

## **PRECONSTRUCTION SERVICES AGREEMENT**

**THIS PRECONSTRUCTION SERVICES AGREEMENT** (this “Agreement”) is made as of this \_\_\_\_ day of 2017 (the “Effective Date”), between the City of Coral Gables, a Florida municipal corporation (the “City”), having its principal address at: City of Coral Gables Finance Department/ Procurement Division, 405 Biltmore Way, Coral Gables, Florida 33134, and (“Preconstruction Preconstruction CM” or “Preconstruction CM”) having its principal place of business at \_\_\_\_\_ and Florida General Contractor’s License # \_\_\_\_\_. The City and Preconstruction CM are sometimes collectively referred to herein as the “Parties” and each, individually, as a “Party.”

### **RECITALS**

**WHEREAS**, the City issued a Request for Qualifications No. \_\_\_\_\_ (the “RFQ”) seeking qualifications and from contractors to provide certain preconstruction services and service, labor and materials as a Preconstruction CM at risk for construction of the Public Safety Building (the “Project”);

**WHEREAS**, Preconstruction CM submitted its qualifications (“Preconstruction CM’s Qualifications”) in response to the City’s RFQ outlining Preconstruction CM’s extensive experience and expertise in projects similar to the Project;

**WHEREAS**, the City selected Preconstruction CM to perform certain preconstruction services for the Project as set forth in this Agreement (the “Preconstruction Services”) pursuant to Sections 255.103 and 287.055, Florida Statutes, and Section 2-1089 of the City of Coral Gables Code of Ordinances;

**WHEREAS**, City desires to contract with Preconstruction CM to perform the Preconstruction Services while the Parties negotiate the terms of the agreement for the construction of the Project (the “Construction Management Agreement”);

**WHEREAS**, the City and Preconstruction CM acknowledge and agree that no enforceable promise or agreement by the City exists as to the award of the Construction Management Agreement to Preconstruction CM, that no representation has been made, written or oral, as to the award of the Construction Management Agreement to Preconstruction CM, and that no commitment can be made by any employee or representative of the City as to the award of the Construction Management Agreement to Preconstruction CM. The Parties will continue to negotiate the terms of the Construction Management Agreement in good faith, but no such Construction Management Agreement shall be construed or inferred until such time as a written Construction Management Agreement is mutually executed by the Parties;

**WHEREAS**, the City seeks the advice, recommendations and services of Preconstruction CM as part of City’s effort to identify issues in the design of the Project, provide alternative ideas thereto, and to expedite construction in order to minimize construction-related problems and delays, and to deliver the Project in accordance with City’s budget and City’s time requirements;

**WHEREAS**, Preconstruction CM understands that is the City’s intent by engaging Preconstruction CM to minimize the risk of change orders in the construction of the Project

related to unforeseen conditions and constructability issues and to maximize the possibility of the timely completion of the Project;

**WHEREAS**, the Preconstruction CM agrees to provide the Preconstruction Services as defined in this Agreement during the Term of this Agreement in accordance with terms and conditions of this Agreement and reasonable industry standards. The Preconstruction Services can be modified upon written agreement by the Parties;

**WHEREAS**, all information (including any electronic files) generated by Preconstruction CM in its performance of the Preconstruction Services shall be and remain the property of the City and Preconstruction CM agrees to provide such information to the City as reasonably requested;

**WHEREAS**, Preconstruction CM has examined the Preconstruction Services required hereunder and desires to provide the Preconstruction Services to the City;

**WHEREAS**, the Preconstruction CM agrees to accept this Agreement upon the terms and conditions hereinafter set forth; and

**WHEREAS**, the City, through action of the City of Coral Gables City Commission, by Resolution No. \_\_\_\_\_, has authorized the City of Coral Gables City Manager to execute this Agreement on behalf of the City.

**WITNESSETH**, the City and Preconstruction CM, for good and valuable consideration, the receipt and adequacy of which are hereby conclusively acknowledged, hereby agree as follows:

**ARTICLE 1**  
**DEFINITIONS; EXHIBITS**

1.1 “Architect” means the architect for the Project, AECOM, 800 Douglas Entrance, North Tower, Second Floor, Coral Gables, FL 33134.

1.2 “City Commission” means the legislative body of City of Coral Gables.

1.3 The “City” means the City of Coral Gables, Florida, a Florida municipal corporation, the public agency which is a party hereto and for which this Agreement is to be performed. In all respects hereunder, the City’s performance is pursuant to the City’s position as the owner of the Project. In the event the City exercises its regulatory authority as a governmental body, the exercise of such regulatory authority and the enforcement of any rules, regulations, codes, laws and ordinances shall be deemed to have occurred pursuant to the City’s authority as a governmental body and shall not be attributable in any manner to the City as a Party to this Agreement. For the purposes of this Agreement, the “City” without modification shall mean City Manager or Public Works Director, as applicable.

1.4 “Project Manager” means the City’s Director of Public Works or its designee, who may be designated in the City’s sole discretion.

1.5 “Force Majeure” means an event as interpreted under Florida Statutes.

1.6 “Hourly Rates” means the hourly rates which are part of Preconstruction CM’s Preconstruction Services Breakdown attached hereto as **Exhibit “A.”**

1.7 “Notice To Proceed” means a duly authorized written letter or directive issued by the Project Manager directing that Preconstruction CM begin Preconstruction Services for the Project.

1.8 “Subcontractor” means any person who has a written agreement with Preconstruction CM to perform a portion of the Preconstruction Services or to furnish materials or equipment for incorporation into the Project.

1.9 **Exhibits.** The Exhibits to this Agreement which are incorporated into this Agreement are as follows:

<b>Exhibit “A”</b>	<b>Preconstruction Services Breakdown</b>
<b>Exhibit “B”</b>	<b>Preconstruction Services Schedule</b>
<b>Exhibit “C”</b>	<b>Preconstruction CM’s Key Personnel</b>
<b>Exhibit “D”</b>	<b>RFQ</b>
<b>Exhibit “E”</b>	<b>Certificate of Insurance</b>
<b>Exhibit “F”</b>	<b>Preconstruction CM’s Qualifications</b>

## **ARTICLE 2** **GENERAL PROVISIONS**

2.1 **Recitals.** The above recitals are true and correct and are incorporated herein by this reference.

2.2 This Agreement incorporates and supersedes all previous agreements, written, oral and contemporaneous communications between the Parties regarding the Project.

2.3 **Term.** Upon receipt of a Notice to Proceed from City, Preconstruction CM shall commence performance of the Preconstruction Services and continue to perform the Preconstruction Services through termination or completion of this Agreement (the “Term”).

2.3.1 Preconstruction CM shall perform the Preconstruction Services timely and diligently so as not to delay the Project and in accordance with the Preconstruction Services Schedule attached hereto as **Exhibit “B,”** subject to Section 7.3.

2.4 **Priority of Interpretation.** The City of Coral Gables Code and City Resolutions issued prior to the Effective Date shall take precedence over this Agreement and the Exhibits hereto. In the event of any conflict or inconsistency in the definition or interpretation of any word, responsibility, schedule, or the contents or description of any task, deliverable, service, or other work, or otherwise, between the City of Coral Gables Code and City Resolutions issued prior to the Effective Date, this Agreement, and the Exhibits, or between Exhibits, such conflict or inconsistency shall be resolved by giving precedence according to the following priority:

- a. The City of Coral Gables Code and City Resolutions;
- b. Any Change Orders;
- c. This Agreement;

- d. Preconstruction CM Services Breakdown attached as **Exhibit “A”**;  
**and**
- e. Other Exhibits

2.5 **Background Investigation.** Preconstruction CM agrees that all employees of Preconstruction CM and Subcontractor may be subject to an annual background investigation.

2.5.1 **Polygraph Examination.** The Preconstruction CM understands that all of its employees may be required to submit to polygraph examinations at the request of the City, and Preconstruction CM agrees that its employees will do so if requested.

2.6 **Drug Free Workplace.** Preconstruction CM, its employees, agents and Subcontractors shall comply with the City’s Drug Free Work Place Policy at Preconstruction CM’s expense. The City may require that Preconstruction CM and/or its employees, agents and Subcontractors performing services for the Project submit to a yearly medical and drug screen examination, at Preconstruction CM expense.

2.7 **Confidential Information.** Preconstruction CM agrees that any information received by Preconstruction CM from the City for the Project and which is not publicly available, shall not be revealed to any persons, firm or organizations not affiliated with Preconstruction CM or its Subcontractors, unless incident to the proper performance of the Preconstruction CM Services, Preconstruction CM’s obligations hereunder, or in the course of judicial or legislative proceedings where such information has been properly subpoenaed, Preconstruction CM shall require all of its employees, agents, and Subcontractors to comply with the provisions of this Section 2.7.

### **ARTICE 3** **PRECONSTRUCTION SERVICES**

3.1 **Preconstruction Services.** Preconstruction CM agrees to provide the Preconstruction Services as specifically described herein in accordance with the terms and conditions set forth in this Agreement, including the Preconstruction Services Breakdown attached hereto as **Exhibit “A.”** The Preconstruction Services include the following:

3.1.1 Consult with the City and Architect, Architect’s consultants, other consultants engaged by the City (if any) and meet with the City, Architect, Architect’s consultants and others as requested by the City. Gain familiarity with the City’s requirements, design goals, time limitations, and challenges including any governmental conditions of approval for the Project. Preconstruction CM shall participate in design and construction meetings relating to the Project and consult with and advise the City in accordance with Preconstruction Services Breakdown attached as **Exhibit “A.”** The City agrees to provide copies of all design documents and all reports or analyses prepared by Architect and the City’s separate consultants (the “Design Documents”) to Preconstruction CM to facilitate Preconstruction CM’s performance of the Preconstruction Services and to maximize the ability of Preconstruction CM to identify construction-related issues, to estimate costs, and to estimate a schedule for the Project.

3.1.1.1 Preconstruction CM shall review the Design Documents and identify to the City and Architect any issues regarding constructability, coordination, scheduling, cost and value engineering, or other concerns identified by Preconstruction CM.

3.1.2 Preconstruction CM shall consult with Architect regarding local permitting agencies, local conditions, and concerns regarding local residents and businesses.

3.1.3 Review Site Conditions. Review existing site conditions including any surveys, soils reports or other site assessments prepared and delivered by the City to Preconstruction CM. Make recommendations on further investigations which may be prudent to obtain in order to minimize the risk of change orders. Review existing conditions and advise the City of existing conditions that will or may impact the Design Documents and/or the Project.

3.1.4 Cost Estimates. Develop a detailed budget estimate to be updated periodically as design progresses on the Project (the “Cost Estimate(s)”), as set forth below. The Cost Estimates shall be formatted to allow tracking of previous generations thereof, including but not limited to: line item deltas, accepted, rejected and pending alternatives and value engineering. Detailed breakdowns for each individual line item in the Cost Estimates, including quotes from subcontractors for various portions of the Project and analysis shall be furnished. The Cost Estimates will include identification of all clarifications, qualifications and exclusions of elements comprising the cost.

3.1.5 Provide draft plans for traffic impact, noise control, dust control, water control and safety for the construction of the Project.

3.1.6 Cost Estimates shall include a list of value engineering suggestions and cost savings associated with each line item. Cost Estimates shall be prepared and delivered to City at the following milestones:

- Completion of Schematic Design Documents
- Completion of Design Development Documents
- 50% Completion of Construction Documents

Cost Estimates shall contain details as to each trade, general conditions, and fee and any other details requested by City. The City will rely on the completeness and accuracy of the Cost Estimates. Preconstruction CM shall monitor the Architect’s development of the design for cost increases, issues with design constructability or opportunity for savings. Preconstruction CM shall notify the City if Preconstruction CM identifies issues, modifications, conditions or revisions that may lead to material cost increases, unreasonable challenges to constructability, constructability issues, coordination issues, or material impacts to the estimated schedule for the Project.

3.1.7 Construction Schedule. Preconstruction CM shall develop a detailed construction schedule (i) upon commencement of the Preconstruction Services,

and (ii) after Architect completes the schematic design documents for Project. Add details and logic to the schedule as the design progresses. Update the schedule on a regular basis but at a minimum with the delivery of each Cost Estimate. Assist in the identification of schedule items required to be delivered by the City, such as utility connections, special permits, etc. Further, Preconstruction Preconstruction CM shall advise the City of ways to gain efficiency in Project delivery.

3.1.8 Value Engineering. Preconstruction CM shall develop and update value engineering suggestions during the development of the plans and specifications for the Project. Preconstruction CM will provide cost benefit and/or schedule analysis to assist the City in making value engineering / cost benefit decisions.

3.1.9 Constructability Review. Preconstruction CM shall review development plans and specifications and provide recommendations for improving long term performance of the Project and implementation of the Project.

3.1.10 Utilities Coordination. Preconstruction CM shall assist in coordinating utilities, including water, gas and electricity, as applicable.

3.1.11 Preconstruction CM shall competitively bid any subcontracted work. In the event Preconstruction CM performs up to fifty percent (50%) of the Project as allowed per the RFQ, then Preconstruction CM will also provide competitive bids for such work. Preconstruction CM will present all bids to the City with recommendations for subcontractor team.

3.1.12 Preconstruction CM shall conduct plan reviews with the City officials, and other agencies requiring approvals, as well attend meetings and community presentations in accordance with Preconstruction Services Breakdown attached as Exhibit "A."

3.1.13 Preconstruction CM shall provide long-lead procurement studies and initiate procurement of long-lead items if requested by the City in writing.

3.1.14 Preconstruction CM shall protect the City's sensitivity to quality, safety and environmental factors.

3.1.15 Preconstruction CM shall participate in all Project related community meetings.

3.2 Additional Services. Preconstruction CM shall not be entitled to compensation for services in addition to the Preconstruction Services set forth herein ("Additional Services") unless and until authorized by a written document signed by the City and Preconstruction CM after the Effective Date that modifies the Preconstruction Services, the Preconstruction Services Fee, and/or the Preconstruction Services Schedule (a "Change Order"). Preconstruction CM has no obligation to perform Additional Services unless and until authorized to do so by a Change Order and the City has no obligation to compensate Preconstruction CM for Additional Services except as set forth on an executed Change Order. Change Orders shall settle all claims for changes to Preconstruction CM's Fee and/or the

Preconstruction Services Schedule arising out of such Additional Services identified in the Change Order, unless otherwise expressly stated in the Change Order.

3.3 Preconstruction CM represents that it is properly licensed in the State of Florida to perform the Preconstruction Services. Preconstruction CM shall obtain any and all permits required for the performance of the Preconstruction Services, which shall be at the City's expense.

3.4 **Preconstruction CM's Duty of Care.** During the entire Preconstruction Phase of this Project, the Preconstruction CM shall be acting in a position of trust with the City, and as such the Preconstruction CM has a fiduciary duty to act entirely in the best interests of and for the benefit of the City. If any circumstances should arise whereby the Preconstruction CM feels that it can no longer perform their fiduciary duty as the City's agent for the Preconstruction Services, the Preconstruction CM shall immediately notify the City of that fact and the circumstances that have arisen that have led to their conclusion in this regard. In performing the Preconstruction Services, the Preconstruction CM shall:

- a. Exercise reasonable skill, care and diligence, which is to be expected of a competent Preconstruction CM performing Preconstruction Services, experienced in carrying out work of a similar size, scope, and complexity in Florida; and
- b. Apply its knowledge, ideas, experience and abilities to the execution of the Preconstruction Services set forth in this Agreement.

3.4.1 Preconstruction CM shall, at no additional cost to the City, re-perform and/or correct Preconstruction Services which fail to satisfy the foregoing standard of care.

3.4.2. The City agrees that Preconstruction CM is not acting and does not hold itself out as a professional architect, engineer, accountant, or lawyer in the performance of the Preconstruction Services or otherwise in respect of this Agreement.

#### **Article 4** **COMPENSATION**

4.1 As full consideration for the Preconstruction Services hereunder, the City shall pay Preconstruction CM \_\_\_\_\_ Dollars (\$\_\_\_\_\_) ("Preconstruction CM's Fee"), as provided in **Exhibit "A."** Additionally, the City shall pay Preconstruction CM for the costs of any Early Work as provided in Article 22.

4.2 **Payments.** Preconstruction CM shall submit monthly invoices based on the percentage of completion of the Preconstruction Services. The City shall make payment of undisputed amounts of each invoice no later than thirty (30) days after the City's receipt of each invoice. Each of Preconstruction CM's monthly invoices shall be accompanied by sufficient supporting documentation and contain sufficient detail, to allow a proper audit of expenditures, should the City require one to be performed. For the purposes of this Section 4.2, "sufficient detail" means that each monthly invoice shall be based on the approved schedule of values showing the percentage of completion for each line item contained in the schedule of values. As a strict condition precedent to any payment made on the Project to Preconstruction CM by the City, Preconstruction CM shall provide an unconditional Waiver of Lien by the

Preconstruction CM and its subcontractors to the City for the time period reflected in the pay request in accordance with Florida Statutes. If Preconstruction CM is entitled to reimbursement of travel expenses, then all bills for travel expenses shall be submitted in accordance with Section 112.061, Florida Statutes.

4.3 Most Favored Public Entity. The Preconstruction CM represents that the prices charged to City in this Agreement do not exceed existing prices to other customers for the same or substantially similar items or services for comparable quantities under similar terms and conditions. If Preconstruction CM's prices decline, or should Preconstruction CM, at any time during the term of this Agreement, provide the same services to any other customer at prices below those set forth herein, then such lower prices shall be immediately extended to the City.

## **ARTICLE 5** **PERFORMANCE**

5.1 The Preconstruction Services to be performed hereunder shall be performed by Preconstruction CM, unless otherwise approved in writing by City. Said approval shall not be construed as constituting an agreement between the City and said other person(s) or firm.

5.2 City may make written request to Preconstruction CM for the prompt removal and replacement of any personnel employed or retained by Preconstruction CM, or any personnel of Preconstruction CM, any subcontractor, or any personnel of any such subcontractor engaged by Preconstruction CM provide and perform Preconstruction Services pursuant to the requirements of this Agreement. Preconstruction CM shall respond to City within five (5) working days of receipt of such request with either the removal and replacement of such personnel or written justification as to why that may not occur. All decisions involving personnel will be made by Preconstruction CM.

5.3 Preconstruction CM's Key Staff. The Parties acknowledge that Preconstruction CM was selected by the City, in part, on the basis of Preconstruction CM's Qualifications and particular staff identified Preconstruction CM therein, hereinafter referred to as "Key Personnel" and detailed on Preconstruction CM's Key Personnel attached hereto as **Exhibit "C."** Preconstruction CM's Key Personnel shall be primarily responsible for the Preconstruction Services hereunder as long as the Key Personnel are in Preconstruction CM's employ. Preconstruction CM will obtain prior written approval of the City to change Key Personnel. Preconstruction CM shall provide the City with such information as necessary to determine the suitability of proposed individuals to replace the Key Personnel and the City will act reasonably in evaluating such individuals' qualifications.

5.4 Errors and Omissions. Preconstruction CM's shall be responsible to promptly make corrections to Preconstruction Services are found to contain discrepancies, errors or omissions. To the extent that such discrepancies, errors or omissions are the fault of Preconstruction CM, costs associated with corrections of such Preconstruction Services, and delays and/or costs of the construction work resulting from, loss of use, increased costs of construction, cost for correction or replacement of construction work already performed, and damages associated with the Preconstruction CM's Services or the work of other Project participants, resulting from such discrepancies, errors or omissions shall be borne by Preconstruction CM's.



5.5 Preconstruction CM acknowledges entering into this Agreement as an independent Contractor and that Preconstruction CM shall therefore be responsible for the deposit and payment of any Federal Income Taxes, FICA, Unemployment Taxes or any similar fees or taxes that become due, and shall be responsible for the collection and payment of all withholdings, contributions and payroll taxes relating to Preconstruction CM's Services. The City shall not withhold from sums payable to Preconstruction CM, any amount whatsoever for Federal Income Taxes, FICA, Unemployment Insurance Taxes or any similar fees or taxes. Preconstruction CM and its employees or agents will not be considered employees of the City and are not entitled to participate in plans, distributions, arrangements or other benefits extended to the City's employees.

5.6 Agency. Nothing herein shall imply or shall be deemed to imply an agency relationship between the City and Preconstruction CM.

5.7 Preconstruction CM warrants that it fully complies with all Federal statutes and regulations regarding the employment of undocumented workers and others and that all employees performing work under this Agreement meet the citizenship or immigration status requirements set forth in Federal statutes and regulations. Preconstruction CM shall indemnify, defend, and hold harmless the City, its officers and employees from and against any sanctions and any other liability which may be assessed against the City in connection with any alleged violation of any Federal statutes or regulations pertaining to the eligibility for employment of any persons performing Preconstruction Services.

5.8 The employees and agents of each Party, shall, while on the premises of the other Party, comply with all rules and regulations of the premises, including, but not limited to, security requirements.

## **ARTICLE 6** **SUBCONTRACTORS**

6.1 Preconstruction CM shall not engage any Subcontractors for the performance of Preconstruction Services unless expressly agreed to in writing by the City.

6.2 However, as part of Preconstruction CM's Preconstruction Services, Preconstruction CM shall prequalify subcontractors and obtain bids from qualified subcontractors for the Project. All such bids, proposals and other information from subcontractors shall be shared with the City. Preconstruction CM shall not engage any subcontractor for the construction of the Project without the City's written approval.

## **ARTICLE 7** **DEFAULT & DELAYS**

7.1 If Preconstruction CM fails to perform its obligations hereunder, then Preconstruction CM shall be in breach of this Agreement. Upon the occurrence of such breach, the City shall provide written notice to Preconstruction CM of such default, and Preconstruction CM shall take all necessary action to cure said default within fifteen (15) business days after receipt of such notice. If Preconstruction CM fails to cure the breach in the stipulated timeframe may result in the City terminating this Agreement. The City may, in their sole discretion, extend in writing the timeframe for curing such default.

7.2 In the event of default, City may withhold payment to Preconstruction CM until such time as the actions giving rise to default have been cured. Preconstruction CM shall only be entitled to payment for Preconstruction Services properly rendered.

7.3 If any such failure on the part of Preconstruction CM is due to a condition of Force Majeure, or the acts or omissions of the City, then the City shall allow an extension of time reasonably commensurate with the cause of such failure to perform or cure. If Preconstruction CM is delayed in performing any obligation under this Agreement due to a Force Majeure condition or the acts or omissions of the City, then Preconstruction CM shall request a time extension from the City within seven (7) business days of said occurrence. Any time extension shall be subject to mutual agreement of the Parties. Any time extension shall be subject to mutual agreement and shall not be cause for any claim by Preconstruction CM for, or include, extra compensation unless Additional Services are required.

## **ARTICLE 8**

### **TERMINATION OF AGREEMENT**

8.1 The City's Right to Terminate. The City has the right to terminate this Agreement for any reason or no reason, upon ten (10) days' written notice to Preconstruction CM. Upon termination of this Agreement, the Documents (as defined herein) must be turned over to the City, both in hard copy and in electronic form. If the termination is without cause, Preconstruction CM shall be paid in accordance with provisions of this Agreement for all Preconstruction Services performed, provided that the Documents are turned over to the City within ten (10) business days of termination. Failure to timely deliver the Documents shall be cause to withhold any payments due without recourse by Preconstruction CM until the Documents are delivered to the City.

8.1.2 Except as set forth in this Section, Preconstruction CM shall have no recourse or remedy from a termination made by the City except to retain the fees already disbursed or owing as compensation for the Preconstruction Services that were performed in complete compliance with this Agreement, as full and final settlement of any claim, action, demand, cost, charge or entitlement it may have, or will have against the City, its officials or employees. Further, Preconstruction CM shall have no claim for lost profits, lost fees, lost business opportunity or any other or further costs related to the Construction Contract. If any termination for cause is later found to be wrongful or incorrect, then Preconstruction CM agrees it shall be paid in accordance with Paragraph 8.1 as if the termination was for no cause.

8.2 Preconstruction CM's Right to Terminate. Preconstruction CM shall have the right to terminate this Agreement, in writing, following nonpayment of undisputed amounts by the City, if such nonpayment has not been corrected within sixty (60) days from the date of the City's receipt of a written notice of nonpayment from Preconstruction CM. Preconstruction CM shall be entitled to payment for Preconstruction Services properly rendered through the date of termination; however, Preconstruction CM shall not be entitled to consequential, special or other damages, damages due to such termination including, but not limited to lost profits, lost fees, or lost business opportunity under this Agreement or related to the Construction Management Agreement.

8.3 Termination due to Undisclosed Lobbyist or Agent. Preconstruction CM warrants that it has not employed or retained any company or person, other than a bona fide

employee working solely for Preconstruction CM to solicit or secure this Agreement and that he or she has not paid or agreed to pay any person, company, corporation, individual, or firm, other than a bona fide employee working solely for Preconstruction CM any fee, commission, percentage, gift, or other consideration contingent upon or resulting from the award or making of this Agreement. For the breach or violation of this provision, City shall have the right to terminate the Agreement without compensation.

## **ARTICLE 9**

### **DOCUMENTS AND RECORDS**

9.1 Ownership of Documents. Provided that the City makes payment of all amounts due in accordance with this Agreement, all tracings, plans, drawings, specifications, maps, computer files, estimates, budgets, models and/or reports prepared or obtained under this Agreement, as well as all data collected, together with summaries and charts derived therefrom (the "Documents"), will be considered "work for hire" as such phrase is defined in Section 101 of Title 17 of the United States Code (Public Law 94-533) and all title, ownership and copyright privileges in and to the Documents are and at all times shall be the property of the City without restriction or limitation on their use. The Documents will be made available to the City on request to the City at any time during the performance of the Preconstruction Services and/or upon completion or termination of this Agreement.

9.2 Delivery upon Request or Cancellation. Failure of Preconstruction CM to promptly deliver the Documents to the City within ten (10) days of termination of this Agreement, or within ten (10) days of request by the City during the Term of this Agreement, shall be just cause for the City to withhold payment due Preconstruction CM hereunder until Preconstruction CM delivers the Documents to the City.

9.3 Preconstruction CM will keep adequate records and supporting documentation, which concern or reflect its Preconstruction Services hereunder. Records subject to the provisions of Public Record law, Chapter 119, Florida Statutes, shall be kept and maintained in accordance therewith. Otherwise, the records and documentation will be retained by Preconstruction CM for a minimum of three (3) years from the date of termination of this Agreement or the date the Preconstruction Services are completed, whichever is later. The City, or any duly authorized agents or representatives of the City, shall have the right to audit, inspect, and copy all such records and documentation as often as they deem necessary during the Term of this Agreement and during the three (3) year period noted above; provided, however, that such activity shall be conducted only during normal business hours.

9.4 While the City does not warrant the accuracy of any existing documentation relative to the conditions of the Project existing prior to the Effective Date, Preconstruction CM shall have the right to rely on all documentation provided by the City pertaining thereto. Preconstruction CM shall notify the City, in writing, of any errors in documentation provided to Preconstruction CM by the City that pertains to the conditions of the Project promptly after such error is discovered.

## **ARTICLE 10**

### **INDEMNIFICATION**

10.1 Except for Preconstruction CM's indemnification obligations subject to Fla. Stat. §725.06, to the fullest extent permitted by law, Preconstruction CM shall defend,

indemnify and hold harmless the City and its elected and appointed officials, attorneys, administrators, consultants, agents, and employees from and against all claims, damages, losses, and expenses direct, indirect and consequential (including but not limited to fees and charges of attorneys and other professionals and court and arbitration costs) arising out of or resulting from the performance of the Work or this Agreement and caused in whole or in part by (i) the negligent performance of the Work (ii) any willful or negligent act or omission of Preconstruction CM, subcontractor, supplier, sub subcontractor, subconsultant, or any person or organization directly or indirectly employed by any of them to perform or furnish any of the work or anyone for whose acts any of them may be liable, or (iii) any reckless or intentionally wrongful act, omission or misconduct of the Preconstruction CM, subcontractor, supplier, sub-subcontractor, subconsultant, or any person or organization employed by any of them to perform or furnish any of the work or anyone for whose acts any of them may be liable.

10.2 For Preconstruction CM's indemnification obligations subject to Fla. Stat. §725.06, Preconstruction CM shall defend, indemnify and hold harmless the City, and its elected and appointed officials, attorneys, administrators, consultants, agents, and employees (the "Indemnified Parties") from liability, damages, losses and costs, including, but not limited to, reasonable attorney's fees at the trial and appellate level, but only to the extent caused by any negligent, reckless, or intentionally wrongful act, omission or misconduct of the Preconstruction CM, any subcontractor, supplier, subsubcontractor, subconsultant, or any person or organization directly or indirectly employed by any of them to perform or furnish any of the work or anyone for whose acts any of them may be liable, (the "Indemnitor"), arising from Indemnitor's Work on the Project. The City's contributory negligence shall only reduce, but not prevent, the Preconstruction CM's obligation to indemnify provided herein.

10.3 In any and all claims against the City or any of its elected and appointed officials, attorneys, administrators, consultants, agents, or employees by any employee of Preconstruction CM, its subcontractors any person or organization directly or indirectly employed by any of them to perform or furnish any of the Work or anyone for whose acts any of them may be liable, the indemnification obligations in the above paragraph shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for Preconstruction CM or any such subcontractor, supplier, sub-subcontractor, subconsultant or other person or organization under workers' or workman's compensation acts, disability benefit acts, or other employee benefit acts.

10.4 It is the specific intent of the parties hereto that the foregoing indemnification obligations comply with Section 725.06 (Chapter 725), Florida Statutes. Nothing in this Indemnification and Hold Harmless provision shall be considered to increase or otherwise waive any limits of liability, or to waive any immunity, established by Florida Statutes, case law, or any other source of law.

**10.5** The indemnification and hold harmless obligations of Article 10 shall include, but not be limited to, all of the following:

- a. Damages awarded to any person or party.
- b. Reasonable attorney's fees and costs incurred in defending such claims. The City may use the attorney or law firm of its choice in which event the Preconstruction CM will pay such firm the fees it charges the City, provided such fees are reasonable in light of the prevailing market rate

for similar legal services. Such fees shall be deemed reasonable if they are no greater than the fees that City pays other counsel for representation in similar cases. If the City Attorney's Office provides the defense, Preconstruction CM will reimburse the City at the prevailing market rate for similar legal services.

c. Reasonable attorney's fees and cost of any party that a court orders the City to pay.

d. Lost time that results from the City or its officials or employees responding to discovery or testifying by deposition or in court. In this regard, for any time the City spends in responding to document requests or public records requests relating to such claims whether from Preconstruction CM or any other party, Preconstruction CM will reimburse City \$50.00 for each employee work hour spent reviewing or responding to such requests. For any time spent testifying in court or in depositions, or preparing for such testimony, Preconstruction CM will reimburse City on a per hour basis as follows:

- Mayor or City Commissioner: \$300.00 per hour
- City Manager: \$250.00 per hour
- An Assistant City Manager or Department Director: \$250.00 per hour
- An Assistant Department Director: \$100.00 per hour
- City Attorney or Deputy City Attorney: Prevailing market rates
- Other City employees: \$50.00 per hour

e. Reasonable expenses incurred by City in complying with any administrative or court order that may arise from such claims.

f. Reasonable miscellaneous expenses relating to such claims including expenses of hotels and transportation in trips relating to such claims; and

g. Any other direct or indirect expense that City would not have incurred but for a claim that arises out of this Agreement.

10.6 The indemnification and hold harmless obligations of this Agreement and in particular this Article 10 shall survive termination or completion of this Agreement.

10.7 Preconstruction CM shall exercise the same degree of care, skill and diligence in the performance of the services as is ordinarily provided by a comparable professional under similar circumstances and the Preconstruction CM shall, at no additional cost to the City, re-perform services which fail to satisfy the foregoing standard of care.

## **ARTICLE 11** **INSURANCE**

11.1 During the Term of this Agreement, Preconstruction CM shall provide and maintain at its own expense the insurance coverages described below. Such programs and evidence of insurance shall be satisfactory to the City and shall be primary to and not contributing with any other insurance or self-insurance program maintained by the City. Certificates or other evidence of coverage shall be delivered to:

City of Coral Gables Insurance Compliance  
PO Box 100085-CE  
Duluth, GA 30096

Such certificates or other evidence of coverage shall be delivered prior to commencing performance under this Agreement, specifically identify this Agreement, and contain the express condition that the City is to be given advance written notice by receipted delivery at least thirty (30) days in advance of any cancellation or non-renewal of the insurance policy. Preconstruction CM shall advise the City in writing of any material change to the insurance policy within ten (10) days of receipt of such notice from the insurance carrier.

11.2 Preconstruction CM shall maintain during the Term of this Agreement, except as otherwise stated, the following insurance:

- .1 Commercial general liability insurance, also covering explosion, collapse and underground, and including completed operations and products liability, contractual liability as provided by the standard ISO CG 00 01, severability of interests with cross liability provision, and personal injury and property damage liability with limits no less than \$1,000,000 per occurrence and \$2,000,000 in the aggregate. Said policy or policies shall name the City as additional insured on a primary and non-contributory basis. Such commercial general liability shall be written on an occurrence basis;
- .2 Worker's compensation insurance for all employees of Preconstruction CM as required by Section 440, Florida Statutes, and employer's liability insurance with limits not less than, \$1,000,000 each accident bodily injury, policy limit by disease, and each employee bodily injury by disease;
- .3 Automobile liability insurance covering all owned, non-owned and hired vehicles used in connection with the performance of the work in an amount not less than \$1,000,000 combined single limit each accident for bodily injury and property damage; and
- .4 Other (or increased amounts of) insurance which the City shall from time to time deem advisable or appropriate as long as coverage is available at commercially reasonable rates. Such new or additional insurance to be effective as of the sooner of ninety (90) days after notice thereof or the next annual renewal of any policy being increased (as applicable). The City shall be responsible for the costs of all such other, new or increased insurance policies, limits or requirements described in this Section 11.2.4.

- .5 **Pollution Liability.** Preconstruction CM hereby agrees to maintain Pollution Legal & Remediation Liability coverage at a minimum limit not less than One Million (\$1,000,000) Dollars per occurrence and per annual aggregate providing coverage for damages against, but not limited to, third party liability, environmental clean-up, corrective action including assessment, remediation and defense costs. In the event the policy includes a self-insured retention or deductible in excess of \$10,000, the City reserves the right to review and request a copy of the Preconstruction CM's most recent annual report or audited financial statements. This coverage shall be endorsed to include the City of Coral Gables as an Additional Insured on a primary and non-contributory basis with a waiver of subrogation.
- .6 **Commercial Umbrella/Excess Liability,** also covering Explosion, Collapse, and Underground, Preconstruction CM agrees to provide and maintain either a Commercial Umbrella or Excess Liability Policy (Excess Following Form/True Excess Following Form/True Umbrella) at a limit of liability not less than Ten Million (\$10 Million) Dollars each occurrence Ten Million (\$10,000.00) Dollars annual aggregate. The Preconstruction CM agrees any Self-Insured-Retention or deductible shall not exceed \$25,000. This coverage shall be endorsed to include the City of Coral Gables as an Additional Insured on a primary and non-contributory basis with a waiver of subrogation.
- .7 **Professional Liability.** Preconstruction CM agrees to provide and maintain Professional Liability Insurance with a limit of liability not less than One Million (\$1,000,000.00) Dollars per claim, with a deductible per claim not to exceed 5% of the limit of liability providing for all sums which the Preconstruction CM shall become legally obligated to pay as damages for claims arising out of the services performed by the Preconstruction CM or any person employed in connection with this agreement. Preconstruction CM shall maintain Professional Liability coverage for at least ten (10) years after completion of the work.
- .8 **Builder's Risk.** In the event the City authorizes Early Work, unless otherwise provided, the Preconstruction CM shall purchase and maintain, with a company or companies lawfully authorized to do business in the State of Florida, property insurance written on a builder's risk, "all-risk" or equivalent policy form in the amount of the Early Work, plus the value of subsequent modifications and cost of materials supplied or installed by others, comprising of the total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained until final payment has been made or until no person or entity other than the City has an insurable interest in the property required by this Section to be covered, whichever is later. This insurance shall include interests of the City, Preconstruction CM and Subcontractors

on the Project. The Preconstruction CM shall be solely responsible for any deductibles under the Builders Risk insurance and under all other insurance required by Article 11. The policy must be endorsed to provide that the Builders Risk will continue to apply until final acceptance of the Project. The policy must be endorsed to provide the City at least forty five (45) days' notice of any cancellation and/or restriction. City shall be endorsed as a Loss Payee.

11.3 All policies shall contain waiver of subrogation against the City where applicable, and shall expressly provide that such policy or policies are primary over any other collective insurance the City may have.

11.4 All of the above insurance is to be placed with insurance companies with an A.M. Best or equivalent rating of "A-", "VI" or better, qualified to do business under laws of the State of Florida.

11.5 The City shall be named as an additional insured on a primary and non-contributory basis under such policies, including completed operations, except worker's compensation and professional liability. Additional insured coverage shall be on ISO form CG 20 10 and CG 20 37 (or their equivalents). Said policies shall contain a "severability of interest" or "cross liability" clause without obligation for premium payment of the City. The City reserves the right to request a copy of required policies for review.

11.6 All insurance policies shall provide for thirty (30) days [ten (10) days for non-payment of premium] advance written notice to the City prior to cancellation non-renewal or material change. Insurance policies cannot be restricted to a specific designated premises or be restricted to sole negligence. Should the insurance company refuse to provide notice of cancellation to the City, Preconstruction CM shall be responsible to immediately provide said notice of cancellation or material change to the City of Coral Gables Risk Management Division by receipted delivery within 48 hours of receipt of said notice.

11.7 Preconstruction CM shall furnish certificates of insurance to the Risk Management Division of the Human Resources Department for the City of Coral Gables prior to the commencement of operations or policy termination, which certificates shall clearly indicate that the City is named as and additional insured on a primary and non-contributory basis on all policies except for professional liability and workers compensation and that Preconstruction CM has obtained insurance in the type, amount and classification required for strict compliance with this Article and that no cancellation or non-renewal of this insurance shall be effective without thirty (30) [ten (10) days for non-payment of premium] days advance written notice to the City.

11.8 Failure on the part of the Preconstruction CM to obtain and maintain all required insurance coverage is a material breach upon which the City may, in its sole discretion, immediately suspend Preconstruction CM's performance or terminate this Agreement after 30 days' written notice.

11.9 The City and its Risk Management Division reserves the right to require modifications, increases, or changes in the required insurance requirements, coverage, deductibles or other insurance obligations by providing a thirty (30) day advance written notice



to Preconstruction CM as long as coverage is available at commercially reasonable rates. Preconstruction CM shall comply with such requests unless the insurance coverage is not then readily available in the national market, and shall be entitled to additional compensation for reimbursement of any additional costs from the City.

## **ARTICLE 12** **AUDIT RIGHTS**

12.1 The City reserves the right to audit Preconstruction CM's accounts during the Term and for three (3) years after the Term of this Agreement. Preconstruction CM agrees to furnish copies of any records necessary, in the reasonable opinion of the City, to approve any requests for payment by Preconstruction CM.

12.2. The Preconstruction CM shall maintain accurate and complete financial records of its activities and operations relating to this Agreement in accordance with generally accepted accounting principles. Preconstruction CM shall maintain adequate records to justify all charges and costs incurred in performing the services for at least ten (10) years after the Term of this Agreement. Preconstruction CM shall also maintain accurate and complete employment and other records relating to its performance of this Agreement. Preconstruction CM agrees that the City, or its authorized representatives, shall have access to and the right to examine, audit, excerpt, copy or transcribe any pertinent transaction, activity, or records relating to this Agreement. All financial records, timecards and other employment records, and proprietary data and information shall be kept and maintained by Preconstruction CM and made available to the City during the Term of this Agreement and for a period of ten (10) years thereafter, unless City's written permission is given to dispose of any such material prior to such time. All such materials shall be maintained by Preconstruction CM at a location in Miami-Dade County, Florida, provided that if any such material is located outside Miami-Dade County, then, at City's option Preconstruction CM shall pay the City for travel, per diem, and other costs incurred by the City to examine, audit, excerpt, copy or transcribe such material at such other location. The City shall have access to such books, records, and documents as required in this section for the purpose of inspection or audit during normal working business hours at the Preconstruction CM's place of business.

12.3 In the event that an audit is conducted by Preconstruction CM specifically regarding this Agreement by any Federal or State auditor, or by any auditor or accountant employed by Preconstruction CM, then Preconstruction CM shall file a copy of the audit report with the City's Auditor within thirty (30) days of Preconstruction CM's receipt thereof, unless otherwise provided by applicable Federal or State law. City shall make a reasonable effort to maintain the confidentiality of such audit report(s). Failure on the part of Preconstruction CM to comply with the provisions of this 12.3 shall constitute a material breach upon which the City may terminate or suspend this Agreement.

12.4 **City Audit Settlements.** If, at any time during or after the term of this Agreement, representatives of the City conduct an audit of Preconstruction CM regarding the Services performed under this Agreement, and if such audit finds that City's dollar liability for any such Services is less than payments made by City to Preconstruction CM, then the difference shall be either repaid by Preconstruction CM to City by cash payment upon demand or, at the sole option of City, deducted from any amounts due to Preconstruction CM from City. If such audit finds that City's dollar liability for such Services is more than the payments made by City to Preconstruction CM then the difference shall be paid to

Preconstruction CM by cash payment.

12.5 Failure on the part of Preconstruction CM to comply with the provisions of this Article 12 shall constitute a material breach upon which the City may terminate or suspend this Agreement.

### **ARTICLE 13** **SOVEREIGN IMMUNITY**

13.1 The Preconstruction CM acknowledges that the Florida Doctrine of Sovereign Immunity bars all claims by Preconstruction CM against the City other than claims arising out of this Agreement. Preconstruction CM acknowledges that this Agreement in no way estops or affects the City's exercise of its regulatory authority. In addition, the City retains the full extent of its sovereign immunity in relation to the exercise of its regulatory authority. Specifically, the Preconstruction CM acknowledges that it cannot and will not assert any claims against the City, unless the claim is based upon a breach by the City of this Agreement. The Preconstruction CM acknowledges that it has no right and will not make a claim based upon any of the following:

- .1 Claims based upon an alleged breach by the City of implied warranties or representations not specifically set forth in this Agreement, as the Parties stipulate that there are no such implied warranties or representations of the City. All obligations of the City are only as set forth in this Agreement.
- .2 Claims based upon negligence or any tort arising out of this Agreement.
- .3 Claims based upon alleged acts or inaction by the City, its commissioners, attorneys, administrators, consultants, agents, or any City employee.
- .4 Claims based upon an alleged waiver of any of the terms of this Agreement unless such waiver is in writing and signed by an authorized representative for the City and the Preconstruction CM.

Nothing contained herein shall be construed as a waiver of sovereign immunity by the City.

### **ARTICLE 14** **FLORIDA PUBLIC RECORDS LAW FLORIDA STATUTES CHAPTER 119, et seq.**

14.1 Records subject to the provisions of Public Record Law, Chapter 119, Florida Statutes, shall be kept and maintained in accordance therewith. Preconstruction CM acknowledges that records and books, not subject to exemption under Chapter 119, Florida Statutes, may be disclosed and/or produced to third parties by the City in accordance with requests submitted under Chapter 119, Florida Statutes, or court orders without penalty or reprisal to the City for such disclosure and/or production. Preconstruction CM also agrees to

assert, in good faith, any relevant exemptions provided for under Chapter 119, Florida Statutes, for records in its possession on behalf of the City. Furthermore, Preconstruction CM agrees to comply with the provisions outlined in Section 119.0701, Florida Statutes, the requirements of which are incorporated herein.

## **ARTICLE 15** **NON-DISCRIMINATION**

15.1 EEO and ADA: Preconstruction CM must be and remain in compliance with all local, state and federal Equal Employment Opportunity (EEO) and American Disabilities Act (ADA) requirements.

15.2 It is understood that Preconstruction CM shall not discriminate against any employee in the performance of the contract with respect to hire, tenure, terms, conditions or privileges of employment, or any other matter directly or indirectly related to employment because of age, marital status, race, color, religion, national origin, sex, or disability.

15.3 City Policy Regarding Conduct. Preconstruction CM, its employees, agents and Subcontractors must abide by the City's policies regarding conduct as set forth in Rule 27 of the City of Coral Gables Personnel Rules & Regulations. Discrimination, harassment, and/or violations of the City policies will not be tolerated and are grounds for termination of this Agreement.

## **ARTICLE 16** **CONFLICT OF INTEREST**

16.1 Preconstruction CM represents that it has provided a list of all current clients subject to the jurisdiction of the City. Any potential or actual conflict between private interests and responsibilities under this Agreement shall be immediately disclosed to the City. Preconstruction CM agrees that it will not enter into any agreements during the term of this Agreement to provide services for any person or corporation who applies for a permit or other development approval from the City. Upon request of Preconstruction CM, and full disclosure of the nature and extent of the proposed representation, the City Manager or his designee shall have the authority to authorize such services or representation during the Term of this Agreement.

## **ARTICLE 17** **TRUTH-IN-NEGOTIATION CERTIFICATE**

17.1 Execution of this Agreement by Preconstruction CM shall act as the execution of a truth-in- negotiation certificate certifying that the wage rates and costs used to determine the compensation provided for in this Agreement are accurate, complete, and current as of the Effective Date of this Agreement.

17.2 The said rates and costs shall be adjusted to exclude any significant sums should the City determine that the rates and costs were increased due to inaccurate, incomplete, or noncurrent wage rates or due to inaccurate representations of fees paid to outside consultants. The City may exercise its rights under this Article within one (1) year following completion of the Preconstruction Services or termination of this Agreement, whichever is sooner.

**ARTICLE 18**  
**NOTICE**

18.1 Any notice, request, instruction or other document required or permitted to be given hereunder by either Party hereto to the other shall be in writing, and delivered personally, or sent by certified or registered mail, postage prepaid, return receipt requested, to the address set forth for such party at the bottom of this Agreement. Any notice so given shall be deemed received when personally delivered or three (3) business days after mailing. Any Party may change the address to which notices are to be sent by giving notice of such change of address to the other Party in the manner herein provided for giving notice.

Notice to the City shall be to:

City Manager  
City of Coral Gables  
405 Biltmore Way  
Coral Gables, FL 33134

With a copy to:

City Attorney  
405 Biltmore Way  
Coral Gables, FL 33134

Notice to Preconstruction CM shall be to:

With a copy to:

**ARTICLE 19**  
**COMPLIANCE WITH LAWS**

19.1 In performance of the Preconstruction Services, the Preconstruction CM will comply with applicable regulatory requirements, the Florida Building Code (latest edition), all federal, state, special district, and local laws, rules, regulations, orders, codes, ordinances, criteria, and standards that apply to the Preconstruction Services. It shall be the responsibility of Preconstruction CM to obtain and maintain, at no cost to the City, any and all license and permits required to complete the services provided pursuant to this Agreement.

19.2 Preconstruction CM is aware of the conflict of interest code of the City of Coral Gables, the Conflict of Interest and Code of Ethics of Miami-Dade County, Florida, Section 2-11.1 et seq., and the Ethics Laws of the State of Florida, and agrees that it shall fully comply in all respects with the terms of said laws.

**ARTICLE 20**  
**MISCELLANEOUS**

20.1 Entire Agreement; Non-Waiver. This Agreement, as it may be amended from time to time, represents the entire and integrated agreement between the City and

Preconstruction CM and supersedes all prior negotiations, representations or agreements, written or oral. This Agreement may not be amended, changed, modified, or otherwise altered in any respect, at any time after the execution hereof, except by a written document executed by the Parties. Waiver by either Party of a breach of any provision of this Agreement shall not be deemed to be a waiver of any other breach of any provision of this Agreement.

20.2 Successors and Assigns. The performance of this Agreement shall not be transferred, pledged, sold, delegated or assigned, in whole or in part, by Preconstruction CM without the written consent of the City, acting by and through its City Commission. It is understood that a sale of the majority of the stock or partnership shares of Preconstruction CM, a merger or bulk sale, an assignment for the benefit of creditors shall give the City a right to terminate this Agreement. Preconstruction CM's Preconstruction Services are unique in nature and any transference without the City's approval shall be cause for the City to terminate this Agreement. Preconstruction CM shall have no recourse from such termination. The City may require bonding, other security, certified financial statements and tax returns from any proposed assignee and the execution of an assignment/assumption agreement in a form satisfactory to the City's City Attorney as a condition precedent to considering approval of an assignment. Preconstruction CM and the City each binds one another, their partners, successors, legal representatives and authorized assigns to the other party of this Agreement and to the partners, successors, legal representatives and assigns of such party in respect to all covenants of this Agreement.

20.3 Applicable Law & Venue. This Agreement shall be interpreted and construed in accordance with and governed by the laws of the State of Florida. Any suit or action brought by any party, concerning this Agreement, or arising out of this Agreement shall be brought in Miami-Dade County, Florida. Each Party shall bear its own attorney's fees, subject to Article 10.

20.4 Dispute Resolution. In an effort to engage in a cooperative effort to resolve conflict which may arise during the course of the design and/or construction of the Project, and/or following the completion of the Project, the Parties to this Agreement agree all disputes between them shall be submitted to non-binding mediation prior to the initiation of litigation, unless otherwise agreed in writing by the Parties. A certified mediator, who the Parties find mutually acceptable, will conduct any mediation proceedings in Miami-Dade County, Florida. The Parties will split the costs of a certified mediator on an equal basis. Preconstruction CM agrees to include such similar contract provisions in its written agreements with all Subcontractors retained for the Project, thereby providing for non-binding mediation as the primary mechanism for dispute resolution. **THE PARTIES VOLUNTARILY WAIVE THEIR RIGHT TO JURY TRIAL AND AGREE TO HAVE ANY DISPUTE ARISING FROM, OR RELATED TO, THIS AGREEMENT TO BE HEARD BY A JUDGE SITTING ALONE WITHOUT A JURY. THE PARTIES ALSO AGREE NOT TO FILE PERMISSIVE COUNTERCLAIMS IN ANY LITIGATION ARISING FROM, OR RELATED TO, THIS AGREEMENT.**

20.5 Preparation of this Agreement has been a joint effort between the Parties. The language of this Agreement has been agreed to by both Parties to express their mutual intent and no rule of strict construction shall be applied against either Party hereto. The headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement. All personal pronouns used in this Agreement shall include the other gender, and the singular shall include the plural, and vice versa, unless

the context otherwise requires. Terms such as “herein,” “hereof,” “hereunder,” and “hereinafter” refer to this Agreement as a whole and not to any particular sentence, paragraph, or section where they appear, unless the context otherwise requires.

20.6 Whenever reference is made to a Section or Article of this Agreement, such reference is to the Section or Article as a whole, including all of the subsections of such Section or Article, unless the reference is made to a particular subsection or subparagraph of such Section or Article.

20.7 Preconstruction CM has been procured and is being engaged to provide services to the City as an independent contractor, and not as an agent or employee of the City. This Agreement does not create a joint venture, partnership or other business enterprise between the Parties. Preconstruction CM has no authority to bind the City to any promise, debt, default, or undertaking of Preconstruction CM. Preconstruction CM further understands that Florida Workers’ Compensation benefits available to employees of the City are not available to Preconstruction CM.

20.8 Funding for this Agreement is contingent upon the availability of funds and continued authorization for program activities and this Agreement is subject to amendment or termination due to lack of funds, reduction of funds and/or change in regulations, upon thirty (30) days’ notice.

20.9 The duties and obligations imposed by this Agreement and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available at law or in equity. The invalidity, illegality, or unenforceability of any provision of this Agreement, or the occurrence of any event rendering any portion or provision of this Agreement void, shall in no way effect the validity or enforceability of any other portion or provision of this Agreement. Any void provision shall be deemed severed from this Agreement, and the balance of this Agreement shall be construed and enforced as if this Agreement did not contain the particular portion or provision held to be void. The Parties further agree to reform this Agreement to replace any stricken provision with a valid provision that comes as close as possible to the intent of the stricken provision.

20.11 Business Interruption. Preconstruction CM acknowledges and agrees that the construction of the Project will impact existing businesses. Preconstruction CM shall work with the City and local business, as requested by City in the performance of Preconstruction Services for the Project, so as to be mindful of the local businesses, pedestrians and customers during the construction of the Project.

20.12 The Preconstruction CM waives claims against the City for consequential damages arising out of or relating to this Agreement. This waiver includes damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit. This waiver is applicable, without limitation, to all consequential damages due to either party’s termination.

**ARTICLE 21**  
**NO BINDING Construction Management AGREEMENT**

21.1 The City and Preconstruction CM acknowledge and agree that no enforceable promise or agreement by the City exists as to the award of the Construction Management Agreement to Preconstruction CM, that no representation has been made, written or oral, as to the award of the Construction Contract to Preconstruction CM, and that no commitment can be made by any employee or representative of the City as to the award of the Construction Management Agreement. The Parties will continue to negotiate the terms of the Construction Contract in good faith, but no such Construction Contract shall be construed or inferred until such time as a written Construction Contract, if any, is mutually executed by the Parties. Preconstruction CM agrees that in the event the parties cannot agree on a final Construction Management , that Preconstruction CM will cooperate with City and the City's eventual Construction Management in transitioning all institutional knowledge, documents, schedules, subcontractor information, and any other documents and know how developed by Preconstruction CM. Preconstruction CM's time and effort in transitioning the Project knowledge to the Construction Management shall be treated as Additional Services under this Agreement.

**ARTICLE 22**  
**EARLY WORK**

22.1 Preconstruction CM acknowledges that time is of the essence with respect to this Project and as a result, the City may request in writing that certain construction work commence early prior to an agreement on the terms of a Construction Management Agreement. City may, in its sole discretion, without any obligation to do so, issue written Authorizations to Proceed to Preconstruction CM to proceed with engaging subcontractor(s) to perform portions of work ("Early Work"), it being understood that Preconstruction CM shall not engage any person or entity to which City objects. Absent a written Authorization to Proceed, City shall have no obligation to pay for any work of Preconstruction CM, its subcontractors or suppliers. The Authorization to Proceed will outline the terms for payment for such Early Work. Any Authorization to Proceed will contain a provision giving City the right to terminate the Authorization to Proceed for its convenience.

22.2 To the extent any Early Work is authorized by City, Contractor and its subcontractors shall comply with all City requirements for insurance, bonding and permitting. All Early Work shall be warranted by Preconstruction CM and any subcontractor performing Early Work to be free of defects and to be in accordance with the applicable plans and drawings.

**IN WITNESS WHEREOF**, the parties have executed this Agreement as of the Effective Date above written.

Approved as to Insurance:

**AS TO THE CITY:**

\_\_\_\_\_  
David Ruiz  
Risk Management Division  
Human Resources

\_\_\_\_\_  
Cathy Swanson-Rivenbark  
City Manager

Approved by Department Head

ATTEST:

or head of negotiations team  
as to the negotiated business  
terms:

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Ed Santamaria  
Public Works Director

Approved as to compliance with  
Applicable Procurement  
Requirements:

---

**Diana Gomez**  
Chief Procurement Officer

---

Walter J. Foeman  
City Clerk

APPROVED AS TO FORM  
AND LEGAL  
SUFFICIENCY:

---

Craig E. Leen  
City Attorney



Approved as to Funds Appropriation:

\_\_\_\_\_  
Diana M. Gomez, Finance  
Director

ATTEST:

AS TO **PRECONSTRUCTION CM**:

\_\_\_\_\_  
Corporate Secretary

\_\_\_\_\_  
President

Print Name: \_\_\_\_\_ Print Name:

(SEAL) (OR)

WITNESSES (2):

\_\_\_\_\_  
Print Name: \_\_\_\_\_

\_\_\_\_\_  
Print Name: \_\_\_\_\_