

**CITY OF MARATHON, FLORIDA
RESOLUTION 2007-79**

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA, AUTHORIZING THE CITY TO ENTER INTO A CONTINUING SERVICES AGREEMENT WITH THE FOUR GATES COMPANY; AUTHORIZING THE CITY MANAGER AND CITY ATTORNEY TO FINALIZE THE TERMS AND CONDITIONS OF THE AGREEMENT; AUTHORIZING THE MANAGER TO EXECUTE THE AGREEMENT; AND PROVIDING AN EFFECTIVE DATE

WHEREAS, on September 26, 2006, the City Council authorized the City Manager and City staff to enter into an agreement with The Four Gates Company to perform contract planning services for the City during a period when the City was not fully staffed; and

WHEREAS, the City desires to continue to using The Four Gates Company to supplement staff on an as-needed basis;

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 Agreement between the City of Marathon and The Four Gates Company, 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 12th day of June, 2007.

THE CITY OF MARATHON, FLORIDA


Christopher M. Bull, Mayor

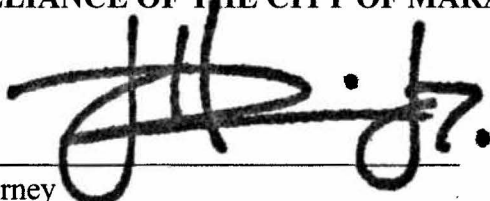
AYES: Cinque, Tempest, Vasil, Worthington, Bull
NOES: None
ABSENT: None
ABSTAIN: None

ATTEST:


Diane Clavier
City Clerk

(City Seal)

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


City Attorney

**PROFESSIONAL SERVICES AGREEMENT BETWEEN
THE CITY OF MARATHON
AND
THE FOUR GATES COMPANY, INC. TO PROVIDE PROFESSIONAL PLANNING
SERVICES**

THIS AGREEMENT is made between **THE FOUR GATES COMPANY, INC.**, a Florida corporation, (hereinafter the “Consultant”), and the **CITY OF MARATHON, FLORIDA**, a Florida municipal corporation, (hereinafter the “City”).

WHEREAS, City and Consultant desire to enter into a professional services agreement for Consultant to provide temporary Planning Consulting Services to the City within the basic terms and conditions set forth in this agreement (hereinafter referred to as “Professional Services Agreement” or “Agreement”).

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 professional planning services to the City as set forth in the Scope of Services attached to this Agreement and incorporate herein as Exhibit “A.”
- 1.2 The professional services to be rendered by the Consultant shall commence on June 27, 2007 (the “Commencement Date”).
- 1.3 Changes in the Scope of Services consisting of additions, deletions, revisions, or any combination thereof, may be ordered by the City by Change Order without invalidating the Agreement.
- 1.4 Change Order shall mean a written order to the Consultant executed by the City, issued after execution of this 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 may be changed only by Change Order.
- 1.5 The execution of a Change Order by the City and the Consultant shall constitute conclusive evidence of the Consultant’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 Consultant, 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.

- 1.6 The City Manager or designee is authorized to negotiate and execute Change Orders, in an amount not to exceed \$25,000.00. Changes, which exceed \$25,000.00, shall be approved by the City Council.

2. **Term/Commencement Date.**

- 2.1 This Agreement shall become effective upon execution by both parties and shall remain and continue in effect for 365 Days unless extended in accordance with Paragraph 1, or earlier terminated in accordance with Paragraph 8 of this Agreement (the "Contract Term").
- 2.2 Consultant agrees that time is of the essence and Consultant shall provide the services set forth in the Scope of Services in a timely manner as ordinarily provided by a professional planner under similar circumstances.

3. **Compensation and Payment.**

- 3.1 The Consultant shall receive a fee not to exceed \$50,000.00 (the "Contract Price") for all services set forth in Exhibit "A." Consultant shall be paid for hourly work paid in accordance with the fee schedule set forth in Exhibit "A." The Contract Price shall constitute full payment and includes all sub-consultant fees, labor, overhead, review fees, and profit.
- 3.2 The Consultant shall invoice the City on a monthly basis for services rendered. Monthly invoices shall include a detailed narrative of services rendered by Consultant and corresponding hourly rate in accordance with Exhibit "A," and shall not exceed the corresponding pro-rata amount of the Contract Price. The invoice shall also contain a summary of reimbursable costs and total credits for portions of the Contract Price previously paid by the City.
- 3.3 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.
- 3.4 The City reserves the right to withhold retainage in the amount of ten percent (10%) of any payment due to the Consultant until expiration of the Contract Term. Said retainage may be withheld at the sole discretion of the City Manager and as security for the successful completion of the Consultant's duties and responsibilities under this Agreement.

3.5 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 including but not limited to costs of acceleration or inefficiency or extended overhead, 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. Consultant shall be entitled only to an extension of the contract time as the sole and exclusive remedy for delay. All extensions of time must be approved in writing by the City Manager by Change Order.

4. **Sub consultants.**

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

4.2 Any sub-consultants used must have the prior written approval of the City Manager.

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 relating to the services to be performed by Consultant.

5.2 Furnish to Consultant, at the Consultant's written request, all available maps, plans, existing studies, reports and other data pertinent to the services to be provided by Consultant, in possession of the City.

5.3 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.

6. **Consultant's Responsibilities**

6.1 The Consultant shall exercise the same degree of care, skill and diligence in the performance of the Scope of Services as is ordinarily provided by a professional planner under similar circumstances. If at any time during the term of this Agreement for which the Consultant has provided planning services, it is determined that the Consultant's work product 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. **Conflict of Interest.**

7.1 To avoid any conflict of interest or any appearance thereof, Consultant shall not, for the term of this Agreement, represent any private sector entities (developers, corporations, real estate investors, etc.), with regard to any adversarial issues in the City. For the purposes of this section "adversarial" shall mean any development application where staff is recommending denial or denied the application, administrative appeal or court action wherein the City is a party.

8. **Termination.**

8.1 The City Manager without cause may terminate this Agreement upon fifteen (15) days written notice to the Consultant, or immediately with cause.

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

8.3 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 8.4.

8.4 The Consultant shall transfer all plans, drawings, books, records, reports, working drafts, documents, maps, and data pertaining to the work performed by Consultant pursuant to this Agreement 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.

9. **Insurance.**

The Consultant shall secure and maintain throughout the duration of this Agreement insurance of such type and in such amounts as required by the City

Manager. 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:

- 9.1 Worker's Compensation and Employer's Liability Insurance. If applicable, coverage to apply for all employees at minimum statutory limits as required by Florida Law.
- 9.2 Comprehensive Automobile and Vehicle Liability Insurance. Motor vehicle liability insurance, including applicable no-fault coverage, with limits of liability of not less than \$1,000,000.00 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.
- 9.3 Commercial General Liability. If applicable, this insurance shall be written in comprehensive form and shall protect the Consultant 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 Consultant or any of its agents, employees, or sub-consultants. 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.
 - (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 Consultants 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 Consultant in performance of this Agreement. Consultant'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 Consultant's insurance. Consultant'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.

- 9.4 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 \$100,000.00 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 \$50,000.00 during the policy term.
- 9.5 Certificates of Insurance shall be provided to the City at the time of execution of this Agreement and certified copies provided if requested. 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.
- 9.6 All deductibles or self-insured retentions must be declared to and be approved by the City Manager. The Consultant shall be responsible for the payment of any deductible or self-insured retentions in the event of any claim. The City Manager may at any time require the Consultant, to provide a bond or other monetary consideration to cover the Consultant's deductible for Professional Liability Insurance.

10. **Nondiscrimination.**

- 10.1 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 to abide by all Federal and State laws regarding nondiscrimination

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

- 11.1 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.
- 11.2 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.

12. **Indemnification.**

12.1 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 or any Project 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.

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

13. **Notices/Authorized Representatives.**

13.1 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:

Michael H. Puto, City Manager
City of Marathon, Florida
10045-55 Overseas Highway
Marathon, Florida 33050

With a copy to:

Jimmy Morales, Esq.
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
150 West Flagler Street
Suite 2200
Miami, FL 33130

For The Consultant:

Amy Kimball-Murley
The Four Gates Company, Inc.
1890 SW 21st Street
Miami, Florida 33145
Telephone: (305) 285-2336
Facsimile: (866) 836-7810

14. **Governing Law.**

14.1 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.

15. **Entire Agreement/Modification/Amendment.**

15.1 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.

15.2 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.

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

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

16.2 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.

16.3 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.

17. **Nonassignability.**

17.1 The City is relying upon the apparent qualifications and personal 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.

18. **Severability.**

18.1 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.

19. **Independent Consultant.**

19.1 The Consultant and its employees, volunteers and agents shall be and remain independent Consultant 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.

20. **Compliance with Laws.**

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

21. **Waiver**

21.1 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.

22. **Survival of Provisions**

22.1 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.

23. **Prohibition Of Contingency Fees.**

23.1 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.

24. **Counterparts**

24.1 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 Principal, whose representative has been duly authorized to execute same.

Attest:

Diane Clavier
City Clerk

CITY OF MARATHON

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

Date: *6/15/07*

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

[Signature]
City Attorney

THE FOUR GATES COMPANY, INC.

By: *[Signature]*
Amy Kimball-Murley, Principal

Date: *June 21, 2007*

EXHIBIT "A"

SCOPE OF SERVICES

1. Development approval review services, including drafting staff reports, development agreements, conditional use approvals, and other development approvals/orders as needed.
2. Comprehensive plan amendment and implementation services.
3. Preparation of reports relating to the Area of Critical State Concern.

Consultant shall work at City offices, and attend public meetings/hearings as needed.

Consultant shall be paid in accordance with the following fee schedule:

Amy Kimball-Murley	\$95.00 per hour
Office Assistant	\$35.00 per hour

Travel to and from Marathon will only be billed if during normal working hours (i.e., 8 a.m. to 6 p.m.). Reimbursable expenses shall include mileage, meals, and lodging if overnight stay is required.
