

RESOLUTION NO. 2009-172

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA, APPROVING AN AGREEMENT BETWEEN THE CITY OF MARATHON AND KEEFE, MCCULLOUGH & CO., LLP FOR AUDITING SERVICES; AUTHORIZING THE ACTING CITY MANAGER TO EXECUTE THE AGREEMENT ON BEHALF OF THE CITY AND EXPEND BUDGETED FUNDS; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, Section 218.39 *Florida Statutes*, requires that Florida municipalities retain auditors to perform an annual independent audit;

WHEREAS, the City of Marathon (the "City") solicited proposals, in accordance with the City's Auditor Selection Procedures, for auditing services, and after review of the submitted proposal elected to hire Keefe, McCullough & Co., LLP (the "Auditor");

WHEREAS, the City desires to enter into an agreement with the Auditor to provide auditing services to the City.

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

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

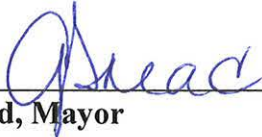
Section 2. The Agreement between the City of Marathon and Keefe, McCullough & Co., LLP for auditing services for the City (the "Agreement"), a copy of which is attached as Exhibit "A," together with such non-material changes as may be acceptable to the City Manager and approved as to form and legality by the City Attorney, is hereby approved.

Section 3. The Acting City Manager is authorized to execute the Agreement on behalf of the City, and expend budgeted funds to implement the terms and conditions of the Agreement.

Section 4. This Resolution shall become effective immediately upon its adoption.

PASSED AND APPROVED by the City Council of the City of Marathon, Florida, this 10th day of November, 2009.

CITY OF MARATHON, FLORIDA



Ginger Snead, Mayor

AYES: Cinque, Keating, Ramsay, Worthington, Snead
NOES: None
ABSENT: None
ABSTAIN: None

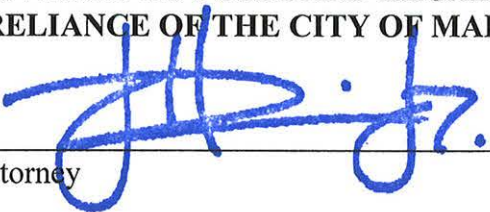
ATTEST:



Diane Clavier, City Clerk

(City Seal)

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



City Attorney

CONTRACT FOR PROFESSIONAL SERVICES

THIS AGREEMENT is made and entered into this _____ day of November, 2009, by and between the City of Marathon, a Florida municipal corporation (the "City"), and Keefe, McCullough & Co., LLP ("Auditor").

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties agree as follows:

1. AUTHORIZATION

1.1 The Auditor shall provide the services specified in the Scope of Services to the City, in accordance with the Generally Accepted Governmental Accounting Principles.

1.2 The City Manager and the Finance Director shall be responsible for the direction and supervision of the Auditor.

2. SCOPE OF SERVICES

Auditor shall provide the following services to the City:

2.1 General Purpose Financial Statements

2.1.1 The Auditor will express an opinion on the fair presentation of the City's general purpose financial statements in conformity with generally accepted accounting principles and meeting the requirements of Section 218.39, Florida Statutes.

2.2 Reports to be Issued.

Following the completion of the audit of the fiscal year's financial statements, Auditor shall compile the financial statements and footnotes based on information provided by the City. In addition, Auditor shall prepare reports as

2.2.1 A report on the fair representation of the general purpose financial statements in conformity with generally accepted accounting principles.

2.2.2 A report on internal control over financial reporting and compliance and other matters based on an audit of financial statements performed in accordance *Government Auditing Standards*.

2.2.3 A report on compliance and internal control over compliance applicable to each major federal awards program and state financial

2.2.4 A management letter in accordance with the Rules of the Auditor General of the State of Florida.

- 2.2.5 A report on compliance with requirements to the Gas Tax Sharing Interlocal Agreement for the fiscal year ending September 30, 2009.
- 2.2.6 In the required reports on internal controls, the auditor shall communicate any control deficiencies found during the audit. A control deficiency exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent or detect misstatements on a timely basis.
- 2.2.7 A significant deficiency is a control deficiency, or combination of control deficiencies, that adversely affects the City's ability to initiate, authorize, record, process, or report financial data reliably in accordance with generally accepted accounting principles such that there is more than a remote likelihood that a misstatement of the City's financial statements that is more an inconsequential will not be prevented or detected by the City's internal control.
- 2.2.8 A material weakness is a significant deficiency, or combination of significant deficiencies, that results in more than a remote likelihood that a material misstatement of the financial statements will not be prevented or detected by the City's internal control.
- 2.2.9 The report on compliance shall include all material instances of noncompliance. All nonmaterial instances of noncompliance shall be reported in a separate management letter, which shall be referred to in the report on compliance.

2.3 Irregularities and Illegal Acts

- 2.3.1 Auditor shall be required to make an immediate, written report of all irregularities and illegal acts of which they become aware to the appropriate City personnel (which may include the City Manager, the Finance Director and the City Council) as well as the City Attorney.

2.4 Proposal for Auditing Services

- 2.4.1 Auditor's Proposal for Auditing Services dated September 11, 2009, shall be incorporated into this Agreement thereby binding Auditor and the City to the terms contained therein.

3. COMPENSATION

- 3.1 For all services provided by Auditor as described in Section 2 of this Agreement, the City shall compensate Auditor at the annual rate of \$46,000 for the 2009 fiscal year, \$48,000 for the 2010 fiscal year, and \$50,000 for the 2011 fiscal year. The Auditor shall provide the City with a monthly invoice.
- 3.2 In the event the Auditor continues under this Agreement's option for continuation, the City shall compensate the Auditor \$52,000 for the 2012 fiscal year and \$54,000 for the 2013 fiscal year.
- 3.3 Auditor commits to these amounts being "total all-inclusive maximum fees" for each of the audit years. In the event that Auditor's monthly invoices for a fiscal year total a lesser amount than the "total all-inclusive maximum fees" the City shall be under no obligation to pay a greater amount than that of the combined invoices for each fiscal year..

Payments and reimbursements due under this section shall be paid by the City in accordance with the Florida Prompt Payment Act.

4. RECORDS/RIGHT TO INSPECT AND AUDIT

- 4.1 All records, books, documents papers and financial information (the "Records") that result from Auditor providing services to the City under this Agreement shall be the property of the City.
- 4.2 Upon termination or expiration of this Agreement, or at any time upon the written request of the City Manager, any and all such Records shall be delivered to the City by Auditor within 15 calendar days from the date of the request.
- 4.3 Auditor shall maintain records, books, documents, papers and financial information pertaining to work performed under this Agreement during the term of this Agreement and for a period of five (5) years following termination of this Agreement unless the Auditor is notified in writing by the City of the need to extend the retention period.
- 4.4 The City Manager or his designee shall, during the term of this Agreement and for a period of five (5) years from the date of termination of this Agreement, have access to and the right to examine and audit any Records of Auditor involving transactions related to this Agreement.
- 4.5 The City may cancel this Agreement for refusal by Auditor 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.

5. INDEMNIFICATION

- 5.1. Auditor shall defend, indemnify, and hold harmless the City, its officers, agents and employees, from and against any and all demands, claims, losses, suits, liabilities, causes of action, judgment or damages, arising out of, related to, or in any way connected with Auditor's performance or non-performance of any provision of this Agreement including, but not limited to, liabilities arising from contracts between the Auditor and third parties made pursuant to this Agreement. Auditor shall reimburse the City for all its expenses including reasonable attorney fees and costs incurred in and about the defense of any such claim or investigation and for any judgment or damages arising out of, related to, or in any way connected with Auditor's performance or non-performance of this Agreement.
- 5.2. Auditor shall indemnify, defend and hold the City harmless from all losses, injuries or damages and wages or overtime compensation due its employees in rendering services pursuant to this Agreement, including payment of reasonable attorneys' fees and costs in the defense of any claim made under the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act or any employment related litigation brought under federal or state law.
- 5.3. The provisions of this section shall survive termination of this Agreement.

6. TERM

- 6.1. This Agreement shall become effective upon its execution and shall continue through the completion of the audit and reporting of the fiscal year ending September 30, 2011, unless earlier terminated as provided in Section 7.
- 6.2. The City shall have the option to continue this Agreement for the auditing of the two fiscal years ending September 30, 2012 and 2013 respectively upon the same terms and conditions contained herein upon 30 calendar days written notice to Auditor. Thereafter, any renewal shall be in writing and executed by both parties.

7. TERMINATION

- 7.1. The City may elect to terminate this Agreement by giving Auditor written notice at least 90 days prior to the effective date of termination. Upon receipt of a written notice of termination, Auditor shall not enter into any third party agreements or incur any financial obligations or expenses unless such expenses are specifically approved or directed in writing by the City Manager.
- 7.2. Auditor may terminate this Agreement by giving the City written notice at least 90 calendar days prior to the effective date of termination.

- 7.3. In the event of termination or expiration of this Agreement, Auditor and the City shall cooperate in good faith in order to effectuate a smooth and harmonious transition from Auditor 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 this Agreement.
- 7.4. Auditor will take all reasonable and necessary actions to transfer all books, records and data of the City in its possession in an orderly fashion to either the City or its designee in a hard copy and computer format.
- 7.5. Subsequent to the termination of this Agreement, Auditor 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. Auditor shall be compensated for any such post-termination services on an hourly basis not to exceed \$150.00 per hour.

8. ENTIRE AGREEMENT/MODIFICATION/AMENDMENT

- 8.1. 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.
- 8.2. 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.

9. INSURANCE

- 9.1 Auditor shall maintain at its sole cost and expense all times, in addition to any other insurance the City may reasonably require, professional liability insurance, employee dishonesty insurance, employer's liability insurance, comprehensive general liability insurance and automotive liability insurance with minimum policy limits for each coverage in the amount of One Million Dollars (\$1,000,000.00) per occurrence, single limit for property damage and bodily injury, including death. The City shall be named as an additional insured in the above policies, unless prohibited by law, and Auditor shall provide the City with a certificate evidencing same. Each policy shall also state that it is not subject to cancellation, modification, or reduction in coverage without thirty (30) days written notice to the City prior to the effective date of cancellation, modification, or reduction in coverage.
- 9.2 Auditor shall maintain Worker's Compensation insurance at the statutory minimums required by Chapter 440, Florida Statutes.

- 9.3 Auditor shall maintain each of the above insurance policies throughout the term of this Agreement and any extensions of this Agreement.
- 9.4 Auditor shall provide City with a current copy of each of the above insurance policies, and any renewals.

10. SEVERABILITY

- 10.1. 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.

11. GOVERNING LAW

- 11.1. 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.

12. WAIVER

- 12.1. 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.

13. NOTICES/AUTHORIZED REPRESENTATIVES

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

For the City:

City of Marathon
Attention: Peter Rosasco, Acting City Manager
9805 Overseas Highway
Marathon, Florida 33050
Telephone: (305) 743-0033
Facsimile: (305) 743-3667

With a copy to:

Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A..

Attention: John R. Herin, Esq.
150 W. Flagler Street, Suite 2200
Miami, FL 33130
Telephone: (305) 789-3532
Facsimile: (305) 789-3395

For Auditor:

Keefe, McCullough & Co., LLP
Attention: Cynthia L. Calvert, CPA
6550 North Federal Highway, Suite 410
Fort Lauderdale, Florida 33308
Telephone: (954) 771-0896
Facsimile: (954) 938-9353

Either party shall have the right to change its address for notice purposes by sending written notice of such change of address to the other party in accordance with the provisions hereof.

14. INDEPENDENT CONTRACTOR

- 14.1. Auditor is and shall remain an independent contractor and is not an employee or agent of the City. Services provided by Auditor shall be by employees of Auditor working under the supervision and direction of Auditor and nothing in this Agreement shall in any way be interpreted or construed to deem said employees to be agents, employees, or representatives of the City. Auditor agrees that it is a separate and independent enterprise from the City.
- 14.2. Auditor shall be responsible for all compensation, tax responsibilities, insurance benefits, other employee benefits, and any other status or rights of its employees during the course of their employment with Auditor. This Agreement shall not be construed as creating any joint employment relationship between Auditor and the City, and the City will not be liable for any obligation incurred by Auditor, including but not limited to, unpaid minimum wages and/or overtime payments.

15. ASSIGNMENT

- 15.1. The parties agree that the professional services of Keefe, McCullough & Co. are personal in nature and are considered material to the performance of Auditor's obligation under this Agreement. Accordingly, this Agreement shall not be assignable by Auditor unless such assignment is first approved by the City Council at the City's sole discretion.

16. PROHIBITION AGAINST CONTINGENT FEES

16.1. Auditor warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for Auditor, 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 Auditor, any fee, commission, percentage, gift, or any other consideration, contingent upon or resulting from the award or making of this Agreement.

17. WARRANTIES OF AUDITOR

17.1. Auditor warrants and represents that at all time during the term of this Agreement it shall maintain in good standing all licenses and certificates required under federal, state and local laws necessary to perform the Scope of Services specified in this Agreement, including but not limited to maintaining any required software registration and licensing.

17.2 Auditor warrants and represents that its employees providing services to the City under this Agreement will abide by the applicable Code of Ethics for Public Officers and employees, Chapter 112 Florida Statutes, as it may be amended from time to time.

18. ATTORNEYS FEES

18.1 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.

19. WAIVER OF JURY TRIAL

19.1 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.

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IN WITNESS WHEREOF the undersigned parties have executed this Agreement on the date indicated above.

WITNESSES:

Keefe, McCullough & Co.



Print Name: Pamela Von Tersch

By: Cynthia L. Calvert, CPA
Print Name: Cynthia L. Calvert, CPA

Beth C. Anderson
Print Name: Beth C. Anderson Date: 11/18/09

ATTEST:

CITY OF MARATHON


City Clerk

By: Peter Rosasco
Peter Rosasco, Acting City Manager
Date: 11-13-09

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


City Attorney