

**CITY OF MARATHON, FLORIDA
RESOLUTION 2012-125**

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA, APPROVING AN AGREEMENT RESOLVING CERTAIN CLAIMS BETWEEN CITY AND FOUNTAIN ENGINEERING, INC., RELATING TO THE CONSTRUCTION OF THE SERVICE AREA 7 WASTEWATER AND STORMWATER COLLECTION SYSTEM PROJECT; PRESERVING CLAIMS FOR ADDITIONAL COMPENSATION FOR THE CONSTRUCTION OF SWALES; OVER TRENCHING EXCAVATION; AND EXCESSIVE MAINTENANCE OF TRAFFIC REQUIREMENTS; PROVIDING THAT ALL OTHER CLAIMS ARE WAIVED AND RELEASED, AUTHORIZING THE CITY MANAGER TO EXECUTION THE AGREEMENT AND APPROPRIATE FUNDS ON BEHALF OF THE CITY AT THE TIME OF SETTLEMENT; AND PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, City of Marathon (the “City”) and Fountain Engineering, Inc. (“Fountain”) entered into a contract for the construction of the Service Area 7 Wastewater and Stormwater Collection System project (“Contract”); and

WHEREAS, subsequent thereto the City and Fountain entered into various Change Orders to the Contract, several of which increased the overall cost of the project; and

WHEREAS, Fountain has submitted claims to City for additional compensation for the performance of alleged extra work and delays above and beyond the previously approved Change Orders (“Fountain Claims”); and as a result, the City has withheld payment of monies to Fountain pending the resolution of these outstanding claims; and

WHEREAS, City disputes the Fountain Claims to the extent said claims have not been waived or otherwise eliminated in accordance with the Contract; and

WHEREAS, the City and Fountain have agreed for City to release and disburse all funds previously approved via progress payments, including previously approved Change Order work that has been performed and included within previous progress payments to Fountain with each party to reserve their respective rights, claims and defenses against one another as to the Fountain Claim only.

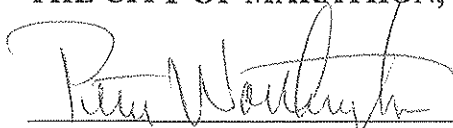
NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA, THAT:

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

Section 2. The Agreement for Resolution of Pending Claims attached hereto as Exhibit "A", between the City and Fountain is hereby approved. The Mayor is authorized to sign the Agreement on behalf of the City, and the City Manager is authorized to expend budgeted funds on behalf of the City.

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

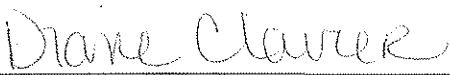
PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA, THIS 23rd DAY OF OCTOBER, 2012.

THE CITY OF MARATHON, FLORIDA


Pete Worthington, Mayor

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

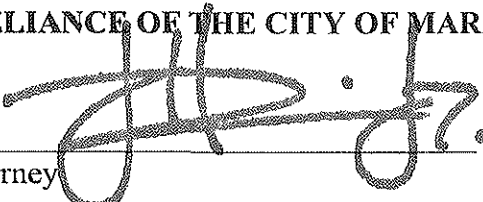
ATTEST:



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

AGREEMENT FOR RESOLUTION OF PENDING CLAIMS

THIS AGREEMENT entered into this 11th day of October, 2012, by and between the City of Marathon, Florida, a Florida municipal corporation ("City") and Fountain Engineering, Inc., a Florida corporation ("Fountain").

WHEREAS, City and Fountain entered into a contract for the construction of the Service Area 7 Wastewater and Stormwater Collection System project ("Contract"); and

WHEREAS, Fountain has submitted claims to City for additional costs for the performance of extra work and for delays as set forth in paragraph 4 herein ("Fountain Claims"); and

WHEREAS, City disputes the Fountain Claims to the extent said claims have not been waived or otherwise eliminated in accordance with the Contract; and

WHEREAS, the City and Fountain have agreed for City to release and disburse all funds previously approved via progress payments, including previously approved Change Order work that has been performed and included within previous progress payments to Fountain with each party to reserve their respective rights, claims and defenses against one another as to the Fountain Claim only, to the extent said rights, claims and defenses have not been waived or otherwise eliminated in accordance with the Contract as set forth herein; and City's claims against Fountain's performance bond surety, to the extent said rights, claims and defenses have not been waived or otherwise eliminated in accordance with the Contract.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. City will disburse to Fountain all funds previously approved via progress payments, which may include a reduction of retainage via an expedited progress payment, within ten business days of the date that this Agreement is executed by both parties.
2. As a condition to the disbursement of payment by City, Fountain will provide releases of claims for all subcontracted work performed or a Consent of Surety to City whereby Fountain's surety will consent to the City's reservation of rights, claims and defenses under the Contract and this Agreement, to the extent said rights, claims and defenses have not been waived or otherwise eliminated in accordance with the Contract.
3. As an additional condition to the disbursement of payment by City, Fountain will provide City with a Contractor's Affidavit acknowledging the receipt of such payment and setting forth any subcontractors and/or suppliers that are owed funds for

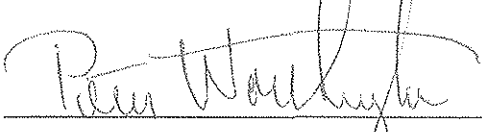
work performed or materials supplied on the Project. Fountain warrants and represents that Releases from all other subcontractors and suppliers not listed in the Contractor's Affidavit have previously been provided to City. Contemporaneous with the receipt of the funds from City, Fountain will issue payment of the amounts set forth in the Contractor's Affidavit to each subcontractor and/or supplier set forth therein and obtain either a Partial or Final Release, whichever is appropriate, a copy of which will then be provided to City.

4. City and Fountain represent that the Fountain Claim is limited to:
 - a. Claim for additional compensation arising from the construction of swales where no wastewater transmission pipe was installed; not to exceed \$146,109.42.
 - b. Claim for additional compensation arising from over trenching excavation: not to exceed \$71,517.39.
 - c. Claim of additional compensation for excessive Maintenance of Traffic requirements associated with the Overseas Hwy. FDOT Permit No. 2011 H 692 57 (US 1 Corridor); not to exceed \$18,000.00.

Except for the preceding items a., b., and c., all other claims that either the City or Fountain may have against the other, to the date of this Agreement, are hereby waived and released including, but not limited to, any claims either may have for delays, delay related damages and/or liquidated damages, as well as any claims that Fountain may have against City for damages (including interest), relating to the release of the funds pursuant to this Agreement.


5. Only as to the Fountain Claim, both City and Fountain reserve all of their rights, claims and defenses, to the extent said rights, claims and defenses have not been waived or otherwise eliminated in accordance with the Contract, arising out of the Fountain Claim, and the disbursement of the funds by City and the acceptance of same by Fountain will not impact or otherwise impair any such right, claim or defense.
6. City and Fountain agree the outstanding items of the Fountain Claim shall be attempted to be resolved by meet and confer sessions between representatives of each of the parties, which sessions will be conducted and completed within ninety (90) days of the date of approval of this Agreement. If the issue or issues cannot be resolved to the satisfaction of the parties, then City and Fountain agree to submit the Fountain Claim (or any of its unresolved sub-parts) to pre-suit mediation, which shall be conducted within one hundred twenty (120) days of the completion of the meet and confer session(s). Thereafter, any party shall have the right to seek such relief or remedy as may be provided by Florida law.

CITY OF MARATHON, FLORIDA



Pete Worthington, Mayor

FOUNTAIN ENGINEERING, INC.



Eric Brown President
Print Name

ATTEST:



Diane Clavier, City Clerk

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



City Attorney