeding arising out of or relating to this Agreement or any Project Agreement. Venue of any action to enforce this Agreement or any Project Agreement shall be in Monroe County, Florida.

15.6 Severability If any provision in this Agreement is held to be unenforceable, the remainder of this Agreement shall continue in full force and effect and, to the extent permitted by law, this Agreement shall be interpreted so as to give effect to the original written intent of the parties. If any portion of a provision is held to be unenforceable, the remainder shall be enforced to the maximum extent so as to give effect to the original written intent of the parties.

15.7 Attorney Fees. If Construction Manager or the City obtains a judgment against the other with respect to a dispute arising under to this Agreement, reasonable attorneys' fees and costs as fixed by the court shall be included in the judgment.

15.8 Successors and Assigns. Subject to Section 15.1, this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

15.9 Multiple Counterparts. This Agreement may be executed in several counterparts, each of which shall be an original of this Agreement but all of which, taken together, shall constitute one and the same agreement.

15.10 Pronouns. The pronouns used in this Agreement referring to Construction Manager or the City shall be understood and construed to apply whether Construction Manager or the City is an individual, partnership, corporation or an individual or individuals doing business under a firm or trade name, and the masculine and neuter pronouns shall each include the other and may be used interchangeably with the same meaning.

15.11 Headings All headings herein are inserted only for convenience and ease of reference and are not to be considered in the construction or interpretation of any provision of this Agreement.

15.12 No Waiver The waiver of any of the terms and conditions of this Agreement on any occasion or occasions shall not be deemed as waiver of such terms and conditions on any future occasion. No waiver shall be implied by any isolated or repeated action or non-action. To be effective, any waiver must be in writing executed by the party to be bound thereby.

15.13 No Third Party Beneficiaries. The provisions of this Agreement are for the exclusive benefit of the parties hereto and their permitted successors and assigns and are not for the benefit of any other person or entity.


15.14 Further Assurances. Each party agrees to execute, acknowledge, deliver, file, record and publish such further instruments and documents, and do all such other acts and things as may be required by law, or as may be required to carry out the purposes and intent of this Agreement.

15.15 Definitions. Capitalized terms used but not defined herein shall have the same meaning as those in the edition of AIA Document A201/Cma, General Conditions of the Contract for Construction, Construction Manager-Adviser Editions, current as of the date of this Agreement.


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 the Construction Manager, signing by and through its Vice President, duly authorized to execute same.

Attest:

CITY OF MARATHON




Cindy L. Eeklund, City Clerk of
Clara Perrine, Acting City Clerk

By: 

Michael H. Puto, City Manager

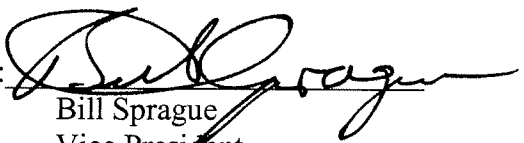
Date: 5/24/06

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



City Attorney

B.W. SPRAGUE, INC.

By: 

Bill Sprague
Vice President

Date: 25 May 06