

**CITY OF MARATHON, FLORIDA  
RESOLUTION 2011-26**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA, APPROVING A FIRST AMENDMENT TO ASSIGNMENT AND ASSUMPTION OF CONTRACT DATED DECEMBER 14, 2010, BETWEEN THE CITY OF MARATHON AND FOUNTAIN ENGINEERING, INC. IN THE ORIGINAL AMOUNT OF \$3,178,745.48; AUTHORIZING THE CITY MANAGER TO EXECUTE THE FIRST AMENDMENT AND EXPEND BUDGETED FUNDS ON BEHALF OF THE CITY; AND PROVIDING FOR AN EFFECTIVE DATE**

**WHEREAS**, pursuant to Resolution No. 2010-131, the City of Marathon (the "City") and Fountain Engineering, Inc. ("Fountain"), entered into an Assignment and Assumption of Contract Agreement (the "Agreement") for the completion of the Service Area 3 stormwater and wastewater collection system (the "Project"); and

**WHEREAS**, subsequent to the execution of the Agreement Fountain advised the City that its bonding company, Hanover Insurance Company, did not want to be a signatory to the Agreement, but would still furnish new payment and performance bonds for the Project; and

**WHEREAS**, the City and Fountain desire to amend the Agreement to memorialize the foregoing and clarify certain other issues the parties have agreed to (the "First Amendment").

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

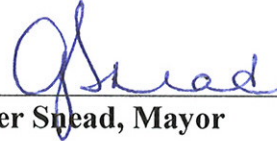
**Section 1.** The above recitals are true and correct and incorporated herein.

**Section 2.** The First Amendment to the Agreement between the City and Fountain, 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 by the City Attorney, is hereby approved. The City Manager is authorized to execute the First Amendment and expend budgeted funds on behalf of the City.

**Section 3.** This resolution shall take effect immediately upon its adoption.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA, THIS 29<sup>th</sup> DAY OF MARCH, 2011.

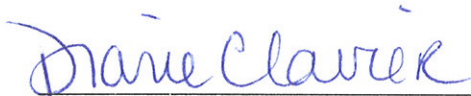
THE CITY OF MARATHON, FLORIDA



Ginger Snead, Mayor

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

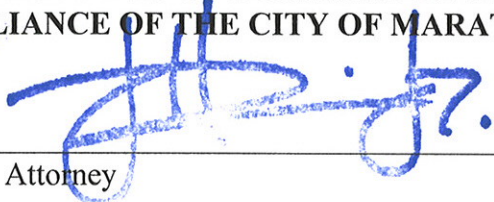
ATTEST:



Diane Clavier, City Clerk

(City Seal)

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



City Attorney

**FIRST AMENDMENT TO ASSIGNMENT AND ASSUMPTION OF CONTRACT  
BETWEEN THE CITY OF MARATHON, FLORIDA AND FOUNTAIN  
ENGINEERING, INC., DATED FEBRUARY 24, 2011**

This First Amendment to the Assignment and Assumption of Contract is made and entered into on this 29<sup>th</sup> day of March, 2011, by and between the City of Marathon, Florida, a municipal corporation of the State of Florida ("City") and Fountain Engineering, Inc. ("Fountain"), a Florida corporation.

**WHEREAS**, pursuant to Resolution No. 2010-131 the City and Fountain entered into an Assignment and Assumption of Contract ("Assignment"). A copy of the Assignment is attached hereto as Exhibit "A" and incorporated by this reference; and

**WHEREAS**, the City and Fountain desire to amend the Assignment as set forth herein.

**NOW THEREFORE**, in consideration of the mutual covenants set forth in this First Amendment, the parties agree as follows:<sup>1</sup>

**Section 1. Amendment to Name of Assignee.** The parties hereby amend the name of the Assignee to "Fountain Engineering, Inc." from "Fountain."

**Section 2. Amendment to 5<sup>th</sup> Whereas Clause.** The parties hereby amend the 5<sup>th</sup> "Whereas Clause" as follows:

WHEREAS, Assignor desires to assign to Assignee, and Assignee desires to accept from Assignor, all of Assignor's Conquest Engineering's rights and obligations under the Contract As Amended; and

**Section 3. Amendment to Section 1 of the Assignment.** The parties hereby amend Section 1 of the Contract to read as follows:

**1.** Assignee hereby accepts said assignments, and assumes and agrees to be bound by all obligations and liabilities of ~~Assignor~~ Conquest Engineering arising under or with respect to the Contract As Amended, only from and after the date hereof. Nothing herein shall be deemed to extend a warranty in the City's favor with respect to work performed by Conquest Engineering. Fountain, however, shall be responsible for and warrant all work performed by Fountain, including any repair or remedial work performed by Fountain on work installed by Conquest Engineering.

**Section 4. Amendment to Section 3 of the Assignment.** The parties hereby amend Section 3 of the Assignment to read as follows:

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<sup>1</sup> / Additions to existing text are shown by underline, and deletions are shown as ~~striketrough~~.

3. Assignee shall begin the work required hereunder no later than ~~January 3~~ March 30, 2011 (the "Commencement Date"). The work required hereunder shall be substantially completed within two hundred forty (~~210~~ 240) calendar days of the Commencement Date, and completed and ready for final payment in accordance with the Contract Documents within two hundred seventy (270) calendar days of the Commencement Date. Assignee shall work full time, in a workman like manner and in accordance with the requirements of the Contract, from the Commencement Date and is hereby granted a non compensatory time extension from the original completion date in the Contract. As consideration for the non compensatory time extension, the Assignee hereby waives any right to any claim for any additional time extensions and/or damages as a result of any delays which may have been caused by the Owner or other contractors up to and including ~~the date of this Assignment~~ March 1, 2011.

**Section 5. Amendment to Section 5 of the Assignment.** The parties hereby amend Section 5 of the Assignment to read as follows:

5. While the City and Fountain understand and represent that the Hanover Insurance Company shall not be a party to the Assignment, Fountain warrants and represents that tThe Hanover Insurance Company consents to this Assignment and agrees to be bound to the City in accordance with the terms of the Payment and Performance Bonds attached hereto as Exhibit "B" including all work performed by Fountain called for by the Contract As Amended. The Hanover Insurance Company agrees to issue new Payment or Performance Bonds to reflect the value of this Assignment, and all work to be performed by Fountain called for by the Assignment.

**Section 6. Addition of Section 10 to the Assignment.** The parties hereby add Section 10 to the Assignment as follows:

10. The Parties acknowledge that the scope of Fountain's work is stated in the Schedule of Values which supersedes and amends the Contract to the extent the Contract is inconsistent with the Schedule of Values.

**Section 7. Addition of Section 11 to the Assignment.** The parties hereby add Section 11 to the Assignment as follows:

11. The City represents that it has the authority to assign the Conquest contract to Fountain and will hold harmless and indemnify Fountain from and for any claims, including attorneys' fees and costs of defense, made by or through the rights of Conquest under the Contract including the claims of any subcontractors, suppliers, employees and independent contractors and other claims resulting from Conquest's work for the City.

**Section 8. Addition of Section 12 to the Assignment.** The parties hereby add Section 12 to the Assignment as follows:

12. The parties acknowledge a scrivener's error in Item 48 of the Schedule of Values, and agree to amend the error with a change order in the amount of \$14,021.42, which shall be submitted to the City Council for approval.

**Section 9. Addition of Section 13 to the Assignment.** The parties hereby add Section 13 to the Assignment as follows:

13. Fountain represents that all change orders and contract documents, as defined in Paragraph 8.1 of the Contract were made available to Fountain for inspection prior to the date of this First Amendment.

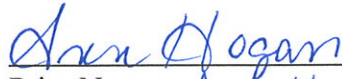
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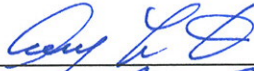
**EXCEPT AS PROVIDED HEREIN**, all other terms and conditions of the ASSIGNMENT AND ASSUMPTION OF CONTRACT dated February 24, 2011 remain in full force and effect.

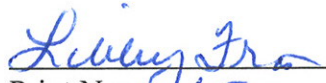
**DATED** this 29<sup>th</sup> day of March, 2011.

**WITNESSES:**

**FOUTNAIN ENGINEERING, INC.**

  
Print Name: Ann Hogan

By:   
Print Name: Amy Fountain  
Title: President

  
Print Name: L. Frazer

**THE CITY OF MARATHON, FLORIDA**

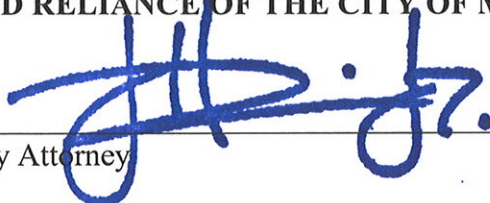
  
**Roger T. Hernstadt, City Manager**

**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