



## **AGREEMENT**

For

**NORWOOD BAFFLE BOX RETROFIT**

### **Contractor**

Don Luchetti Construction, Inc

### **Contact Information**

Don Luchetti, President

565 Distribution Dr, Melbourne, FL 32904

Phone Number: 321-951-2947

[krista@donluchetticonstruction.com](mailto:krista@donluchetticonstruction.com)

## SECTION 00500

### AGREEMENT

THIS AGREEMENT made and entered as of the date of the final signature below and effective the date the notice to proceed is issued, by and between the City of Palm Bay, 120 Malabar Road, SE, Palm Bay, FL 32907 a Florida municipal corporation (CITY) and Don Luchetti Construction, Inc (FEIN 59-2820834) located at 565 Distribution Dr, Melbourne, FL 32904, (CONTRACTOR), (Parties);

WHEREAS, the CITY desires to retain the CONTRACTOR for the Project described as **Norwood Baffle Box Retrofit**, and,

WHEREAS, the CONTRACTOR has expressed its willingness, ability, capability, experience and time to perform the necessary Work to accomplish the Project at the cost proposed by the CONTRACTOR.

NOW, THEREFORE, the CITY and the CONTRACTOR, in consideration of the mutual covenants and conditions contained herein and for other good and valuable consideration, the receipt and sufficiency is hereby acknowledged, agree as follows:

### ARTICLE 1 – DEFINITIONS

Wherever used in this Agreement or in other Contract Documents, the following terms have the meanings indicated which are applicable to both the singular and plural forms:

- 1.1 Agreement - This written agreement between the CITY and the CONTRACTOR covering the Work to be performed at the cost proposed, including other Contract Documents that are attached to or incorporated in the Agreement.
- 1.2 Application for Payment - The form accepted by the CITY which is to be used by the CONTRACTOR in requesting progress or final payment and which is to include such supporting documentation as is required by the Contract Documents.
- 1.3 Approve - The word approve is defined to mean review of the material, equipment or methods for general compliance with the design concepts and with the information given in the Contract Documents. It does not imply a responsibility on the part of the CITY to verify in every detail conformance with plans and specifications.
- 1.4 Certificate of Substantial Completion - Certificate provided by the CITY certifying that all Work, excluding the punch list items, has been completed, inspected, and accepted by the CITY.
- 1.5 Change Order - A written order to the CONTRACTOR, signed by the CITY and the CONTRACTOR authorizing an addition, deletion or revision in the Work, or an adjustment in the Contract Price or the Contract Time issued on or after the Effective Date of the Agreement.
- 1.6 CITY - The City of Palm Bay, Florida, including but not limited to its employees, agents, officials, representative, contractors, subcontractors, volunteers, successors and assigns, with whom the CONTRACTOR has entered into the Agreement and for whom the Work is to be provided. The Project Manager, or designee, shall be the authorized agent for the CITY unless otherwise specified.
- 1.7 Contract Documents – The Contract Documents shall consist of the Drawings, Plans and Specifications, Notice to Proceed, Certificate(s) of Insurance, Construction Bonds and any additional documents that are required to be submitted under the Agreement, and all amendments, modifications and supplements, change orders and Work directive changes issued on or after the Effective Date of the Agreement; and as further determined in Article 4 of this Agreement.

- 1.8 Contract Price - The moneys payable by the CITY to the CONTRACTOR in the Agreement submitted by the CONTRACTOR to complete the Work and as stated in this Agreement.
- 1.9 Contract Time - The number of calendar days stated in the agreement for the completion of the Work. The dates on which the Work shall be started and shall be completed as stated in the Notice to Proceed.
- 1.10 CONTRACTOR - The person, firm or corporation with whom the CITY has entered into the Agreement, including but not limited to its employees, agents, representatives, contractors, subcontractors, their subcontractors and their other successors and assigns.
- 1.11 Cost of the Work - means the sum to be paid for the construction and completion of the Work in accordance with this Agreement. (See Contract Price)
- 1.12 Day - A calendar day of twenty-four (24) hours ending at midnight.
- 1.13 Defective - An adjective which when modifying the word "Work" refers to Work that is unsatisfactory, faulty, or deficient, or does not conform to the Contract Documents or does not meet the requirements of any inspection, test or approval referred to in the Contract Documents, or has been damaged prior to the Project Manager's recommendation of final payment.
- 1.14 Effective Date of the Agreement - The date indicated in the Agreement on which it becomes effective, but if no such date is indicated, it means the date on which the Agreement is signed and delivered by the last of the Parties to sign and deliver.
- 1.15 Engineer of Record - A professional engineer who seals drawings, reports, or documents for the Work.
- 1.16 Final Completion Date - The date the Work is actually and finally completed, including completion of the final punch list, and delivered along with those items specified in the Agreement and the Work is inspected and accepted by the CITY.
- 1.17 Hazardous Materials - (HAZMAT): Any solid, liquid, or gaseous material that is toxic, flammable, radioactive, corrosive, chemically reactive, or unstable upon prolonged storage in quantities that could pose a threat to life, property, or the environment defined in Section 101(14) of Comprehensive Environmental Response, Compensation and Liability Act of 1980 and in 40 CFR 300.6). Also defined by 49 CFR 171.8 as a substance or material designated by the Secretary of Transportation to be capable of posing an unreasonable risk to health, safety, and property when transported in commerce and which has been so designated. See definition of hazardous substance.
- 1.18 Hazardous Substance - As defined by Section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act; any substance designated pursuant to Section 311(b) (2) (A) of the Clean Water Act; any element, compound, mixture, solution or substance designated pursuant to Section 102 identified under or listed pursuant to Section 3001 of the Solid Waste Disposal Act (but not including any waste listed under Section 307[a] of the Clean Water Act); any hazardous air pollutant listed under Section 112 of the Clean Air Act; and any imminently hazardous chemical substance or mixture pursuant to Section 7 of the Toxic Substances Control Act. The term does not include petroleum, including crude oil or any fraction thereof, which is not otherwise specifically listed or designated as a hazardous substance in the first sentence of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).
- 1.19 Hazardous Waste - Those solid wastes designated by OSHA in accordance with 40 CFR 261 due to the properties of ignitability, corrosivity, reactivity, or toxicity. Any material that is subject to the Hazardous Waste Manifest requirements of the EPA specified in 40 CFR Part 262.

- 1.20 Holidays - Those designated non-workdays as established by the City Council of the City of Palm Bay. Includes New Year's Day, Martin Luther King Jr. Day, President's Day, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving Day, day after Thanksgiving Day, Christmas Day, or any other holidays as approved by City Council.
- 1.21 Inspection - The term "inspection" and the act of inspecting means the examination of construction of the Work by the Project Manager or the Project Manager's designated representative to ensure that it conforms to the design concept and quality expressed in the plans and specifications. This term shall not be construed to mean supervision, superintending and/or overseeing.
- 1.22 Notice to Proceed - A written notice given by the CITY to the CONTRACTOR fixing the date on which the Contract Time will commence to run and on which the Contract Time will end.
- 1.23 Plans - The drawings which show the character and scope of the Work to be performed and which have been prepared or approved by the CITY and are referred to in the Contract Documents.
- 1.24 Pre-Construction Meeting – A meeting scheduled by the Project Manager following issuance of the Notice to Proceed. The purpose of the meeting is to discuss the project plans and specifications, any unusual conditions, federal or state requirements, permit requirements, training (if applicable), and any other items that will result in a better understanding among the involved parties. In addition, the CONTRACTOR will discuss the schedule of operation, type and adequacy of equipment, sources of labor and labor requirements, maintenance of traffic, and precautions for the safety of employees and the public. This meeting must be attended by the Project Manager, the CONTRACTOR, key subcontractors, the CITY inspector, and others as deemed necessary by the Project Manager.
- 1.25 Premises (otherwise known as Work Site) - means the lands, buildings, facilities, etc. upon which the Work is to be performed.
- 1.26 Project – The total construction of the Work to be provided as defined in the Contract Documents.
- 1.27 Project Manager – The employee of the City, or other designated individual who is herein referred to as the Project Manager, will assume all duties and responsibilities and will have the rights and authorities assigned to the Project Manager in the contract Documents in connection with completion of the Work in accordance with this Agreement.
- 1.28 Proposed Price – The amount proposed by the CONTRACTOR to complete all the Work, which amount induced the CITY to select the CONTRACTOR.
- 1.29 Punch List – The CITY's list of Work yet to be done or be corrected by the CONTRACTOR before the Final Completion date can be determined by the CITY.
- 1.30 Record Documents - A complete set of all specifications, drawings, addenda, modifications, shop drawings, submittals and samples annotated to show all changes made during the construction process.
- 1.31 Record Drawings or "As-Builts" - A set of drawings which show significant changes in the work made during construction and which are usually based on drawings marked up in the field and other data furnished by the contractor. These documents will be signed and sealed by the Engineer of Record or a Professional Land Surveyor licensed in the State of Florida.
- 1.32 Substantially Completed Date – A date that the CITY determines, after the CONTRACTOR has requested in writing, that the Work is ready for an inspection and issuance of a punch list for the Project.

- 1.33 Work - The entire, completed, delivered product or the various separately- identifiable parts thereof, required to be furnished under the Contract Documents. Work is the result of performing services, furnishing labor and furnishing and incorporating materials and equipment into the product, all as required by the Contract Documents.

## **ARTICLE 2 - SCOPE OF WORK**

- 2.1 The CONTRACTOR shall furnish and pay for all management, supervision, financing, labor, materials, tools, fuel, supplies, utilities, equipment, and services of any kind or type necessary to diligently, timely, and fully perform and complete all Work as specified or indicated in the Contract Documents in a good and workmanlike manner. The Project for which the Work under the Contract Documents may be the whole or only part is generally described as follows:

### **Norwood Baffle Box Retrofit**

- 2.2 All Work for the Project shall be constructed in accordance with the Drawings and Specifications.

## **ARTICLE 3 – PROJECT MANAGER**

- 3.1 The Project Manager is hereby designated by the CITY to be:

**Tim Roberts  
Utilities Department  
1050 Malabar Road  
Palm Bay, Florida 32907**

## **ARTICLE 4 - CONTRACT DOCUMENTS**

- 4.1 The Contract Documents, which comprise the entire Agreement between the CITY and CONTRACTOR, are incorporated into this Agreement, are made a part hereof and consist of the following:
- 4.1.1 This Agreement.
  - 4.1.2 Exhibits to this Agreement.
    - 4.1.2.1 Exhibit A – Plans/Scope of Work
    - 4.1.2.2 Exhibit B – Public Construction Bond
    - 4.1.2.3 Exhibit C – Cost Proposal
  - 4.1.3 Construction Bonds and Certificates of Insurance.
  - 4.1.4 Notice to Proceed.
  - 4.1.5 General Conditions as amended by the Supplementary Conditions.
  - 4.1.6 Technical Specifications.
  - 4.1.7 Plans
  - 4.1.8 All applicable provisions of State and Federal Law and any modification, including Change Orders or written amendments duly delivered after execution of Agreement.
  - 4.1.9 Schedule of Completion and Schedule of Values.
  - 4.1.10 Permits on file with the CITY and or those permits to be obtained shall be considered directive in nature and will be considered a part of this Agreement. A copy of all permits shall be given to the CITY for inclusion in the Contract Documents. Terms of permits shall be met prior to acceptance of the Work and release of the final payment.

- 4.1.11 There are no Contract Documents other than those listed in this Article 4. The Contract Documents may only be altered, amended, or repealed in accordance with the provisions of the terms of this Agreement.
- 4.2 In the event of any conflict between the documents or any ambiguity or missing specification or instruction, the following priority is established:
- Priority 1: Specific direction from the City Manager (or designee).
- Priority 2: This Agreement and any attachments.
- Priority 3: Schedule of Completion.
- 4.3 If during the performance of the Work, CONTRACTOR finds conflict, error, or discrepancy in the Contract Documents, CONTRACTOR shall report it to the Project Manager, in writing, within forty-eight (48) hours of the discovery of the conflict, error, or discrepancy. Before proceeding with the Work affected by the conflict, error, or discrepancy, Contractor shall obtain a written interpretation or clarification from the CITY.
- 4.4 It is the intent of the specifications and plans to describe a complete Project to be constructed in accordance with the Contract Documents. Any Work that may be reasonably inferred from the specifications or plans as being required to produce the intended result shall be supplied whether or not it is specifically called for. When words that have a well-known technical or trade meaning are used to describe Work, materials, or equipment, such words shall be interpreted in accordance with such meaning. Reference to standard specifications, manuals, or codes of any technical society, organization, or associations, or to the code of any governmental authority, whether such reference be specific or implied, shall mean the latest standard specification, manual, or code in effect as of the Effective Date of this Agreement, except as may be otherwise specifically stated. No provision, however, of any referenced standard specification, manual, or code (whether or not specifically incorporated by reference in the Contract Documents) shall change the duties and responsibilities of the CITY, the CONTRACTOR, or any of their agents, any subcontractors or employees from those set forth in the Contract Documents.

#### ARTICLE 5 – CONTRACT TIME

- 5.1 The CONTRACTOR recognizes that **TIME IS OF THE ESSENCE**. The Contract Time shall commence on the date set forth in a Notice to Proceed issued by the City to the Contractor. The Work shall be:
- Scope A – Utility Stabilization
- Substantially Completed** within **sixty (60)** calendar days after the date when the Contract Time commences to run as provided for in the Notice to Proceed, and
- Scope B – Baffle Box Replacement
- Substantially Completed** within **one hundred and eighty (180)** calendar days after the date when the Contract Time commences to run as provided for in the Notice to Proceed, and
- Finally completed on the **Final Completion Date** and ready for final payment in accordance with this Agreement within **two hundred and ten (210)** calendar days after the date when the Contract Time commences to run as provided in the Notice to Proceed.

## ARTICLE 6 - CONTRACT PRICE

- 6.1 CITY shall pay CONTRACTOR for performance of the Work in accordance with Article 7, subject to additions and deletions by Change Order as provided for in this Agreement, the sum, not to exceed **\$3,132,314.00**
- 6.2 The parties expressly agree that the Contract Price is a lump sum price, in accordance with those items in the proposal, which are subject to unit prices.
- 6.3 The Contract Price constitutes the compensation payable to CONTRACTOR for performing the Work plus any Work done pursuant to a Change Order. All duties responsibilities and obligations assigned to or undertaken by CONTRACTOR shall be at CONTRACTOR'S expense without change in the Contract Price.

## ARTICLE 7 - PAYMENT PROCEDURES

- 7.1 CONTRACTOR shall submit Applications for Payment in accordance with the Contract Documents.
- 7.2 Progress Payments. CITY shall make progress payments on account of the Contract Price on the basis of CONTRACTOR'S monthly Applications for Payment which shall be submitted by the CONTRACTOR between the first (1st) and the tenth (10th) day after the end of each calendar month for which payment is requested. All progress payments will be made on the basis of the progress of the Work completed and consistent with §218.735 Florida Statutes.
- 7.3 The CITY may withhold from each progress payment made to the CONTRACTOR an amount not exceeding five percent (5%) of the payment as retainage.
- 7.4 Prior to Final Completion, progress payments will be made in an amount not to exceed ninety-five percent (95%) of the value of Work completed, less in each case, the aggregate of payments previously made.
- 7.5 Final Payment. Upon achieving Final Completion of the Work in accordance with the Contract Documents, as they may be supplemented, the CITY shall pay CONTRACTOR an amount sufficient to increase total payments to one-hundred percent (100%) of the Contract Price as may be adjusted by liquidated damages and inspection fees owed by the CONTRACTOR, or other additional charges in accordance with the Contract Documents, unless the City has grounds, pursuant to §218.735(8)(c), *Fla. Stat.* for withholding all or a portion of the retainage payment; provided, however, not less than five percent (5%) of the Contract Price shall be retained until Record Drawings (as-builts), specifications, addenda, modifications and shop drawings, including all manufacturers' instructional and parts manuals are delivered to and accepted by the CITY.
- 7.6 The CITY shall make payment to the CONTRACTOR in accordance with the Local Government Prompt Payment Act, Chapter 218, Florida Statutes, to the extent outlined above and incorporated by reference herein, in its entirety.
- 7.7 The Owner, as a holder of a current Florida Consumer's Certificate Revenue, may elect to purchase materials and equipment for the Work directly from the supplier of such materials or equipment in order to achieve sales tax savings.

## ARTICLE 8 - CONTRACTOR'S REPRESENTATIONS

In order to induce the CITY to enter into this Agreement, CONTRACTOR makes the following representations upon which the CITY has relied:

- 8.1 CONTRACTOR is qualified in the field of public construction and in particular to perform the Work and services set forth in this Agreement.
- 8.2 CONTRACTOR has visited the Work site, has conducted extensive tests, examinations and investigations and represents and warrants a thorough and complete familiarization with the nature and extent of the Contract Documents, the Work, locality, soil conditions, moisture conditions and all year-round local weather and climate conditions (past and present), and, in reliance on such tests, examination, and investigations conducted by CONTRACTOR and the CONTRACTOR'S experts, has determined that no conditions exist that would in any manner affect the Proposed Price and that the Project can be completed for the Proposed Price submitted. Furthermore, CONTRACTOR warrants and confirms that it is totally familiar with, understands, and obligates CONTRACTOR to comply with all federal, state and local laws, ordinances, rules, regulations and all market conditions that affect or may affect the cost and price of materials and labor needed to fulfill all provisions of this Agreement or that in any manner may affect cost, progress or performance of the Work.
- 8.3 CONTRACTOR has also studied carefully all reports of investigations and tests of subsurface and latent physical conditions at the site or otherwise affecting cost, progress or performance of the Works, and finds and has further determined that no conditions exist that would in any manner affect the Proposed Price and that the Project can be completed for the Proposed Price submitted.
- 8.4 CONTRACTOR, on its own, has made or caused to be made examinations, investigations, tests and studies of reports and related data in addition to those referred to in Paragraphs 8.2 and 8.3, above, as CONTRACTOR deemed necessary-to perform the Work at the Contract Price set by the CONTRACTOR, within the Contract Time and in accordance with the other terms and conditions of the Contract Documents; and no additional examinations, investigations, tests, reports or similar data are, or will be, required by CONTRACTOR to assure that the Work can be done at the Contract Price set by the CONTRACTOR.
- 8.5 CONTRACTOR has correlated the results of all such tests, investigations, reports, observations, examinations, investigations, tests, reports and data conducted and compiled by the CONTRACTOR and the CONTRACTOR'S experts with the terms and conditions of the Contract Documents.
- 8.6 CONTRACTOR has given CITY written notice of all conflicts, errors, or discrepancies discovered in the Contract Documents and the written resolution of them by CITY is acceptable to the CONTRACTOR.
- 8.7 Labor:
- 8.7.1 The CONTRACTOR shall provide competent, suitable, qualified personnel to survey and lay out the Work and perform construction as required by the Contract Documents. The CONTRACTOR shall at all times maintain good discipline and order at the site.
- 8.7.2 The CONTRACTOR shall, at all times, have a competent superintendent, capable of reading and thoroughly understanding the drawings and specifications, as the CONTRACTOR'S agent on the Project, who shall, as the CONTRACTOR'S agent, supervise, direct and otherwise conduct the Work.
- 8.7.3 The CONTRACTOR shall designate its superintendent on the job to the CITY, in writing, immediately after receipt of the Notice to Proceed but no later than at the Pre-Construction Meeting. The CONTRACTOR understands and agrees that the superintendent's physical presence on the job site is indispensable to the successful completion of the Work. If the superintendent is absent from the job site, the Project Manager may deliver written notice

to the CONTRACTOR to stop Work or terminate the Contract in accordance with Article 17.

- 8.7.4 The CONTRACTOR shall assign personnel to the job site that have successfully completed training programs certified relative to trench safety, confined space and maintenance of traffic on all roadways and streets, public or private. A certified "competent person" shall be assigned to the job site daily and at all times. Personnel certified by the International Municipal Signal Association with Florida Department of Transportation qualifications are required to maintain traffic on all roadways and streets, public or private. Failure to pursue the Work with the properly certified supervisory staff may result in notice to stop Work or terminate the Contract in accordance with Article 17.

The CONTRACTOR will designate in writing all Certified personnel immediately after receipt of the Notice to Proceed, but no later than at the Pre-Construction Meeting.

- 8.7.5 The CONTRACTOR shall perform on the site, and with its own organization perform the equivalent to at least 50% of the total amount of the Work to be performed under this Contract. This percentage may be reduced by a Change Order if, during performance of the Work, the CONTRACTOR requests in writing a reduction and the Project Manager determines that the reduction would be to the advantage of the CITY.

8.8 Materials:

- 8.8.1 The CONTRACTOR shall furnish all materials, including but not limited to, equipment, labor, transportation, construction equipment and machinery, tools, appliances, fuel, power, light, heat, telephone, water and sanitary facilities, and all other facilities and incidentals necessary for the execution, testing, initial operation and completion of the Work.

- 8.8.2 All materials and equipment shall be new and of good quality, except as otherwise provided in the Contract Documents. Suppliers shall be selected and paid by the CONTRACTOR; the CITY reserves the right to approve all suppliers and materials.

8.9 Work Hours:

- 8.9.1 Except in connection with the safety or protection of persons, or the Work, or property at the site or adjacent thereto, and except if otherwise indicated, all Work at the site shall be performed during regular working hours between 7:00 a.m. and 6:00 p.m., Monday through Friday. The CONTRACTOR will not permit overtime Work or the performance of Work on Saturday, Sunday or any legal holiday (designated by the City of Palm Bay) without the Project Manager's written consent at least seventy-two (72) hours in advance of starting such Work.

- 8.9.2 If the Project Manager permits overtime Work, the CONTRACTOR shall pay for the additional charges to the CITY, as described herein, with respect to such overtime Work. Such additional charges shall be an additional cost and obligation of the CONTRACTOR and no extra payment shall be made to the CONTRACTOR for overtime Work. The cost to the CONTRACTOR to reimburse the CITY for overtime inspection is established at direct-labor and overtime costs for each person or inspector required. Incidental overtime costs for engineering, testing and other related services will also be charged to the CONTRACTOR at the actual rate accrued.

- 8.10 Patent Fees and Royalties: The CONTRACTOR shall pay all license fees and royalties and assume all costs incident to the use in the performance of the Work or the incorporation into the

Work, or any invention, design, process, product or device which is the subject of patent rights or copyrights held by others.

8.11 Permits: The CONTRACTOR shall obtain and pay for all permits and licenses. The CONTRACTOR shall pay all government charges which are applicable. It shall be the responsibility of the CONTRACTOR to secure and pay for all necessary licenses and permits of a permanent or temporary nature necessary for the prosecution and completion of the Work.

8.12 Laws and Regulations:

8.12.1 The CONTRACTOR shall give all notices and comply with the terms of this Agreement and all laws, ordinances, rules and regulations applicable to the Work. If the CONTRACTOR observes that the specifications or plans are at variance therewith, the CONTRACTOR shall give the Project Manager prompt written notice thereof, and any necessary changes shall be adjusted by an appropriate modification by Change Order.

8.12.2 If the CONTRACTOR performs any Work knowing or having reason to know that it is contrary to this Agreement and such laws, ordinance, rules and regulations, and without such notice to the Project Manager, the CONTRACTOR shall bear all costs, fees and penalties arising therefrom; and, it shall also be one of the CONTRACTOR'S primary responsibilities to make certain that the specifications and plans are in accordance with such laws, ordinances, rules and regulations.

8.13 Taxes: The CONTRACTOR shall pay all sales, consumer, use and other similar taxes required to be paid by him in accordance with all laws.

8.14 CONTRACTOR Use of Premises:

8.14.1 The CONTRACTOR shall confine construction equipment, the storage of materials and equipment and the operations of workmen to areas permitted by law, ordinances, permits and/or the requirements of the Contract Documents, and shall not encumber the premises with construction equipment or other materials or equipment.

8.14.2 The CONTRACTOR shall not enter upon private or public property for any purpose without first securing the written permission of the property owner, furnishing the Project Manager with a copy of said permission. This requirement will be strictly enforced, particularly with regard to such properties as may be utilized for storage or staging by the CONTRACTOR.

8.14.3 The CONTRACTOR shall conduct all Work in such a manner as to avoid and prevent damage to adjacent private or public property. Any damage to existing structures or property of any kind, including permanent reference markers or property corner markers, or the interruption of a telephone, telecommunications or utility service, shall be immediately repaired or restored by the CONTRACTOR promptly, at CONTRACTOR'S expense and no expense to the CITY.

8.14.4 The CONTRACTOR will preserve and protect all existing vegetation such as trees, shrubs and grass on or adjacent to the site which do not interfere with the Work, as determined by the Project Manager. The CONTRACTOR will be responsible for repairing or replacing anything damaged by the CONTRACTOR including but not limited to any trees, shrubs, lawns, landscaping and structures that may be damaged due to operation of equipment, stockpiling of materials, tracking of grass by equipment or other Work activity. The CONTRACTOR will be liable for and will be required to replace or restore at no expense to the CITY all structures and vegetation not protected or preserved as required herein that may be destroyed or damaged.

8.14.5 During the progress of the Work, the CONTRACTOR shall keep the premises free from accumulations of waste materials, rubbish and debris resulting from the Work. Upon the completion of the Work, or more frequently if so directed by the Project Manager, the CONTRACTOR shall remove all waste materials, rubbish and debris from and about the premises as well as all tools, appliances, construction equipment and machinery, and surplus materials, and shall leave the site clean and ready for occupancy by the CITY. The CONTRACTOR shall restore to their original condition those portions of the site not designated for alteration by the Contract Documents at no cost to the CITY.

8.15 Project Coordination:

8.15.1 The CONTRACTOR shall provide for the complete coordination of the construction effort. This shall include, but not be limited to, coordination of the following:

- Flow of material and equipment from suppliers.
- The interrelated Work with affected utility companies.
- The interrelated Work with the CITY where tie-ins to existing facilities are required.
- The effort of independent testing agencies.
- Notice to affected property owners as may be directed by the Project Manager.

8.15.2 Included with its coordination obligations, Contractor shall locate all existing roadways, railways, drainage facilities and utility services above, upon, or under the Project site, said roadways, railways, drainage facilities and utilities being referred to in this Section 2 as the "Utilities". Contractor shall contact the owners of all Utilities to determine the necessity for relocating or temporarily interrupting any Utilities during the construction of the Project. Contractor shall schedule and coordinate its Work around any such relocation or temporary service interruption. Contractor shall be responsible for properly shoring, supporting and protecting all Utilities at all times during the course of the Work.

8.16 Project Record Documents and As-Builts (Record Drawings): The CONTRACTOR shall keep one record copy of all specifications, plans, addenda, modifications, shop drawings and samples at the site, in good order and annotated to show all changes made during the construction process. These shall be available to the Project Manager for examination and shall be delivered to the Project Manager upon completion of the Work. Upon completion of the project and prior to final payment, an as-built (record drawings) of the Project shall be submitted to the Project Manager. The as-built drawings shall be signed and sealed by a Florida Registered Professional Surveyor and Mapper.

8.17 Safety and Protection:

8.17.1 The CONTRACTOR shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work. The CONTRACTOR shall take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury or loss to:

8.17.1.1 All employees working on the project and other persons who may be affected thereby.

8.17.1.2 All the Work and all materials or equipment to be incorporated therein, whether in storage on or off the site.

- 8.17.1.3 Other property at the site or adjacent thereto, including but not limited to trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.
- 8.17.2 The CONTRACTOR shall comply with all applicable laws, ordinances, rules, regulations and orders of any public body having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss; and shall erect and maintain all necessary safeguards for such safety and protection. The CONTRACTOR shall notify owners of adjacent property and utilities when prosecution of the Work may affect them at least seventy-two (72) hours in advance of commencing said Work (unless otherwise required). All damage, injury, or loss to any property caused, directly or indirectly, in whole or in part by the CONTRACTOR, any subcontractor or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, shall be remedied by the CONTRACTOR. The CONTRACTOR'S duties and responsibilities for the safety and protection of the Work shall continue until such time as all the Work is completed and accepted by the CITY.
- 8.17.3 The CONTRACTOR shall provide and maintain Work environments and procedures which will (1) safeguard the public and CITY personnel, property, materials, supplies, and equipment exposed to CONTRACTOR operations and activities; (2) avoid interruptions of CITY operations and delays in project completion dates; and (3) control costs in the performance of this Contract. The CONTRACTOR shall provide appropriate safety barricades, signs, and signal lights; comply with the standards established by the Secretary of Labor for OSHA; ensure that any additional measures the Project Manager determines to be necessary.
- 8.17.4 Whenever the Project Manager becomes aware of any noncompliance with the requirements of this Agreement or any conditions which pose a serious or imminent danger to the health or safety of the public or CITY personnel, the Project Manager shall notify the CONTRACTOR orally, with written confirmation, and request immediate corrective action. This notice, when delivered to the CONTRACTOR or the CONTRACTOR'S representative at the Premises, shall be deemed sufficient notice of the noncompliance and the corrective action required. After receiving the notice, the CONTRACTOR shall immediately take corrective action. If the CONTRACTOR fails or refuses to take corrective action promptly, the Project Manager may issue an order stopping all or part of the Work until satisfactory corrective action has been taken. The CONTRACTOR shall not be entitled to any equitable adjustment of the contract price or time because of any stop Work order issued under this Section.
- 8.18 Emergencies: In emergencies affecting the safety or protection of persons or the Work or property at the site or adjacent thereto, the CONTRACTOR, without special instruction or authorization from the CITY is obligated to act to prevent threatened damage, injury or loss. The CONTRACTOR shall give the Project Manager prompt written notice of any significant changes in the Work or deviations from the Contract Documents caused thereby.
- 8.19 Risk of Loss: The risk of loss, injury or destruction shall be on the CONTRACTOR until acceptance of the Work by the CITY. Title to the Work shall pass to the CITY upon acceptance of the Work by the CITY.
- 8.20 Environmental:
- 8.20.1 The CONTRACTOR and CONTRACTOR'S experts have fully examined and inspected the Premises and agree to accept the Premises in an "as is" physical condition. The CITY makes no representation or warranty of any kind, including but not limited to, any environmental problems or issues, pollution or contamination on, in or about the Work site. Further, CONTRACTOR and all entities claiming by, through or under the CONTRACTOR,

releases and discharges the CITY from any claim, demand, or cause of action arising out of or relating to the CONTRACTOR'S use, handling, storage, release, discharge, treatment, removal, transport, decontamination, cleanup, disposal and/or presence of any hazardous substances including asbestos on, under, from or about the Premises.

- 8.20.2 The CONTRACTOR shall not use, handle, store, discharge, treat, remove, transport, or dispose of Hazardous Substances including but not limited to asbestos at, in, upon, under, to or from the Premises until receipt of instructions from the CITY. At such time, a CITY-approved Change Order, which shall not include any profit to the CONTRACTOR, shall authorize the CONTRACTOR to perform such services needed to resolve any such hazardous substance issues.
- 8.20.3 The CONTRACTOR shall immediately deliver to the Project Manager complete copies of all notices, demands, or other communications received by the CONTRACTOR from any governmental or quasi-governmental authority or any insurance company or board of fire underwriters or like or similar entities regarding, in any manner, alleged violations or potential violations of any Environmental Law or otherwise asserting the existence or potential existence of any condition or activity on the Premises which is or could be dangerous to life, limb, property, or the environment.
- 8.20.4 For other and additional consideration, the CONTRACTOR hereby agrees, at its sole cost and expense, to indemnify and protect, defend, and hold harmless, the CITY, including but not limited to its respective employees, agents, officials, officers, volunteers, representatives, contractors and subcontractors, successors, and assigns (hereafter the CITY) from and against any and all claims, demands, losses, damages, costs, expenses, including but not limited to mitigation, restoration, and natural restoration expenses, liabilities, assessments, fines, penalties, charges, administrative and judicial proceedings and orders, judgments, causes of action, in law or in equity, remedial action requirements and/or enforcement actions of any kind, including, without limitation, attorneys' fees, expert fees and suit costs for trials and appeals directly or indirectly arising out of or attributable to, in whole or in part, the CONTRACTOR'S use, handling, storage, release, threatened release, discharge, treatment, removal, transport, decontamination, cleanup, disposal and/or presence of a Hazardous Substance on, under, from, to, or about the Premises or any of its employees, agents, invitees, contractors or subcontractors, or any other activity carried on or undertaken on or off the Premises by or on behalf of the CONTRACTOR in connection with the use, handling, storage, release, threatened release, discharge, treatment, mitigation, natural resource restoration, removal, transport, decontamination, cleanup, disposal and/or presence or any Hazardous Substance including asbestos located, transported, or present on, under, from, to, or about the Premises. This indemnity is intended to be operable under all laws that apply to this Agreement.
- 8.20.5 The scope of the CONTRACTOR'S indemnity obligations includes, but is not limited to: (a) all consequential damages; (b) the cost of any required or necessary repair, cleanup, or detoxification of the applicable real estate and the preparation and implementation of any closure, remedial or other required plan, including without limitation; (i) the costs of removal or remedial action incurred by the United States government or the State of Florida or response costs incurred by any other person, or damages from injury to, destruction of, or loss of, natural resources, including the cost of assessing such injury, destruction, or loss, incurred; (ii) the clean-up costs, fines, damages, or penalties incurred pursuant to any applicable provisions of law; and (iii) the cost and expenses of abatement, correction or cleanup, fines, damages, response costs, or penalties which arise from the provisions of any other statute, law, regulation, code, ordinance, or legal requirement, state or federal; and (c) liability for personal injury or property damage arising under any statutory or common law tort theory, including damages assessed for the maintenance of a public private nuisance, response costs, or for the carrying on of an abnormally dangerous activity.

- 8.21 No Damages for Delays: No interruption, interference, inefficiency, suspension or delay in the commencement or progress of the Work from any cause whatsoever, including those for which City may be responsible, in whole or in part, shall relieve Contractor of its duty to perform or give rise to any right to damages or additional compensation from City. Contractor expressly acknowledges and agrees that it shall receive no damages for delay. CONTRACTOR'S sole remedy, if any, against City will be the right to seek an extension to the Contract Time; provided, however, the granting of any such time extension shall not be a condition precedent to the aforementioned "No Damage for Delay" provision. This paragraph shall expressly apply to claims for early completion, as well as to claims based on late completion. In no event shall City be liable to Contractor whether in contract, warranty, tort (including negligence or strict liability) or otherwise for any extended corporate overhead impact, extended project overhead impacts, project support services, mobilization, demobilization, soft costs, lost profits, special, indirect, incidental, or consequential damages of any kind or nature whatsoever, related to or arising out of any interruption, interference, inefficiency, suspension, or delay in the commencement or progress of the Work.
- 8.22 Force Majeure and Extensions of Time: Should Contractor be obstructed or delayed in the prosecution of or completion of the Work as a result of unforeseeable causes beyond the control of Contractor, and not due to its fault or neglect, including, but not restricted to, acts of God or of the public enemy, acts of government, fires, floods, epidemics, quarantine regulation, strikes, lockouts, or weather conditions that are abnormal for the period of time in which the Contractor is seeking an extension, which could not have been reasonably anticipated and had an adverse impact on the critical path of the scheduled Work, Contractor shall notify City in writing within forty-eight (48) hours after the commencement of such delay, stating the cause or causes thereof, or be deemed to have waived any right which Contractor may have had to request a time extension. Notwithstanding the foregoing, the CONTRACTOR'S schedule shall allow the number of days it deems necessary for rain and bad weather when the Contractor prepares its schedule. Contractor and City acknowledge that any Project site rain gauge measurements will not be relied upon for determining rain fall amounts.
- 8.22.1 Notwithstanding the foregoing, the City shall have the right, at any time, whether or not Contractor is behind schedule, to order Contractor to accelerate its Work. In the event that the City orders Contractor to accelerate its Work and Contractor (i) is not behind schedule and (ii) believes that acceleration will increase the cost of performance, Contractor shall be required to submit a Claim for an increase Contract Time and Price pursuant to the Contract Documents. Any such Claim shall be based exclusively and solely on actual and direct increased field costs associated with such acceleration only.
- 8.22.2 Inclement weather, continuous rain for less than three (3) consecutive days or the acts or omissions of subcontractors, third-party contractors, materialmen, suppliers or their subcontractors, shall not be considered acts of force majeure.
- 8.23 All of CONTRACTOR'S duties, obligations, and responsibilities set forth in the Contract Documents shall flow down and apply equally to all the CONTRACTOR'S subcontractors and suppliers in the same manner as the Contractor is bound to the City. CONTRACTOR shall be obligated to inform all subcontractors of all the provisions of this Agreement, provide them with a copy of this Agreement, obtain written proof thereof, and ensure that all subcontracts contain a similar flow down provision binding the subcontractor to the Contractor in the same way that the Contractor is bound to the City.

#### **ARTICLE 9 – CITY'S RESPONSIBILITIES**

- 9.1 The CITY shall furnish the data required of the CITY under the Contract Documents promptly and shall make payments to the CONTRACTOR after they are due as provided in Article 7.
- 9.2 The CITY's duties in respect of providing lands and easements and providing engineering surveys to establish reference points are set forth in the Contract Documents.

9.3 Technical Clarifications and Interpretations:

9.3.1 The CITY shall issue such written clarifications or interpretations of the Contract Documents as it may determine necessary, which shall be consistent with or reasonably inferable from the overall intent of the Contract Documents. Should the CONTRACTOR fail to request interpretation of questionable items in the Contract Documents, the CITY shall not entertain any excuse for failure to execute the Work in a satisfactory manner.

9.3.2 The CITY shall interpret and decide matters concerning performance under the requirements of the Contract Documents, and shall make decisions on all claims, disputes or other matters in question. Written notice of each claim, dispute or other matter will be delivered by claimant to the other Party but in no event later than five (5) days after the occurrence of the event and written supporting data will be submitted to the other Party within five (5) days after such occurrence. All written decisions of the CITY on any claim or dispute will be final and binding.

9.4 The CONTRACTOR shall perform all Work to the satisfaction of the CITY in accord with the Contract Documents and not to exceed the Contract Price. In cases of disagreement or ambiguity, the CITY shall decide all questions, difficulties, and disputes of whatever nature, which may arise under or by reason of this Agreement, or the quality, amount and value of the Work, and the CITY's decisions on all claims, questions and determination are final.

**ARTICLE 10 - BONDS AND INSURANCE**

10.1 Bonds: The CONTRACTOR shall furnish certified copy of the recorded Construction Bonds meeting the approval of the CITY, each in an amount at least equal to the Contract Price as security for the faithful performance and payment of all the CONTRACTOR'S obligations under the Contract Documents. The CITY will not make a payment to the CONTRACTOR until the CONTRACTOR has complied with this requirement. These Bonds shall remain in effect one (1) year after the date of final payment, except as otherwise provided by law. All Bonds shall be furnished and provided by the surety and shall be in substantially the same form as prescribed by the Contract Documents and be executed by such sureties as (i) are licensed to conduct business in the State of Florida, and (ii) are named in the current list of Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies as published in Circular 570 (as amended) by the Audit Staff Bureau of Accounts, U.S. Treasury Department and (iii) otherwise meet the requirements of the CITY and as set forth herein that apply to sureties. All Bonds and other documents signed by an agent must be accompanied by a certified copy of the authority to act on behalf of the surety.

10.2 Disqualification of Surety: If the Surety on any Bond furnished by the CONTRACTOR is declared bankrupt or becomes insolvent or its right to conduct business in the State of Florida is terminated or it ceases to meet the requirements of clauses (i) and (ii) of Paragraph 10.1, the CONTRACTOR shall within five (5) days thereafter substitute another Bond and surety, both of which shall be acceptable to the CITY.

10.3 CONTRACTOR'S Liability Insurance: The CONTRACTOR shall purchase and maintain such comprehensive general liability and other insurance as will provide protection from claims set forth below which may arise out of or result from the CONTRACTOR'S performance of the Work and the CONTRACTOR'S other obligations under this Agreement, whether such performance is by the CONTRACTOR, by any subcontractor, by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable.

10.3.1 Claims under workers' or workmen compensation, disability benefits and other similar employee benefit acts;

- 10.3.2 Claims for damages because of bodily injury, occupational sickness or disease, or death of the CONTRACTOR'S employee;
- 10.3.3 Claims for damages because of bodily injury, sickness or disease, or death of any person other than the CONTRACTOR'S employee;
- 10.3.4 Claims for damages insured by personal injury liability coverage which are sustained (i) by any person as a result of an offense directly or indirectly related to the employment of such person by the CONTRACTOR, or (ii) by any other person for any other reason;
- 10.3.5 Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom; and
- 10.3.6 Claims for damages because of bodily injury or death of any person or property damage arising out of the ownership, maintenance or use of any motor vehicle; and
- 10.3.7 Claims for losses arising out of or related to the indemnification and hold harmless clauses of the Agreement.

The insurance required by this Paragraph 10.4 shall include the specific coverage set forth herein and be written for not less than the limits of liability and coverage provided in Paragraph 10.6, or required by law, whichever is greater. The comprehensive general liability insurance shall include completed operations insurance. All such insurance shall contain a provision that the coverage afforded cannot be canceled, materially changed or renewal refused until at least thirty (30) days prior written notice has been given to the CITY. All such insurance shall remain in effect until final payment and at all times thereafter when the CONTRACTOR may be correcting, removing or replacing defective Work in accordance with Article 11. In addition, the CONTRACTOR shall maintain such completed operations insurance for at least five (5) years after final payment and furnish CITY with evidence of continuation of such insurance at final payment and five (5) years thereafter. All insurance required by this Paragraph 10.4 will name the CITY of Palm Bay as additional insured for both on-going and completed operations, shall be primary and non-contributory, shall not contain an endorsement prohibiting suits against or amongst named insureds, and shall contain or allow a waiver of subrogation.

- 10.4 Contractual Liability Insurance: The comprehensive general liability insurance required by Paragraph 10.4 will include contractual liability insurance applicable to the CONTRACTOR'S obligations under Paragraph 10.6.
- 10.5 Minimum insurance coverage, with limits and provisions, are as follows:
  - 10.5.1 Comprehensive General Liability: The CONTRACTOR shall provide minimum combined single limits of \$1,000,000.00 each occurrence / \$2,000,000.00 general aggregate for bodily injury and property damage liability. This shall include premises/operations, personal & advertising injury, products & completed operations, broad form property damage, personal and advertising injury and contractual liability coverage, and otherwise comply with the requirements set forth in Paragraph 10.4 above.
  - 10.5.2 Automobile: The CONTRACTOR shall provide minimum limits of liability of \$1,000,000.00 each accident, combined single limit for bodily injury and property damage. This shall include coverage for:
    - Owned Automobiles
    - Hired Automobiles
    - Non-Owned Automobiles

10.5.3 Umbrella/Excess Liability: The CONTRACTOR shall provide umbrella/excess coverage with limits of no less than \$1,000,000.00 excess of Comprehensive General Liability, Automobile Liability and Employers' Liability. **\*\*This coverage is optional if the CONTRACTOR carries \$2,000,000 Commercial General Liability Insurance with a \$2,000,000 general aggregate\*\***

10.5.4 Workers' Compensation: The CONTRACTOR shall provide and maintain workers' compensation insurance for all employees in the full amount required by statute and full compliance with the applicable laws of the State of Florida. Exemption certificates to this requirement are not acceptable. **Should the Named Vendor utilize a Professional Employer Organization, said Vendor acknowledges and agrees that all employees sent to the City of Palm Bay MUST be included on that PEO roster.** The policy must include Employers' Liability insurance with limits of no less than:

- Each Accident \$500,000.00
- Disease – Policy Limit \$500,000.00
- Disease – Each Employee \$500,000.00

The CONTRACTOR shall further ensure that all of its sub-contractors maintain appropriate levels of workers' compensation insurance.

(1) Exemption Certificates for Subcontractors are not acceptable.

(2) Pursuant to sections 440.02(15) and 440.10, Florida Statutes, the Contractor acknowledges that all of the employees of the contractor AND all subcontractor(s) shall be deemed to be employed in one and the same business or establishment, and the Contractor shall be liable for, and shall secure, the payment of compensation to all such employees. The only exception will be as to the employees of those subcontractors who produce a valid, current and verifiable certificate of workers' compensation coverage.

(3) If any Subcontractor utilize a PEO or leasing company, the Contractor will exercise due diligence to verify that the SUBCONTRACTOR'S PEO has a valid certificate of workers' compensation insurance and that only listed and covered labor will be assigned to the City.

10.6.5 Property Insurance (Installation Floater): The CONTRACTOR shall purchase and maintain in force, at its own expense, an Installation Floater covering CONTRACTOR'S materials and equipment, both during transit and while stored at the work site.

10.6.6 Other Insurance Provisions: The CITY is to be specifically included on all Certificates of Insurance as an additional insured (with exception to Workers Compensation). Waiver of subrogation is required for Commercial General Liability and Automobile Liability coverages. All certificates must be received prior to commencement of the Work. In the event the insurance coverage expires prior to the completion of this Agreement, a renewal certificate shall be issued thirty (30) days prior to the expiration date. The certificate shall provide a thirty (30) day notification clause in the event of cancellation or modification to the policy.

10.6.7 Deductible Clause: The CONTRACTOR shall declare all self-insured retention and deductible amounts.

10.6.8 All insurance carriers shall be rated "A" or better by the most recently published A.M. Best Rating Guide. Unless otherwise specified, it shall be the responsibility of the CONTRACTOR to ensure that all subcontractors comply with the same insurance requirements spelled out above. The CITY may request a copy of the insurance policy

according to the nature of the project. CITY reserves the right to accept or reject the insurance carrier.

- 10.7 All Certificates of Insurance shall be approved by the CITY's Risk Manager **prior** to the commencement of any Work.

**ARTICLE 11 - WARRANTY AND GUARANTEE, TESTS AND INSPECTIONS, CORRECTION, REMOVAL OR ACCEPTANCE OF DEFECTIVE WORK**

- 11.1 Warranty: The CONTRACTOR warrants and guarantees to the CITY that all Work will be of good quality, free from all defects, and will be performed in accordance with the Contract Documents and the Contract Price proposed by the CONTRACTOR. Prompt notice of all defects shall be given to the CONTRACTOR. All Defective Work, whether or not in place, may be rejected, corrected, or accepted as provided in this Article.
- 11.1.1 Warranty of Title: The CONTRACTOR warrants to the CITY that it possesses good, clear, and marketable title to all equipment and materials provided and that there are no pending liens, claims or encumbrances against the equipment and materials.
- 11.1.2 Warranty of Specifications: The CONTRACTOR warrants that all equipment, materials and workmanship furnished, whether furnished by the CONTRACTOR its subcontractors or suppliers will comply with the specifications, drawings and other descriptions supplied or adopted and that all services will be performed in a workmanlike manner.
- 11.1.3 Warranty of Merchantability (if applicable): The CONTRACTOR warrants that any and all supplies, materials, and equipment to be supplied pursuant to this Agreement is merchantable, free from defects, whether patent or latent in material or workmanship, and fit for the ordinary purposes for which it is intended.
- 11.2 Tests and Inspections: The CONTRACTOR shall give the Project Manager timely (minimum of thirty-six (36) hours) notice of readiness of the Work for all required inspections, tests or approvals.
- 11.2.1 If any law, ordinance, rule, regulation, code or order of any public body having jurisdiction requires any Work (or part thereof) to specifically be inspected, tested or approved, the CONTRACTOR shall assume full responsibility, pay all costs in connection therewith, and furnish the Project Manager the required certificates of inspection, testing or approval. The CONTRACTOR shall also be responsible for and shall pay all costs in connection with any inspection or testing required in connection with the CITY's acceptance of a manufacturer, fabricator, supplier or distributor of materials or equipment proposed to be incorporated in the Work, or of materials or equipment submitted for approval prior to the CONTRACTOR'S purchase thereof for incorporation in the Work.
- 11.2.2 All inspections, tests or approvals are the responsibility of the CONTRACTOR.
- 11.2.3 Neither observations by nor inspections, tests or approvals by the Project Manager or others shall relieve the CONTRACTOR from his obligations to perform the Work in accordance with the Contract Documents.
- 11.3 Uncovering Work: If any Work that is to be inspected, tested or approved is covered without approval or consent of the Project Manager, it must, if requested by the Project Manager, be uncovered for observation and/or testing. Such uncovering and replacement shall be at the CONTRACTOR'S sole expense unless the CONTRACTOR has given the Project Manager timely notice of the CONTRACTOR'S intention to cover such Work, and the Project Manager has not acted with reasonable promptness in response to such notice.

- 11.3.1 If the Project Manager considers it necessary or advisable that Work covered in accordance with Paragraph 11.2.1, 11.2.2 and 11.2.3 be observed by the CITY or inspected or tested by others, the CONTRACTOR at the CITY's request, shall uncover, expose or otherwise make available for observation, inspection or testing as the Project Manager may require, that portion of the Work in question, furnishing all necessary labor, material and equipment. If it is found that such Work is defective, the CONTRACTOR shall bear all the expenses of such uncovering, exposure, observation, inspection and testing and of satisfactory reconstruction, including compensation for additional professional services, and an appropriate deductive Change Order shall be issued. If, however, such Work is not found to be defective, the CONTRACTOR shall be allowed an increase in the Contract Price or an extension of the Contract Time, or both, directly attributable to such uncovering, exposure, observation, inspection testing and reconstruction if he makes a claim therefore as provided in Articles 14 and 15.
- 11.4 CITY May Stop the Work: If the Work is defective, or the CONTRACTOR fails to supply sufficient skilled supervisory personnel or workmen or suitable materials or equipment or the Work area is deemed unsafe, the CITY may order the CONTRACTOR to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, this right of the CITY to stop the Work shall not give rise to any duty on the part of the CITY to exercise this right for the benefit of the CONTRACTOR or any other party. The CITY will not award any increase in Contract Price or Contract Time if the Work is stopped due to the circumstances described herein.
- 11.5 Correction or Removal of Defective Work Before Final Payment: If required by the Project Manager, the CONTRACTOR shall promptly, without cost to the CITY and as specified by the Project Manager, either correct any Defective Work, whether or not fabricated, installed or completed, or, if the Work has been rejected by the CITY, remove it from the site and replace it with non-Defective Work.
- 11.6 One Year Correction Period After Final Payment: If within one (1) year after the Final Completion Date, or such longer period of time as may be prescribed by law or by the terms of any applicable special guarantee required by the Contract Documents, any Work is found to be Defective, the CONTRACTOR shall promptly, without cost to the CITY and in accordance with the CITY's written instructions, either correct such Defective Work, or, if it has been rejected by the CITY, remove it from the site and replace it with non-Defective Work. With respect to the correction of any Defective or nonconforming Work, the Contractor shall be liable for all damage to any part of the Work itself and to any adjacent or other property which is caused by the Defective Work or by such corrective work.
- If the CONTRACTOR does not promptly comply with the terms of such instructions or in an emergency where delay would cause serious risk of loss or damage, as determined by the CITY, the CITY may have the Defective Work corrected or the rejected Work removed and replaced, and all direct and indirect costs for such removal and replacement, including compensation for additional professional services, shall be paid by the CONTRACTOR.
- 11.7 Acceptance of Defective Work, Deductions: If, instead of requiring correction or removal and replacement of Defective Work, the CITY, at the CITY's sole option, prefers to accept it, the CITY may do so. In such a case, if acceptance occurs prior to the Project Manager's recommendation of final payments, a Change Order shall be issued incorporating the necessary revisions in the Contracts Documents, including appropriate reduction in the Contract Price; or if the acceptance occurs after such recommendation, an appropriate amount shall be paid by the CONTRACTOR to the CITY.
- 11.8 CITY May Correct Defective Work: If the CONTRACTOR fails within a reasonable time determined by the CITY after written notice of the Project Manager to proceed to correct Defective Work or to remove and replace rejected Work as required by the Project Manager in accordance with Paragraph 11.5, or if the CONTRACTOR fails to perform the Work in accordance with the Contract

Documents, the CITY may, after seven (7) days written notice to the CONTRACTOR, correct and remedy any such deficiency. In exercising its rights under this paragraph, the CITY shall proceed expeditiously. To the extent necessary to complete corrective and remedial action, the CITY may exclude the CONTRACTOR from all or part of the site, take possession of all or part of the Work, suspend the CONTRACTOR'S services related thereto and take possession of the CONTRACTOR'S tools, construction equipment and materials stored at the site or elsewhere. The CONTRACTOR shall allow the CITY'S representative agents and employees such access to the site as may be necessary to enable the CITY to exercise its rights under this paragraph. All direct and indirect costs of the CITY in exercising such rights shall be charged against the CONTRACTOR in an amount verified by the Project Manager, and a Change Order shall be issued incorporating the necessary revisions in the Contract Documents and a reduction in the Contract Price. Such direct and indirect costs shall include, in particular but without limitation, compensation for additional professional services required and costs of repair and replacement of Work of others destroyed or damaged by correction, removal or replacement of the CONTRACTOR'S defective Work. The CONTRACTOR shall not be allowed an extension of the Contract Time because of any delay in performance of the Work attributable to the exercise by the CITY of the CITY'S rights hereunder.

#### **ARTICLE 12 - INDEMNIFICATION**

12.1 Disclaimer of Liability: The CITY shall not at any time, be liable for injury or damage occurring to any person or property from any cause, whatsoever, arising out of CONTRACTOR'S fulfillment of this Agreement.

12.2 Indemnification: For other and additional good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the CONTRACTOR agrees as follows:

12.2.1 To the maximum extent permitted by Florida law, the Contractor shall defend, indemnify, and hold harmless the City and its officers, agents, representatives, council members, volunteers, employees, successors, and assigns (hereinafter the "City") from any and all liabilities, claims, damages, penalties, demands, judgments, actions, proceedings, losses, or costs, including, but not limited to, reasonable attorney fees and court costs, whether resulting from any claimed breach of this Agreement by Contractor or from personal injury, property damage, direct or consequential damages, or economic loss, to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of Contractor or its subcontractors, or anyone employed or utilized by them in the performance of the Work on the Project.

The duty to defend under this Section is independent and separate from the duty to indemnify, and the duty to defend exists regardless of any ultimate liability of the Contractor, City, or any indemnified party. The duty to defend arises immediately upon presentation of a claim by any party and written notice of such claim being provided to the Contractor. The CONTRACTOR'S obligations to defend and indemnify under this Agreement will survive the expiration or earlier termination of this Agreement until it is determined by final judgment that an action against the City or an indemnified party for the matter indemnified hereunder is fully and finally barred by the applicable statute of limitations.

12.2.2 CONTRACTOR agrees to indemnify, defend, save and hold the CITY harmless from any type whatsoever, including but not limited to damages, liabilities, losses, claims, fines, costs, expenses and fees, and from any and all suits and causes of actions of every name, or description that may be brought against CITY, on account of any claims, fees, royalties, or costs for any invention or patent and/or for the infringement of any and all copyrights or patent rights claimed by any person, firm, or corporation.

12.2.3 CONTRACTOR shall pay all claims, losses, liens, settlements or judgments of any nature in connection with the foregoing indemnifications including, but not limited to, reasonable attorney's fees and suit costs for trials and appeals.

12.2.4 If any Subcontractor, supplier, laborer, or materialmen of CONTRACTOR or any other person directly or indirectly acting for or through CONTRACTOR files or attempts to file a mechanic's or construction lien against the real property on which the Work is performed or any part thereof or against any personal property or improvements thereon or make a claim against any monies due or to become due from the CITY to CONTRACTOR or from CONTRACTOR to a Subcontractor, for or on account of any Work, labor, services, material, equipment, or other items furnished in connection with the Work or any change order, CONTRACTOR agrees to satisfy, remove, or discharge such lien or claim at its own expense by transfer to bond, payment, or otherwise within five (5) days of the filing or from receipt of written notice from the CITY.

Additionally, until such time as such lien or claim is satisfied, removed or discharged by CONTRACTOR, all monies due to CONTRACTOR, or that become due to CONTRACTOR before the lien or claim is satisfied, removed or otherwise discharged, shall be held by CITY as security for the satisfaction, removal and discharge of such lien and any expense that may be incurred while obtaining the discharge. If CONTRACTOR shall fail to do so, CITY shall have the right, in addition to all other rights and remedies provided by this Agreement or by law, to satisfy, remove, or discharge such lien or claim by whatever means CITY chooses at the entire and sole cost and expense of CONTRACTOR which costs and expenses shall, without limitation, include attorney's fees, litigation costs, fees and expenses and all court costs and assessments, and which shall be deducted from any amount owing to CONTRACTOR. In the event the amount due CONTRACTOR is less than the amount required to satisfy CONTRACTOR'S obligation under this, or any other article, paragraph or section of this Agreement, the CONTRACTOR shall be liable for the deficiency due the CITY.

12.2.5 The CONTRACTOR and the CITY agree that they waive any defects in the wording of this Article that runs afoul of any Florida statutory section.

### **ARTICLE 13 - CHANGES IN THE WORK**

13.1 Without invalidating this Agreement, the CITY may, at any time or from time to time, order additions, deletions or revisions in the Work through the issuance of written Change Orders. Upon receipt of a written Change Order, the CONTRACTOR shall proceed with the Work involved. All Work shall be executed under the applicable conditions of the Contract Documents. If any Change Order causes an increase or decrease in the Contract Price or an extension or shortening of the Contract Time, an equitable adjustment will be made as provided in Article 14 or Article 15 on the basis of a claim made by either Party.

13.2 The Project Manager may authorize minor changes in the Work not involving an adjustment in the Contract Price or the Contract Time, which are consistent with the overall intent of the Contract Documents. Such changes must be in writing and signed by both the CITY and the CONTRACTOR.

13.3 If notice of any change affecting the general scope of the Work or change in the Contract Price is required by the provisions of any Bond to be given to the Surety, it will be the CONTRACTOR'S responsibility to so notify the Surety, and the amount of each applicable Bond shall be adjusted accordingly. The CONTRACTOR shall furnish proof of such adjustment to the CITY.

### **ARTICLE 14 - CHANGE OF CONTRACT PRICE**

Change of Contract Price, approved by CITY, shall be computed as follows:

- 14.1 Cost of the Work: The term "Cost of the Work" means the sum of all direct costs necessarily incurred and paid by Contractor in the proper performance of the Work. Except as otherwise may be agreed to in writing by the CITY, these costs shall be in amounts no higher than those prevailing in the City and shall include only the following items and shall not include any of the costs itemized in Paragraph 14.3:
  - 14.1.1 Payroll costs for employees in the direct employ of the CONTRACTOR. Payroll costs for employees not employed full time on the Work shall be apportioned on the basis of their time spent on the Work. Payroll costs shall include, but not be limited to, salaries and wages plus the cost of fringe benefits which shall include social security contributions, unemployment, excise and payroll taxes, worker's compensation, health and retirement benefits, bonuses, sick leave, vacation and applicable holiday pay.
  - 14.1.2 Cost of all materials and equipment furnished and incorporated in the Work, including costs of transportation and storage, and required suppliers and field services. All cash discounts, rebates and refunds and all returns from sale of surplus materials and equipment shall accrue to the CITY, and the CONTRACTOR shall make provisions so that they may be obtained.
  - 14.1.3 Supplemental costs including the following:
    - 14.1.3.1 Cost, including transportation and maintenance of all materials, supplies, equipment, machinery, appliances, office and temporary facilities at the site and hand tools not owned by the workers, which are consumed in the performance of the Work.
    - 14.1.3.2 Rentals of all construction equipment and machinery and the parts whether rented from the CONTRACTOR or others in accordance with rental agreements approved by the CITY, and the costs of transporting, loading, unloading, installation, dismantling and removal. The rental of any such equipment, machinery or parts shall cease when the use is no longer necessary for the Work.
    - 14.1.3.3 Sales, consumer, use or similar taxes related to the Work, and for which the CONTRACTOR is liable, imposed by laws and regulations.
    - 14.1.3.4 Royalty payments and fees for permits and licenses.
    - 14.1.3.5 The cost of utilities, fuel and sanitary facilities at the Premises.
    - 14.1.3.6 Minor expenses such as telegrams, long distance telephone calls, telephone service at the site, expressage and similar petty cash items in connection with the Work.
    - 14.1.3.7 Cost of premiums for additional bonds required because of changes in the Work at the original bond rate paid by the Contractor, but not to exceed two percent (2%).
- 14.2 The Contract Price may only be increased by a Change Order when Work is modified in accordance with Article 13 and approved by the CITY in writing. Any claim for an increase in the Contract Price resulting from a Change Order shall be based on written notice delivered to the Project Manager within ten (10) days of the occurrence of the Change Order giving rise to the claim. Notice of the amount of the claim with supporting data shall be provided in writing and delivered within twenty

(20) days of such occurrence unless Project Manager allows an additional period of time to ascertain accurate cost data. Any change in the Contract Price resulting from any such claim shall be incorporated in the Change Order that was originally issued by the City.

14.3 Not Included in the Cost of the Work: The term "Cost of the Work" shall not include any of the following and the cost of them shall be paid by the CONTRACTOR.

14.3.1 Payroll costs and other compensation of the CONTRACTOR'S officers, executives, principals (of partnership and sole proprietorships), general managers, engineers, architects, estimators, attorneys, auditors, accountants, purchasing and contracting agents, expeditors, timekeepers, clerks and other personnel employed by the CONTRACTOR whether at the site or in the CONTRACTOR'S principal or branch office for general administration of the Work; all of which are to be considered administrative costs covered by the CONTRACTOR'S fee.

14.3.2 Expenses of the CONTRACTOR'S principal and branch offices other than the CONTRACTOR'S office at the site.

14.3.3 Any part of the CONTRACTOR'S capital expenses, including interest on the CONTRACTOR'S capital utilized for the Work and charges against the CONTRACTOR for delinquent payments.

14.3.4 Cost of premiums for all bonds and for all insurance whether or not the CONTRACTOR is required by the Contract Documents to purchase and maintain the same, except as stated in paragraph 14.1.3.7.

14.3.5 Costs due to the negligence of the CONTRACTOR, any subcontractor, or anyone directly or indirectly employed by either of them or for whose acts any of them may be liable, including but not limited to, the correction of defective Work, disposal of materials or equipment wrongly supplied and making good any damage to property.

14.3.6 Other overhead or general expense costs of any kind and the costs of any item not specifically and expressly included in Paragraph 14.1, including but not limited to any direct or indirect financial damages, losses or expenses for extended corporate overhead impacts, extended project overhead impacts, project support services, overhead expenses, demobilization expenses, or by whatever label or legal concept or theory such claims or types of claims may have or any business arrearages or losses of whatever type or nature and CONTRACTOR, for other and additional consideration, the receipt and sufficiency of which is acknowledged, hereby waives any right to make any such claim or claims.

14.4 Basis of Compensation: The CONTRACTOR'S compensation, allowed to the CONTRACTOR for overhead and profit in the event the CITY and the CONTRACTOR enter into a mutually agreeable Change Order, shall be determined as follows:

14.4.1 A mutually acceptable negotiated fee:

14.4.1.1 For costs incurred under Paragraphs 14.1.1 and 14.1.2, the CONTRACTOR'S fee shall not exceed five percent (5%).

14.4.1.2 No fee shall be payable on the basis of costs itemized under Paragraphs 14.1.3.1, 14.1.3.2, 14.1.3.3, 14.1.3.4, 14.1.3.5, 14.1.3.6, 14.1.3.7, 14.3.1, 14.3.2, 14.3.3, 14.3.4, 14.3.5 and 14.3.6.

14.4.1.3 The amount of credit to be allowed by the CONTRACTOR to the CITY for any such change which results in a net decrease plus a deduction in the CONTRACTOR'S fee by an amount equal to five percent (5%) for the net decrease.

14.4.1.4 When both additions and credits are involved in any one Change Order the combined overhead and profit shall be figured on the basis of net increase if any, however, not to exceed five percent (5%) of the agreed compensation. Profit will not be paid on any work not performed.

14.5 Cost Breakdown Required: Whenever the Cost of the Work is to be determined pursuant to this Article, the CONTRACTOR, upon request of the CITY, will submit in form acceptable to the CITY an itemized cost breakdown together with supporting documentation. Whenever a change in the Work is to be based upon mutual acceptance of a lump sum, whether the amount is an addition, credit, or no-change-in-cost, the CONTRACTOR shall, upon request of the CITY, submit an estimate substantiated by a complete itemized breakdown:

14.5.1 The breakdown shall list quantities and unit prices for materials, labor, equipment and other items of cost.

14.5.2 Whenever a change involves the CONTRACTOR and one (1) or more subcontractors and the change is an increase in the agreed compensation, the overhead and profit percentage for the CONTRACTOR and each subcontractor shall be itemized separately.

#### **ARTICLE 15 - CHANGE OF THE CONTRACT TIME**

15.1 The Contract Time may only be changed by a Change Order. Any claim for an extension in the Contract Time shall be based on written notice delivered to the Project Manager within five (5) days of the occurrence of the event giving rise to the claim. Any change in the Contract Time resulting from any such claim shall be incorporated in a Change Order.

15.2 The Contract Time will be extended in an amount equal to time lost due to delays that are more fully described in Section 8.22 of this Agreement if a claim is made therefore as provided in Paragraph 15.1.

15.3 All time limits stated in the Contract Documents are of the essence. The provisions of this Article 15 shall not exclude recovery for damages by the CITY for delay caused by the CONTRACTOR.

15.4 Delays caused by or resulting from entities, contractors or subcontractors who are not affiliated with the CONTRACTOR (non-affiliated Contractors) shall not give rise to a claim by the CONTRACTOR for damages for increases in material and/or labor costs. Such entities, contractors and subcontractors include, but are not limited to, the CITY's contractors and subcontractors, Florida Power and Light Company and Florida East Coast Railway, LLC.

#### **ARTICLE 16 - LIQUIDATED DAMAGES**

16.1 Upon failure of the CONTRACTOR to complete the Work by the **Substantial Completion Date** the CONTRACTOR shall pay to the CITY the sum of Two Thousand Six Hundred and Fifty Dollars (**\$1,500**) for each and every calendar day until the Work reaches **Substantial Completion Date**, as fixed and agreed liquidated damages and not as a penalty. The Parties agree and recognize the impossibility of precisely ascertaining the amount of damages that the City will sustain in the event that Contractor fails to timely achieve the **Substantial Completion Date**. The CITY shall have the right to deduct from or retain any compensation which may be due, or which may become due and payable to the CONTRACTOR in the amount of liquidated damages to be assessed by the CITY against the CONTRACTOR. The CONTRACTOR shall be responsible for reimbursing the CITY,

in addition to liquidated damages or other damages for delay, for all costs of engineering, architectural fees, and inspection and other costs incurred in administering the Work beyond the **Substantial Completion Date**.

#### **ARTICLE 17 - SUSPENSION OF WORK AND TERMINATION**

- 17.1 CITY May Suspend Work: The CITY may, at any time and without cause, suspend the Work or any portion of the Work for a period of not more than ninety (90) days by notice in writing to the CONTRACTOR which shall fix the date on which Work shall be resumed. The CONTRACTOR shall resume the Work on the date fixed. The CONTRACTOR will be allowed an extension of the Contract Time directly attributable to any suspension, if the CONTRACTOR makes a claim as provided in Article 15; provided, however, CONTRACTOR shall not be entitled to any extended or delay damages as set forth in Paragraph 8.21.
- 17.2 CITY May Terminate for Convenience: The CITY retains the right to terminate this Agreement, without cause, with thirty (30) days prior written notice. In the event of such termination for convenience, the CONTRACTOR'S recovery against the City shall be limited to that portion of the Contract Price earned through the date of termination, together with any retainage withheld and demobilization costs incurred. The Contractor, however, shall not be entitled to any other or further recovery against the City, including, but not limited to, any other form of payment or damages not specifically set forth herein or any anticipated or lost profits on portions of Work not performed.
- 17.3 CITY May Terminate for Cause: The City may terminate this Agreement following fifteen (15) days' notice and an opportunity to cure upon the occurrence of any one or more of the following default events:
- 17.3.1 If the CONTRACTOR commences a voluntary bankruptcy action or a bankruptcy petition is filed against the CONTRACTOR under any chapter of any Bankruptcy Code, or if the CONTRACTOR takes any equivalent or similar action by filing a petition under any federal or state law relating to the bankruptcy or insolvency.
  - 17.3.2 If the CONTRACTOR makes a general assignment of its assets or receivable for the benefit of creditors.
  - 17.3.3 If a trustee, receiver, custodian or agent of the CONTRACTOR is appointed under applicable law or under Contract, whose appointment or authority to take charge of property of the CONTRACTOR is for the purpose of enforcing a lien against such property or for the purpose of general administration of such property for the benefit of the CONTRACTOR'S creditors.
  - 17.3.4 If the CONTRACTOR persistently fails to perform the Work in accordance with the Contract Documents, including but not limited to, failure to supply sufficient skilled workers or suitable materials or equipment or failure to adhere to the progress schedule as same may be revised from time to time.
  - 17.3.5 If the CONTRACTOR repeatedly fails to make prompt payments to subcontractors or for labor, material or equipment.
  - 17.3.6 If the CONTRACTOR repeatedly disregards proper safety procedures.
  - 17.3.7 If the CONTRACTOR disregards any local, state or federal laws or regulations.
  - 17.3.8 If the CONTRACTOR otherwise violates any provisions of this Agreement.
- 17.4 CITY's Rights After Termination for Cause:

- 17.4.1 Following termination for cause, the CONTRACTOR may be excluded from the Premises and the CITY may take possession of the Work and of all the CONTRACTOR'S tools, appliances, construction equipment and machinery at the site and use them without liability to the CITY for trespass or conversion and incorporate them in the Work, and all materials and equipment stored at the site or for which the CITY has paid the CONTRACTOR but which are stored elsewhere, and finish the Work as the CITY may deem expedient. In this instance, the CONTRACTOR shall not be entitled to receive any further compensation until the Work is finished.
- 17.4.2 The liability of the Contractor following a termination for cause shall extend to and include the full amount of any and all sums paid, expenses and losses incurred, damages sustained, and obligations assumed by the City in good faith under the belief that such payments or assumptions were necessary or required in completing the Work and providing labor, materials, equipment, supplies, and other items therefor or re-letting the Work, and in settlement, discharge or compromise of any claims, demands, suits, and judgments pertaining to or arising out of the Work hereunder.
- 17.4.3 If, after notice of termination of Contractor for default pursuant to Section 17.3 above, it is determined for any reason that Contractor was not in default, or that its default was excusable, or that the City did not have the right to terminate the Contractor, then such termination shall be deemed a termination for convenience and the CONTRACTOR'S remedies shall be the same as and limited to those afforded under Section 17.2 above.
- 17.5 If the Contractor commits a default due to its insolvency or bankruptcy, the following shall apply:
- 17.5.1 Should this Agreement be entered into and fully executed by the parties, and funds have been released to the Contractor by the City (Debtor) files for bankruptcy, the following shall occur:
- 17.5.1.1 In the event the Contractor files a voluntary petition under 11 U.S.C. 301 or 302, or an order for relief is entered under 11 U.S.C. 303, the Contractor shall acknowledge the extent, validity, and priority of the lien recorded in favor of the City. The Contractor further agrees that in the event of this default, the City shall, at its option, be entitled to seek relief from the automatic stay provisions in effect pursuant to 11 U.S.C. 362. The City shall be entitled to relief from the automatic stay pursuant to 11 U.S.C. 362(d)(1) or (d)(2), and the Contractor agrees to waive the notice provisions in effect pursuant to 11 U.S.C. 362 and any applicable Local Rules of the United States Bankruptcy Court. The Contractor acknowledges that such waiver is done knowingly and voluntarily.
- 17.5.1.2 Alternatively, in the event the City does not seek stay relief, or if stay relief is denied, the City shall be entitled to monthly adequate protection payments within the meaning of 11 U.S.C. 361. The monthly adequate protection payments shall each be in an amount determined in accordance with the Note and Mortgage executed by the Contractor in favor of the City.
- 17.5.1.3 In the event the Contractor files for bankruptcy under Chapter 13 of Title 11, United States Code, in addition to the foregoing provisions, the Contractor agrees to cure any amounts in arrears over a period not to exceed twenty-four (24) months from the date of the confirmation order, and such payments shall be made in addition to the regular monthly payments required by the Note and Mortgage. Additionally, the Contractor shall agree that the City is over secured and, therefore, entitled to interest and attorney's fees pursuant to 11 U.S.C. 506(b). Such fees shall be allowed and payable as an administrative expense. Further, in the event the Contractor has less than five (5) years of payments remaining on the Note, the Contractor agrees that the treatment afforded to the

claim of the City under any confirmed plan of reorganization shall provide that the remaining payments shall be satisfied in accordance with the Note, and that the remaining payments or claim shall not be extended or amortized over a longer period than the time remaining under the Note.

17.5.2 Should this Agreement be entered into and fully executed by the parties, and the funds have not been forwarded to Contractor, the following shall occur:

17.5.2.1 In the event the Contractor files a voluntary petition pursuant to 11 U.S.C. 301 or 302, or an order for relief is entered under 11 U.S.C. 303, the Contractor acknowledges that the commencement of a bankruptcy proceeding constitutes an event of default under the terms of this Agreement. Further, the Contractor acknowledges that this Agreement constitutes an executory contract within the meaning of 11 U.S.C. 365. The Contractor acknowledges that this Agreement is not capable of being assumed pursuant to 11 U.S.C. 365(c)(2), unless the City expressly consents in writing to the assumption. In the event the City consents to the assumption, the Contractor agrees to file a motion to assume this Agreement within ten (10) days after receipt of written consent from the City, regardless of whether the bankruptcy proceeding is pending under Chapter 7, 11, or 13 of Title 11 of the United States Code. The Contractor further acknowledges that this Agreement is not capable of being assigned pursuant to 11 U.S.C. 365(b)(1).

17.6 Should the CONTRACTOR'S services be terminated by the CITY, the termination shall not affect any rights of the CITY against the CONTRACTOR then existing or which may thereafter accrue. Any retention or payment of moneys due the CONTRACTOR by the CITY will not release the CONTRACTOR from liability.

17.7 CONTRACTOR understands and agrees that the CITY may immediately terminate this contract upon written notice if the CONTRACTOR is found to have submitted a false certification or any of the following occur with respect to the CONTRACTOR or a related entity: (i) for any contract for goods or services in any amount of monies, it has been placed on the Scrutinized Companies that Boycott Israel List, or is engaged in a boycott of Israel, or (ii) for any contract for goods or services of one million dollars (\$1,000,000) or more, it has been placed on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, or it is found to have been engaged in business operations in Cuba or Syria.

17.8 The CONTRACTOR has no right, authority or ability to terminate the Work except for wrongful withholding of any payments due the CONTRACTOR from the CITY.

#### ARTICLE 18 – NOTICES

18.1 All notices required by any of the Contract Documents shall be in writing and shall be deemed delivered upon mailing by certified mail, return receipt requested to the following:

To the City:

City Manager  
City of Palm Bay  
120 Malabar Rd SE  
Palm Bay, FL 32907

AND

Chief Procurement Officer  
City of Palm Bay  
120 Malabar Rd SE  
Palm Bay, FL 32907

To the Contractor:

Don Luchetti Construction, Inc  
565 Distribution Drive, Melbourne, FL 32904

## **ARTICLE 19 – LIMITATION OF LIABILITY**

- 19.1 Limitation of Liability: The City desires to enter into this Agreement only if in so doing the City can place a limit on the City's liability for any cause of action arising out of this Agreement. For other and additional good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Contractor expresses its willingness to enter into this Agreement with the knowledge that the CONTRACTOR'S recovery from the City to any action or claim arising from the Agreement is limited to a maximum amount of the contract value less the amount of all funds actually paid by the City to Contractor pursuant to this Agreement. Nothing contained in this paragraph or elsewhere in this Agreement is in any manner intended either to be a waiver of the limitation placed upon the City's liability as set forth in Section 768.28, Florida Statutes, or to extend the City's liability beyond the limits established in said Section; and no claim or award against the City shall include attorney fees, investigative costs, expert fees, suit costs or pre-judgment interest. This section shall not prevent the City from taking corrective action against the Contractor.

## **ARTICLE 20 - GOVERNING LAW / VENUE / WAIVER OF JURY TRIAL**

- 20.1 The rights of the Parties hereto shall be construed, subject to, and in accordance with the laws of the State of Florida. THE PARTIES HEREBY WAIVE THE RIGHT TO A TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT OR FILED BY EITHER OF THEM AGAINST THE OTHER. Venue for any suit filed arising out of or related to this Agreement shall be in a court of competent jurisdiction in Brevard County, Florida.

## **ARTICLE 21 - MISCELLANEOUS**

- 21.1 The duties and obligations imposed by this Agreement and the rights and remedies available to the parties and, in particular but without limitation, the warranties, guaranties and obligations imposed upon the CONTRACTOR and all of the rights and remedies available to the CITY, are in addition to, and are not to be construed in any manner as a limitation of any rights and remedies available to any or all of them that are otherwise imposed or available by laws or regulations, by special warranty or guarantee or by other provisions of the Contract Documents. Furthermore, the provisions of this Paragraph will be as effective as if repeated specifically in the Contract Documents, and the provisions of this Paragraph will survive final payment and termination or completion of this Agreement.
- 21.2 The CONTRACTOR shall not assign or transfer this Agreement or its rights, title or interests. The obligations undertaken by the CONTRACTOR pursuant to this Agreement shall not be delegated or assigned to any other person or firm. Violation of the terms of this Paragraph shall constitute a material breach of Agreement by the CONTRACTOR and the CITY may, at its discretion, cancel this Agreement and all rights, title and interest of the CONTRACTOR which shall immediately cease and terminate.
- 21.3 The CONTRACTOR and its employees, agents, representatives, officers, volunteers and agents shall be and remain an independent contractor 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 manner be construed to create a partnership, association or any other kind of joint undertaking or venture between the Parties.
- 21.4 The CONTRACTOR'S employees are required to obtain, at no charge, from the City's Human Resources Department, a security identification badge prior to performance of its awarded contract. This law is established by the City Council through the City Ordinance Number 2007-48, Public Protection Act, as amended by City Ordinance Number 2007-96, with an effective date of November 15, 2007.

- 21.5 The CITY reserves the right to audit the records of the CONTRACTOR relating in any way to the Work to be performed pursuant to this Agreement at any time during the performance and term of this Agreement and for a period of five (5) years after completion and acceptance by the CITY. If required by the CITY, the CONTRACTOR agrees to submit to an audit by an independent certified public accountant selected by the CITY. The CONTRACTOR shall allow the CITY to inspect, examine and review the records of the CONTRACTOR at any and all times during normal business hours during the term of this Agreement.
- 21.6 The City is a public agency subject to Chapter 119, Florida Statutes. The Contractor shall comply with Florida's Public Records law. Specifically, the Contractor shall:
- 21.6.1 Keep and maintain public records required by the public agency to perform the service.
  - 21.6.2 Upon request from the public agency's custodian of public records, provide the public agency with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in this chapter or as otherwise provided by law.
  - 21.6.3 Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the contract term and following completion of the contract if the contractor does not transfer the records to the public agency.
  - 21.6.4 Upon completion of the contract, transfer, at no cost, to the public agency all public records in possession of the contractor or keep and maintain public records required by the public agency to perform the service. If the contractor transfers all public records to the public agency upon completion of the contract, the contractor shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If the contractor keeps and maintains public records upon completion of the contract, the contractor shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the public agency, upon request from the public agency's custodian of public records, in a format that is compatible with the information technology systems of the public agency.

The failure of the Contractor to comply with the provisions set forth in this section shall constitute a material breach of Agreement and shall be cause for immediate termination of the Agreement.

**If the contractor has questions regarding the application of Chapter 119 Florida Statutes, to the contractor' duty to provide public records relating to this contract, contact the custodian of public records at the City of Palm Bay Procurement Department, 120 Malabar Road SE, Suite 200, Palm Bay, Florida 32907; 321-952-3424 or [procurement@pbfl.org](mailto:procurement@pbfl.org).**

- 21.7 The remedies expressly provided in this Agreement to the CITY shall not be deemed to be exclusive but shall be cumulative and in addition to all other remedies in favor of the CITY now or later existing at law or in equity.
- 21.8 Should any part, term, or provision of this Agreement be decided by the courts to be invalid, illegal or in conflict with any state or federal law, such part, term, or provision shall be severed and the validity of the remaining portions or provisions of this Agreement shall not be affected.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed as follows:

Approved by City Council on: \_\_\_\_\_.

**DON LUCHETTI CONSTRUCTION, INC**

\_\_\_\_\_  
Signature, Authorized Agent

\_\_\_\_\_  
Printed/Typed Name

\_\_\_\_\_  
Date

**ATTEST:**

**CITY OF PALM BAY, FLORIDA**

\_\_\_\_\_  
Terese Jones  
City Clerk

\_\_\_\_\_  
George Barber MPA, CPPO, CPPB, NIGP-CPP  
Chief Procurement Officer



**EXHIBIT A: PLANS/SCOPE OF WORK**

## **PROJECT DESCRIPTION**

The project proposes to increase flood protection by upgrading pipe sizes with single 9'x6' box culvert and dual 72" pipes of the entire old pipe run being removed/replaced and includes new roadway curb inlets, headwalls, baffle box, rubble rock, road reconstruction, utility relocations, utility coordination with owners all demolition, furnishing, installing, reconstruction and final site restoration. The project will also reduce pollutant discharges into the impaired Indian River Lagoon by installing one large nutrient separating baffle box with approved filter media into the box system and removing / disposing of two (2) existing old baffle boxes. The drainage outfalls discharge within the City of Palm Bay leads out to MTWCD Canal C-1. The baffle box is in a strategic location to benefit the country club area and have ease of access for periodical cleaning. The benefit of the new baffle box will help to reduce the amount of Total Nitrogen, Total Phosphorus and Total Suspended Solids from the drainage system and will help to improve water quality leading to the impaired Indian River Lagoon.

The third (3<sup>rd</sup>) generation nutrient separating baffle box and box culverts shall be precast per the details and specifications shown on the design plan. The headwall can be cast in place and will require a concrete strength of minimum 5,500 PSI with reinforcing rebar per ASTM and FDOT standards. The details and specifications shown on the plans for the baffle box, box culvert and headwall are provided to show minimum required designs dimensions; the City will accept any equivalent baffle boxes, and box culverts, and headwall designs that meet the plans' same specifications and are approved by a structural Engineer in the state of Florida. The baffle box dimension is sized for the proposed concrete box culvert dimension as shown on the plan sheet. The baffle box shall have all required 3<sup>rd</sup> generation box requirements including but not limited to filter material/ baskets/ deflectors at the entry and exit points and all other items as identified on the plans and shall be provided in the box as part of the installation. The filter media to be provided in the baffle box shall meet DEP requirement approval and threshold reduction percentage identified to remove Total Nitrogen, Total Phosphorus and Total Suspended Solids from the drainage system as per DEP adopted criteria. The filter material shall be removable for cleaning and replacement. The box top shall be installed with rectangular large hatches instead of manhole lids for ease of access and the hatch opening large enough for person and equipment to access the box's internal components for cleaning, replacement and maintenance. A public observation covers allowing people to see the inner workings of the device will be required at one of the box hatch openings for observation to be built and installed on the discharge side matching the City of Palm Bay Boundary Canal location; located on Port Malabar Blvd. The observation cover will be hinged with lock that can be readably opened or removed for access to the inside of the box for maintenance.

The contractor shall be responsible to furnish professionally engineered, by a Florida licensed engineer, signed and sealed baffle box, box culvert and headwall structural designs and calculations for the locations on the plans. The term headwall and end wall may be used interchangeably and shall be understood to refer to the end treatment for the box culverts herein. The baffle box, box culvert and headwalls shall be designed as outlined in the FDOT Standard Plans Instructions (SPI) including Index 400-292 and submitted to the City for acceptance signed and sealed along with the calculations prior to installation. Including but not limited to concrete mix design and quantity of materials for cast in place structures. For each location, the city has provided finish elevation and overall width of the structures in the design plans. General notes, illustrations, and references to applicable FDOT Standard Plans (SP) and Standard Specification (SB) Indexes for both installation and design have also been referenced. Concrete to be used shall be for moderately aggressive environment 5,500 PSI or better.

There is an existing utility lift station within the proximity of the project area and there are existing utility lines crossing the work area including but not limited to water mains, gravity sewer, force main, and underground power lines. The locations are generally shown on the plans, but not intended to be all inclusive on amounts or locations; all lines and locations shall be field verified by the contractor. The locations shown on the plans are approximate and not intended to be exact locations.

The contractor shall be responsible for utility line locations and verification. The lift station site shall be protected during construction and shall also be the responsibility of the contractor. The contractor shall use either sheet piles and/or trench boxes when working near the lift station and the existing utility lines.

The lift station and utility lines are required to be protected/ relocated during the duration of the project construction. The location of the lines and station shall be clearly marked during the construction and only limited equipment staff shall be allowed/permitted within the proximity of the utility system. All work in these sensitive areas shall be coordinated with the Project Manager, Utility, and Public Works inspection staff on site before starting construction near the lift station or lines.

There is also coordination required with FPL for the contractor. A work order has been created to relocate the utility pole near the roadway on the southeast side of the existing pipes. A new pole is to be moved further east, and a hand hold is to be installed at the base of the removed pole and power shall be rerouted down the new pole to the hand hold. This is the primary power to the lift station and shall be maintained during the construction by the contractor. The hand hold/ powerline shall be held in place during the construction and power conduit stabilized as the installation takes place along the culvert run.

This turn-key project is to construct/upgrade the old stormwater system for flood protection with a new system and structures and is to provide treatment upgrade in accordance with the final design plans. The project construction will take place as soon as possible due to failures in the system from previous storms. A pre-construction video shall be performed by the contractor to document existing conditions of the project site prior to mobilization and shall be used for dispute resolution of any existing damage. Two copies shall be provided to the City for retention.

Mobilization/demobilization, surveying, erosion control, dewatering, Maintenance of Traffic, sign removal, utility location verifications, utility conflict coordination, utility relocations, testing, compaction, furnish and install all items, furnish and install media, pavement restoration, (Baffle box, box culvert and headwall) furnishing and installations, as built and final restoration and all other incidentals not mentioned in this listing or bid tab items shall be included as a part of the bid work. The contractor shall be responsible to furnish and install all items identified on the construction plans.

Box culvert installations shall be handled in accordance with manufacturers' specification and recommendations, City of Palm Bay Public Works Manual, and the 2024 Florida Department of Transportation (FDOT) Standard Specifications for Road and Bridge Construction Division II and III documents and links to which have been provided herein. The most stringent requirements shall govern if there are conflicting specification therein. Box culvert, structures and pipe inverts are to be field verified prior to placement of base material but not sooner than backfill being placed and compacted up to at least one-half the height of the structures and box. All field verification shall be done in the presence of a Public Works Engineering Inspector and emailed to the Public Works Project Manager immediately following the field verification. Field verification is for informational purposes only and does not substitute the need for final as-built verification by a professional licensed surveyor. Please refer to the FDOT 2024 spec. Book 430 section 4 for acceptable tolerance and resolution.

The contractor shall be responsible for any pot-hole digging to verify utility depths and separation distance to the replacement stormwater system. The contractor shall also be responsible for coordination with all utility owners for all relocations and adjustments as may be needed and get utility locates prior to construction and provide those locate ticket and coordination with City Inspector and Project Manager.

Project schedule shall be updated monthly and be sent to the Project Manager; These will be discussed as needed at the regularly scheduled meeting. Additional weekly schedule updates shall be discussed and shared with the assigned City Inspectors at the start of each work week for coordination.

Road closures will be limited to a maximum of 45 days for the location. A detailed schedule of the road closure shall be furnished at the Preconstruction Meeting and updated monthly throughout the project.

The CONTRACTOR shall include with his/her bid, any additional construction costs necessary to temporarily remove and adjust the utility mains (Potable Water, Raw Water, and Force Main) that may be in conflict with the installation of the dual 72" drainage pipes within the Melbourne Tillman Canal #1 Right-of-Way. This work shall include line stops at both ends of the removed potable and raw water mains to ensure there is no loss of water. At no time shall the potable or raw water mains be disconnected for more than 24-hours. The CONTRACTOR shall replace 60 LF of 8" PVC pressurized sewer main that was damaged during the storm event. The CONTRACTOR shall at his/her own cost, provide temporary services and/or bypasses necessary to provide continuous utility service. The bypass plan must be submitted for review and approval by the Utilities Department. The Contractor shall coordinate with the Utilities Department prior to taking the lift station off-line for the pressurized sewer main replacement. All materials other than the 16" line stops necessary to do the work shall be provided by the Utilities Department. The Utility work shall be constructed in strict conformance to the City of Palm Bay Utilities Department standards. These standards are contained within the document titled "City of Palm Bay utilities Department Policies, Procedures, and Standards Handbook", current edition (Handbook). The document can be obtained by contacting the Utilities Department at 321-952-3410.

### **MAINTENANCE OF TRAFFIC**

All Maintenance of Traffic (MOT) costs required shall be included in the bid as part of the project construction cost. Where detour operations are planned, the contractor shall furnish plans to the City at least two weeks prior to implementation to allow adequate review and approval time. The contractor shall also be responsible for providing MOT notification for his work area at a minimum of 72 hours prior to starting any work. The required form will be provided. The contractor shall coordinate with the Project Manager, and the City will provide notification to the homeowners of the work area. Please see MOT note 4 on page 3 of the construction plans. VMS shall be required on all collector and arterial roadways 7 days prior to construction in all applicable direction of traffic heading to the pipe crossing.

### **TIME FOR COMPLETION**

The CONTRACTOR recognizes that TIME IS OF THE ESSENCE. The Contract Time shall commence on the date set forth in a Notice to Proceed issued by the City to the Contractor. The Work shall be:

The construction will be required to commence on the south end of the project. Immediately after bid award, the utility lines must be secured to prevent any additional failures. Emergency stabilization of utility mains, the installation of the dual 72" pipes, and the stabilization of the MTWCD C-1 canal bank shall be **Substantially Completed** within **sixty (60)** after the date when the Contract Time commences to run as provided for in the Notice to Proceed, and

The remainder of the project to be **Substantially Completed** in **one hundred and fifty (150)** after the date when the Contract Time commences to run as provided for in the Notice to Proceed, and

Finally completed on the **Final Completion Date** and ready for final payment in accordance with this Agreement within **two hundred and ten (210)** calendar days after the date when the Contract Time commences to run as provided in the Notice to Proceed.

### **LIQUIDATED DAMAGES**

Upon failure of the CONTRACTOR to complete the Work by the **Substantial Completion Date** for the **initial phase** of the project, the CONTRACTOR shall pay to the CITY the sum of Fifteen Hundred Dollars **(\$1,500.00)** for each and every calendar day until the work reaches Substantial Completion, and

Upon failure of the CONTRACTOR to complete the Work by the **Substantial Completion Date** for the **remainder** of the project, the CONTRACTOR shall pay to the CITY the sum of Fifteen Hundred **(\$1,500)** for each and every calendar day until the Work reaches **Substantial Completion Date**, as fixed and agreed liquidated damages and not as a penalty. The Parties agree and recognize the impossibility of

precisely ascertaining the amount of damages that the City will sustain in the event that Contractor fails to timely achieve the **Substantial Completion Date**. The CITY shall have the right to deduct from or retain any compensation which may be due, or which may become due and payable to the CONTRACTOR in the amount of liquidated damages to be assessed by the CITY against the CONTRACTOR. The CONTRACTOR shall be responsible for reimbursing the CITY, in addition to liquidated damages or other damages for delay, for all costs of engineering, architectural fees, and inspection and other costs incurred in administering the Work beyond the **Substantial Completion Date**.



**EXHIBIT B: PUBLIC CONSTRUCTION BOND**

**PUBLIC CONSTRUCTION BOND**

Norwood Baffle Box Retrofit

BY THIS BOND, We \_\_\_\_\_, having its principal place of business at \_\_\_\_\_, (\_\_\_\_)\_\_\_\_-\_\_\_\_, herein called Principal, and \_\_\_\_\_, having its principal place of business at \_\_\_\_\_, (\_\_\_\_)\_\_\_\_-\_\_\_\_, a corporation as Surety, are bound to the City of Palm Bay, 120 Malabar Rd SE, Palm Bay, Florida, 32907 herein called Owner, in the sum of \_\_\_\_\_. (\$\_\_\_\_.00) for payment of which we bind ourselves, our heirs, personal representatives, successors, and assigns, jointly and severally.

THE CONDITIONS OF THIS BOND are that if Principal:

1. Performs the contract Norwood Baffle Box Retrofit dated \_\_\_\_\_ between Principal and Owner for construction of (Norwood Baffle Box Retrofit) \_\_\_\_\_, the contract being made a part of this bond by reference, at the times and in the manner prescribed in the contract; and
2. Promptly makes payments to all claimants, as defined in Section 255.05(1), Florida Statutes, supplying Principal with labor, materials, or supplies, used directly or indirectly by Principal in the prosecution of the work provided for in the contract; and
3. Pays Owner all losses, damages, expenses, costs, and attorney's fees, including appellate proceedings, that Owner sustains because of a default by Principal under the contract; and
4. Performs the guarantee of all work and materials furnished under the contract for the time specified in the contract, then this bond is void; otherwise, it remains in full force.
5. This Bond shall be recorded in the public records at the Principal's expense. A certified copy of this recorded Bond shall be provided to the Owner. No payments shall be made to the Principal until the Bond has been recorded and a certified copy has been provided to the Owner.

Any action instituted by a claimant under this bond for payment must be in accordance with the notice and time limitation provisions in Section 255.05(2) and (10), Florida Statutes.

Any changes in or under the contract documents and compliance or noncompliance with any formalities connected with the contract or the changes does not affect Surety's obligation under this bond.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Witness:

\_\_\_\_\_  
(Principal) (Seal)

\_\_\_\_\_

Its: \_\_\_\_\_  
(Title)

Witness:

\_\_\_\_\_  
(Surety) (Seal)

\_\_\_\_\_

Its \_\_\_\_\_  
(Title)

CERTIFICATE AS TO CORPORATE PRINCIPAL

I, \_\_\_\_\_ certify that I am the Secretary of the Corporation named as Principal in the within bond; that \_\_\_\_\_ who signed the said bond on behalf of the Principal, was then \_\_\_\_\_ of said Corporation; that I know the Principal, and the Principal's signature hereto is genuine; and that said bond was duly signed, sealed, and attested for and in behalf of said Corporation by authority of its governing body.

\_\_\_\_\_(Seal)

Secretary

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

Before me, a Notary Public, duly commissioned, qualified and acting, personally appeared \_\_\_\_\_ to me well known, who being by me first duly sworn upon oath, says that this individual is the Attorney-in-Fact, for the and that said individual has been authorized by \_\_\_\_\_ to execute the foregoing bond on behalf of the Contractor named therein in favor of City of Palm Bay, Florida.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, A.D.

(Attach Power of Attorney)

\_\_\_\_\_

Notary Public

State of Florida-at-Large

My Commission Expires: \_\_\_\_\_

My Commission Number is: \_\_\_\_\_



**EXHIBIT C: COST PROPOSAL**