

MEMORANDUM OF AGREEMENT
(Biltmore Golf Course West and East Bridge Repair Project)

4 This Memorandum of Agreement ("Agreement") is dated and effective as of November 4, 2016, and confirms the agreements by and between The City of Coral Gables, Florida, a municipal corporation organized under the laws of the State of Florida (the "City"), and Biltmore Hotel Golf Management LLC, a Florida limited liability company ("BHGM"), as relates to the following facts and circumstances.

Background

A. The City owns the land and improvements comprising the Biltmore Golf Course in Coral Gables, Florida (the "Golf Course"). BHGM manages the Golf Course pursuant to a certain Management Agreement dated January 20, 2004 ("Management Agreement").

B. Pursuant to the Management Agreement, the City is required to undertake and complete the repair and renovation of two separate bridges at the Golf Course (referred to as the "West Bridge" and the "East Bridge" or collectively as the "Bridges"), in order to rectify deteriorated conditions and safety concerns (the "Project").

C. The City and BHGM have discussed Project planning and implementation, and have determined that Project efficiency would be best served by the City delegating to BHGM, the party in possession and managerial control of the Golf Course, the day-to-day supervisory responsibility for the Project; subject to the City's obligation to pay directly all payments and expenses associated with the Project and its final completion.

D. In furtherance of the Project, BHGM has procured a certain inspection report dated October 2, 2014, prepared by m2e consulting engineers (the "Inspection Report"), and provided the Inspection Report to the City. As of the date of this Agreement, the City and BHGM has assessed the Inspection Report with a view toward developing a mutually acceptable definitive work plan, timeline and budget for the Project. In this connection, BHGM consulted with Foundry Commercial, LLC ("Foundry"), and introduced Foundry to the City as the project manager for the Project. Representatives of the City, BHGM and Foundry met at the Golf Course on August 5, 2016. Foundry inspected the Bridges, discussed the Project, and prepared a Project proposal dated September 13, 2016.

E. With the City's consent, BHGM has engaged Foundry as a Project consultant and manager, subject to BHGM's general oversight and supervision and at the City's sole cost and expense, pursuant to a certain Project Management Services Agreement between BHGM and Foundry ("Foundry Agreement"). Also, at Foundry's suggestion and with the City's consent, BHGM intends that R.J. Heisenbottle ("Architect") will be engaged to provide architectural services and that Architect will engage Douglas Wood Associates ("Engineer"), to provide structural engineering subcontract services. BHGM has confirmed that the Architect and Engineer identified above are City-preferred vendors.

F. The Project architectural services contract with Architect will be executed by BHGM using AIA forms reasonably acceptable to BHGM and the City (the "Architect's Agreement"). The Architect's subcontract with the Engineer will be in form and substance reasonably acceptable to BHGM and the City (the "Engineer's Agreement"). The Foundry Agreement, Architect's Agreement and Engineer's Agreement are sometimes collectively referred to as the "Service Agreements". The Parties agree (and agree that the Service Agreements will refer to this Agreement as a contract document and otherwise provide) that all Project costs including contract sums payable in respect of the Architect's Agreement and Engineer's Agreement are and will be the sole responsibility of the City.

G. The City and BHGM (each a "Party" and together the "Parties") have entered into this Agreement to confirm their understandings, agreements and respective roles and responsibilities relative to the Project.

NOW THEREFORE, in consideration of the background recitals and the Parties' respective undertakings in furtherance of the Project, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Introduction. The foregoing statements under the "Background" are true and correct and form the basis of and are incorporated as a part of this Agreement.

2. Preliminary Matters and City Approvals. The Parties will cooperate in good faith and exercise reasonable diligence to address the following conditions precedent, to enable the Project to proceed as soon as practicable.

(a) Using the Inspection Report and Foundry's Project summary as baseline information, and based on BHGM's consultations to date with Foundry, the Parties will work diligently and in good faith, and reasonably cooperate with each other and with Foundry, in order to develop and mutually agree upon: (i) a scope of work for the Project (the "Scope of Work"); (ii) a timeline within which the Scope of Work will proceed and be completed ("Work Schedule"); and (iii) design and construction budgets itemized by reference to various components within the Scope of Work and providing for an aggregate not-to-exceed maximum price, including design costs, construction-related hard and soft costs and general conditions, and profit components for the Architect, Engineer and the general contractor selected for the Project ("Budget"). The Parties will reasonably endeavor to complete and confirm agreements on the Scope of Work, Work Schedule and Budget by a projected target date of February 14, 2017. The Parties intend, and BHGM, coordinating with Foundry, will use commercially reasonable efforts to cause the Contractor (defined below) to substantially complete the Project (both Bridges) by no later than December 15, 2017.

(b) If and to the extent necessary to satisfy City permit requirements and to enable finalization and mutual approval of the Scope of Work, Work Schedule and Budget, BHGM will coordinate further development and completion of underlying design plans and selection of materials and finishes, with Foundry, Architect and Engineer. All such work product

will be subject to the City's prior approval, not to be unreasonably withheld, delayed or conditioned.

(c) BHGM will coordinate with Foundry and the City to develop and implement a request for proposals from Florida licensed general contractors, and to assess responses and select, subject to the City's reasonable approval, a general contractor for the Project ("Contractor"). BHGM will coordinate with Foundry to negotiate a general contractor's agreement between BHGM and the Contractor, which shall be reasonably acceptable to the City ("GC Agreement"). The GC Agreement will provide for the Project to be performed pursuant to the Scope of Work and within the Work Schedule, for a stipulated sum consistent with the City-approved Budget, at the City's sole cost and expense. The Parties intend that the GC Agreement will specify a substantial completion deadline for both Bridges by no later than December 15, 2017. As with the Service Agreements, the GC Agreement will refer to this Agreement as a contract document, to evidence and confirm the City's agreement relative to payment of all sums becoming due under the GC Agreement.

(d) The Parties will reasonably cooperate with respect to procuring all necessary permits for the Project ("Permits").

(e) Prior to commencement of construction, BHGM will cause the Contractor to provide evidence of all insurance required to be procured and maintained pursuant to the GC Agreement. The GC Agreement insurance standards will be consistent with City requirements for construction projects similar to the Project. In addition, BHGM will cause the Contractor to provide the City with copies of all major supply contracts or subcontracts for the Project, and evidence satisfactory to the City that all subcontractors are duly licensed in Florida, and have in force liability and workers' compensation insurance in amounts and issued by companies reasonably consistent with the insurance requirements specified in the GC Agreement.

3. Project Implementation; Payment Provisions.

(a) Subject to satisfaction of the preliminary matters and approvals as provided in Section 2 above, BHGM will direct Contractor or cause Foundry to direct Contractor to perform its duties under the GC Agreement in fulfillment of the Project and the Permits, on Budget and consistent with the Work Schedule. Foundry will assist BHGM and the City in monitoring the status and progress of construction and compliance with the GC Agreement and Permit conditions. BHGM and Foundry will cause Contractor to report to the Parties from time to time as specific aspects of the Project are undertaken and completed. Such reports will confirm that work performed to date has been performed pursuant to and in accordance with the Permits, and the terms, conditions and standards set forth in the GC Agreement. The Parties agree to cooperate in good faith in advance where possible, and regularly in any case, with respect to the Project and progress toward completion. BHGM will provide general supervisory services, working through and with assistance from Foundry, with a view toward ensuring that Project work proceeds in a manner designed to minimize interference with Golf Course operations and operations at the Biltmore Hotel, and to abate nuisance conditions affecting the Project sites.

(b) BHGM, with Foundry's assistance, will perform or cause performance of periodic inspections of the work performed to date, and provide the City with inspection and status reports relative to the progress of the Project.

(c) The Parties agree that the Budget and Work Schedule, and the Service Agreements and GC Agreement will provide for the City to pay Foundry, Architect, Engineer and Contractor directly for their services, in amounts and at times as provided in the respective Service Agreements or the GC Agreement, as applicable. Without limiting the foregoing, the GC Agreement will provide for the City to pay an initial payment to the Contractor at the commencement of the Project, and interim Project completion payment installments to the Contractor, on the terms and subject to retainage as provided in the GC Agreement ("Installments"). The Parties have agreed that Contractor will submit payment requests to the City and to BHGM, initially and for scheduled Installments, and that the City will pay Contractor directly the initial payment and the amount of each Installment consistent with the Budget, as and when due pursuant to the GC Agreement.

(d) The City has agreed to pay Foundry a lump sum fee for services under the Foundry Agreement in the total amount of \$36,400, together with reimbursement for specified reimbursable out-of-pocket expenses (at Foundry's actual cost, without mark-up), such as printing, overnight deliveries, copying, and mileage charges. Foundry will provide monthly invoices and reasonable supporting documentation for all reimbursable expenses.

(e) In addition, the City has agreed to pay BHGM a monthly fee for its supervisory services in the total amount of \$1,200 per month; such amount being deemed by each Party to be fair "make-whole" consideration to remove fixed cost burdens from BHGM. In addition, the City will reimburse BHGM for specified reimbursable out-of-pocket expenses (at actual cost, without mark-up), including BHGM's counsel fees and costs incurred in connection with this Agreement and the Project, and printing, overnight deliveries and copying. BHGM will provide monthly invoices and reasonable supporting documentation for all reimbursable expenses.

(f) The City represents, warrants, acknowledges and agrees that the City is solely responsible for all Project costs, including timely payment of all amounts due to Architect, Engineer, the Contractor, Foundry and BHGM, and for costs associated with the Inspection Report and Foundry's Project proposal, RFP costs, and Project design, permitting, construction and completion.

(g) The Parties intend that the GC Agreement will provide for retainage for "hard costs" as reasonably required by the City.

(h) Contractor's requests for Installment payments and for final payment will be in writing, in a form approved by the Parties, and will set forth the amount of the requested Installment, and certify (i) as to the total sum paid to date and remaining to be disbursed pursuant to the Budget, and that the remaining balance is sufficient to complete the Project; (ii) that the Project work is proceeding in compliance with the GC Agreement, on time and on Budget; and

(iii) that the requested Installment will be used and applied only for the Project purpose correlating to the Budget items that are the subject of the Installment.

(i) In addition, Contractor will include with its requests for Installments a conditional lien waiver with respect to all Installments paid to date and the current Installment, and copies of inspection reports and evidence that no notices to owner or claims of lien have been filed or served on the City or BHGM, or posted on the Property by anyone claiming a lien on the Property; and with satisfactory evidence that all fees to third parties or suppliers have been paid or otherwise satisfied. The Parties may require that each request for an Installment shall also be accompanied by copies of invoices or work orders and paid receipts for all bills or statements for supplies, materials or expenses. The Parties reserve the right to inspect Contractor's records in order to verify that invoices, work orders and lien waivers are true and correct.

(j) Also, in connection with each request for an Installment, Contractor will date-down its representations and warranties that the work completed to date has been completed in a workmanlike manner, in accordance with the Permit and GC Agreement requirements, and that the Project is in conformity with the Timetable and Budget.

(k) The GC Agreement will provide that, with each request for a payment, Contractor will represent and warrant that the Project work completed to date has been completed in a workmanlike manner, using the materials specified, which have been supplied and incorporated in accordance with the approved plans and Permits, and that the Project is in material conformity with the Timetable and Budget, and that Contractor will identify all known or anticipated change orders or deviations from the approved Scope of Work, Timetable or Budget; it being acknowledged that no material changes orders will be made without the City's prior consent.

(l) With respect to each disbursement to the Contractor under the GC Agreement, the City shall have the right to make payment or require payment (subject to retainage) by check or joint check to the Contractor, subcontractors and suppliers in any combination or by credit directly to the Contractor's account, all of which shall separately or in any combination, constitute proper disbursement. The City's approval of a request for a disbursement or the making of a disbursement shall not constitute an acceptance of the Project work or materials. In addition to retainage, the City shall have the right to withhold from disbursements amounts sufficient for remedial or corrective work to be performed.

4. Project Completion; Final Disbursement. When the Project is substantially complete, BHGM will procure from the Contractor and provide to the City the following documents: (a) Contractor's final affidavit in form and substance satisfactory to the Parties, certifying that the Project work has been completed pursuant to approved plans and Permits, and in accordance with the GC Agreement, and certifying that all bills and expenses in connection with the Project have been paid; (b) fully executed and notarized releases of liens signed by the Contractor and all subcontractors and persons furnishing materials, services, or labor to or on the Golf Course property, including those serving a "Notice to Owner" (if any); and (c) evidence that all Permits are closed.

5. Compliance with Laws. The Parties will comply, and BHGM will cause Contractor to comply, with applicable provisions of Florida Statutes, Chapter 713 or Chapter 255, as applicable ("Lien Law") and all other laws as applicable to the development and completion of the Project ("Applicable Laws"). Applicable Laws shall include, without limitation, City zoning and land use laws, the Florida Building Code, and Art in Public Places requirements.

6. Project Records; Accountings and Financial Review. BHGM shall take reasonable steps to ensure that Foundry and Contractor maintain and provide adequate records to justify all Project charges, expenses and costs for at least three years following Project completion. The City shall have access to all Project books and records for inspection and audit purposes.

7. Relationship of the Parties. The Parties agree that BHGM is an independent entity responsible for oversight of the Project and is not an agent or partner of the City. Neither Party, nor the City's elected or appointed officials, nor the respective Parties' managers, employees, officers, agents, representatives, contractors or consultants, shall be considered partners or co-venturers, nor to have been authorized to incur any expense or liability on the part of another such person, nor to act for or bind any such person, except as expressly provided hereunder and/or in the Service Agreements and GC Agreement. Foundry, Architect, Engineer and the GC are recognized by the City as third-party beneficiaries of the City's obligations confirmed hereunder to pay all Project expenses, including under the respective Service Agreements and the GC Agreement.

8. Liability. The Parties shall not be deemed to assume any liability for the negligent or wrongful acts or omissions of the other Party. Nothing contained herein shall be construed as a waiver by either Party of the liability limits established in Florida Statutes, Section 768.28.

9. Breach; Cure. If either Party claims the other has failed to perform its obligations pursuant to this Agreement, the Party claiming breach shall provide written notice to the other Party, setting forth with reasonable particularity the nature of the claimed breach. The other Party shall respond to such notice and undertake cure as may be applicable under the circumstances, promptly and in any event within thirty days after receipt of a default notice; provided, that if cure is undertaken, and it is not reasonably possible to complete responsive actions to cure a breach within thirty days after notice, the cure period shall be extended, reasonably and at least for up to ninety days following the date of the original notice, so long as the Party claimed to be in breach diligently commences and thereafter continues efforts to cure the breach.

10. Remedies. In case of a Party's uncured breach of its obligations hereunder, the Parties shall endeavor in good faith to resolve any resulting disputes or controversies consensually, failing which (after good faith effort) the other Party may institute litigation to recover damages for any default or to obtain any other remedy at law or in equity. The rights and remedies of the Parties are cumulative and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default. Any failure of a Party to

exercise any right or remedy as provided in this Agreement shall not be deemed a waiver by that Party of any claim for damages it may have by reason of the default.

11. Termination. Notwithstanding anything herein to the contrary, until the engagement of the Contractor pursuant to an approved GC Agreement, either Party shall have the right to terminate this Agreement, by giving written notice of termination to the other Party, in the event that the other Party is in material breach of this Agreement; absent cure as provided above. Termination of this Agreement by any Party is not effective until five business days following receipt of the written notice of termination. After the effective date of the GC Agreement, this Agreement shall continue in effect, co-extensive with the GC Agreement. This Agreement will terminate automatically when the GC Agreement is fulfilled and terminated in accordance with its terms. Upon termination of this Agreement, no Party shall have any further liability or obligation to the other Party; provided that no Party shall be relieved of any liability for breach of this Agreement for events or obligations arising prior to such termination.

12. Litigation Costs/Venue. In the event that BHGM or the City institutes any action or suit to enforce the provisions of this Agreement, the prevailing party in such litigation shall be entitled to reasonable costs and attorney's fees at the trial, appellate and post-judgment levels. This Agreement shall be governed by and construed in accordance with the laws of the State of Florida. The City and BHGM agree to submit to service of process and jurisdiction of the State of Florida for any controversy or claim arising out of or relating to this Agreement or a breach of this Agreement. Venue for any court action between the parties for any such controversy arising from or related to this Agreement shall be in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. THE PARTIES WAIVE TRIAL BY JURY.

13. Notices. Any notice, consent or other communication required to be given under this Agreement shall be in writing, and shall be considered given when delivered in person or sent by facsimile or electronic mail (provided that any notice sent by facsimile or electronic mail shall simultaneously be sent personal delivery, overnight courier or certified mail as provided herein), one (1) business day after being sent by reputable overnight carrier or three (3) business days after being mailed by certified mail, return receipt requested, to the respective Parties at the addresses set forth below (or at such other address as a Party may specify by notice given to the other Party):

If to BHGM: c/o The Biltmore Hotel
 1200 Anastasia Avenue
 Coral Gables, Florida 33134
 Attn: T. Gene Prescott

With a copy to: S. Daniel Ponce, Esq.
 Berger Singerman LLP
 1450 Brickell Avenue, Suite 1900
 Miami, Florida 33131

If to City: City Manager
City of Coral Gables
405 Biltmore Way
Coral Gables, Florida 33134

With a copy to: Craig E. Leen, Esq.
City Attorney, City of Coral Gables
405 Biltmore Way
Coral Gables, Florida 33134

14. Modification and Amendment. No amendment or alteration in the terms or conditions contained herein shall be effective unless contained in a written document executed by both Parties.

15. Joint Preparation. The preparation of this Agreement has been a joint effort of the Parties, and the resulting document shall not, as a matter of judicial construction, be construed more severely against one Party than the other.

16. Headings. Captions and headings in this Agreement are for ease of reference only and do not constitute a part of this Agreement and shall not affect the meaning or interpretation of any provisions herein.

17. Waiver. There shall be no waiver of any right related to this Agreement unless in writing and signed by the Party waiving such right. No delay or failure to exercise a right under this Agreement shall impair such right or shall be construed to be a waiver thereof. Any waiver shall be limited to the particular right so waived and shall not be deemed a waiver of the same right at a later time or of any other right under this Agreement. Waiver by a Party of any breach of any provision of this Agreement shall not be considered as or constitute a continuing waiver or a waiver of any other breach of the same or any other provision of this Agreement.

18. Invalidity of Provisions, Severability. Wherever possible, each provision of the Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement, provided that the material purposes of this Agreement can be determined and effectuated.

19. Indemnity. BHGM and the City, respectively, each agrees to indemnify and hold harmless the other Party to the extent and within the limitations of Florida Statutes, Section 768.28, subject to the provisions of that statute, whereby the indemnifying Party shall not be held liable to pay a personal injury or property damage claim or judgment by any one person which exceeds the sum of \$100,000, or any claim or judgments or portions thereof, which when totaled with all other occurrences, exceeds the sum of \$200,000 from any and all personal injury or property damage claims, liabilities, losses or causes of action which may arise solely as a result of the negligence of the indemnifying Party; provided, however, that nothing herein shall be deemed to create an indemnification obligation with respect to any liability or claim arising out

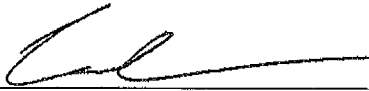
of the negligent performance of or failure of performance by the Party claiming indemnity or any unrelated third party.

20. Assignment. BHGM may not assign or delegate all or any portion of its obligations under this Agreement without the prior written consent of the City.

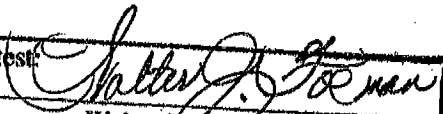
21. Entirety of Agreement. This Agreement incorporates and includes all prior negotiations, correspondence, conversations, agreements, and understandings applicable to the matters contained in this Agreement. The Parties agree that there are no commitments, agreements or understandings concerning the subject matter of this Agreement that are not contained in this Agreement, and that this Agreement contains the entire agreement between the Parties as to all matters contained herein.

IN WITNESS WHEREOF, BHGM and the City, through their respective duly authorized representatives, have executed and delivered this Agreement with an effective date of November 4, 2016.

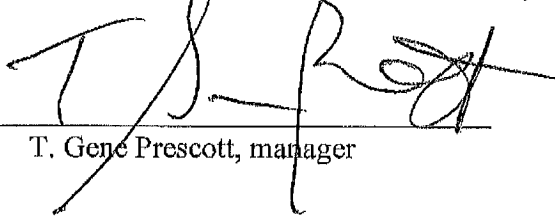
CITY OF CORAL GABLES, FLORIDA

By: 

Craig E. Leen, City Attorney (signed as a settlement agreement pursuant to section 2-201(e)(6) of the City Code)


Attest: 
Walter J. Foeman
City Clerk

BILTMORE HOTEL GOLF MANAGEMENT, LLC

By: 
T. Gene Prescott, manager

*The Parties have agreed that the Scope of Work, Work Schedule, and Budget, will be brought to the City Commission for its review and approval in a timely manner once finalized.


City


Biltmore