

15-008
(E)

CONSTRUCTION AGREEMENT

THIS CONSTRUCTION AGREEMENT dated as of the 13th day of March, 2017, by and between Delray Beach, Florida, a municipal corporation of the State of Florida, hereinafter referred to as City, and MBR Construction, Inc., a Florida company authorized to do business in the State of Florida, hereinafter called Contractor (collectively referred to as the Parties). In consideration of the mutual terms, conditions, promises, covenants, and payments hereinafter set forth, the Parties agree as follows:

ARTICLE 1 WORK

Contractor shall complete all Work as specified or indicated in the Contract Documents. For the project entitled:

**Beach Master Plan; Phase 1
City of Delray Beach Project No. 2015-008
ITBC No. 2017-018**

ARTICLE 2 CONSULTANT

The Project has been designed by EDSA, Inc. who is hereinafter called Consultant and who will assume all duties and responsibilities and will have the rights and authority assigned to Consultant in the Contract Documents in connection with completion of the Work in accordance with the Contract Documents.

ARTICLE 3 AGREEMENT AMENDMENTS

Amendments. The Parties may amend this Agreement to conform to changes in federal, state, or local laws, regulations, directives, and objectives. No modification, amendment, or alteration in the terms or conditions contained herein shall be effective unless contained in a written document prepared with the same or similar formality as this Agreement and executed by the Board and Contractor or others delegated authority to or otherwise authorized to execute same on their behalf.

ARTICLE 4 CONTRACT SUM

The City shall pay, and the Contractor shall accept, as full and complete payment for the Contractor's timely performance of its obligations hereunder, the fixed price of Two Million, Two Hundred Ninety Two Thousand, Four Hundred Ninety Four Dollars and Forty-Two Cents (\$2,292,494.42), which shall constitute the Contract Price, and shall not be modified except by amendment to the Contract, as provided in the Contract Documents.

ARTICLE 5 CONTRACT TIME AND LIQUIDATED DAMAGES

- A. Contract Time. The work will be substantially completed within 150 calendar days from the date of the issuance of the Notice to Proceed, and completed and ready for final payment in accordance with the General Conditions within 30 calendar days from the date of Substantial Completion.
- B. Liquidated Damages. The City and Contractor recognize that time is of the essence of this Agreement and that the City will suffer financial loss if the Work is not completed within the times specified in paragraph 5.A above, plus any extensions thereof allowed in accordance with Article 13 of the General Conditions.

Parties also recognize that the actual loss suffered by the City if the Work is not completed on time is not readily ascertainable at the time of entering this Contract. Accordingly, instead of requiring any such proof, the City and Contractor agree that as liquidated damages for delay (but not as a penalty) Contractor shall pay the City five hundred dollars (\$500.00) for each day that expires after the time specified in paragraphs 5.A for substantial completion until the Work is substantially complete. After Substantial Completion if Contractor shall neglect, refuse or fail to complete the remaining Work within the Contract Time or any proper extension thereof granted by the City, Contractor shall pay City five hundred dollars (\$500.00) for each day that expires after the time specified in paragraph 5.A for completion and readiness for final payment. Contractor expressly acknowledges that such sum is not payable as a penalty but as liquidated damages representing a reasonable estimate of delay damages, inconvenience and additional overhead and costs likely to be sustained by the City, estimated at the time of executing the Contract. If the City reasonably believes in its discretion that Substantial Completion will be delayed, it shall be entitled, but not required to withhold from any amounts otherwise due the Contractor an amount then believed by the City to be adequate to recover liquidated damages applicable to such delays. Partial use or occupancy of the Work shall not result in the Work deemed substantially completed, and such partial use or occupancy shall not be evidence of Substantial Completion.

ARTICLE 6 PAYMENT PROCEDURES

A. Applications for payment must be submitted to:

**Environmental Services Department Administration Building
434 South Swinton Avenue Delray Beach, Florida 33444
Attention: Construction Management Technician**

B. Progress Payments. The City shall make progress payments on account of the Contract Price on the basis of Contractor's Applications for Payment as recommended by Consultant, on or about the First day of each month during construction as provided below. All progress payments will be on the basis of the progress of the Work measured by the schedule of values established herein and in the case of Unit Price Work based on the number of units completed or, in the event there is no schedule of values.

Prior to Substantial Completion progress payments will be made in an amount equal to 90% of the work completed until 50% of the work has been completed and installed, then payment may be made in an amount equal to 95% of the work completed, but in each case, less the aggregate of payments previously made and less such amounts as Consultant shall determine, or the City may withhold, in accordance with this Agreement.

The City is entitled to withhold amounts due Contractor for any defective or non-conforming work or for liquidated damages.

C. Final Payment. Upon final completion and acceptance of the Work, the City shall pay the remainder of the Contract Price.

ARTICLE 7 SUBCONTRACTS

No more than 40% of dollar value of the total contract work may be accomplished by subcontractors. Balance of work must be accomplished by selected Contractor's own forces.

ARTICLE 8 CONTRACTOR'S REPRESENTATIONS

In entering into this Agreement Contractor makes the following representations:

- A. Contractor has familiarized itself with the nature and extent of the Contract Documents, Work, site, locality, and all local conditions and Laws and Regulations that in any manner may affect cost, progress, performance or furnishing of the Work.
- B. Contractor has obtained at its own expense and carefully studied, or assumes responsibility for obtaining and carefully studying, soil investigations, explorations, and test reports which pertain to the subsurface conditions at or contiguous to the site or otherwise may affect the cost, progress, performance or furnishing of the Work as Contractor considers necessary for the performance or furnishing of the Work at the Contract Price, within the Contract Price, within the Contract Time and in accordance with the other terms and conditions of the Contract Documents and no additional examinations, investigations, explorations, tests, reports, studies or similar information or data are or will be required by Contractor for such purposes.
- C. Contractor has reviewed and checked all information and data shown or indicated on the Contract Documents with respect to existing Underground Facilities at or contiguous to the site and assumes responsibility for the accurate location of said Underground Facilities. No additional examinations, investigations, explorations, tests, reports, studies or similar information or data in respect of said Underground Facilities are or will be required by Contractor in order to perform and furnish the Work at the Contract Price, within the Contract Time and in accordance with the other terms and conditions of the Contract Documents.
- D. Contractor has correlated the results of all such observations, examinations, investigations, explorations, tests, reports and studies with the terms and conditions of the Contract Documents.
- E. Contractor has given Consultant written notice of all conflicts, errors or discrepancies that he has discovered in the Contract Documents and the written resolution thereof by Consultant is acceptable to Contractor.

ARTICLE 9 NO DAMAGES FOR DELAY

All time in the Contract Documents is calculated on a consecutive calendar day basis.

Time is of the essence in this Contract, and any breach of same shall go to the essence hereof, and Contractor, in agreeing to complete the Work within the time herein mentioned, has taken into consideration and made allowances for all reasonable hindrances and delays incident to his work.

Contractor agrees to commence the Work when directed by the City and to diligently and continuously perform such Work and to coordinate the Work with other Work being performed on the Project by other trades so that the City shall not be delayed by any act or omission of Contractor in completion of the Project within the time specified above.

Contractor shall not be entitled to any claim for damages on account of hindrance or delays from any cause whatsoever, but if caused by any act of God or active interference on the part of the City, such act, hindrance or delay may only entitle the Contractor to receive an extension of time as its sole and exclusive remedy.

An extension of time to complete the Work shall be determined by the Consultant provided the Contractor provides Consultant and City with notice in writing of the cause of said act, hindrance or delay within twenty days after its occurrence.

In the event the request for extension is not made in writing within that twenty day time period, Contractor acknowledges and agrees it has forever waived any and all rights to such an extension.

All extensions of time shall be authorized only by a written change order executed by the City, Consultant and Contractor; in the absence of a written and fully executed change order, Contractor shall not be entitled to any claim for additional time.

This "no damage for delay" provision shall encompass any damages for delay or disruption even if the Contractor completes construction of the Work in a timely fashion in accordance with this Contract.

Damages as referenced in this "no damage for delay" provision shall include any type of damages that are or could be awarded by any court or arbitration panel such as, by way of general example, but not limitation, tort, contract, strict liability, consequential damages, liquidated damages and/or punitive damages.

The Contractor recognizes and specifically acknowledges the terms and conditions of this "no damage for delay" clause upon execution of this Contract.

ARTICLE 10 AGREEMENT DOCUMENTS

This Agreement (Agreement), along with the documents listed below, and any amendments issued after execution of the Agreement, embodies the entire agreement between City and Contractor and supersedes all other writings, oral agreements or representations. The Agreement documents consist of the following:

- A. Advertisement
- B. Invitation to Bid Construction No. 2017-018 and all its attachments, appendices, exhibits and addenda
- C. Contractor's Bid submitted in response to ITBC 2017-018
- D. Bid Bond
- E. This Agreement
- F. Appendices to this Agreement
- G. Florida Performance Bond
- H. Florida Payment Bond
- I. Certificates of Insurance
- J. Notice of Intent to Award
- K. Notice to Proceed
- L. Certificate of Substantial Completion
- M. Warranty of Title
- N. Final Receipt
- O. Documentation submitted by Contractor prior to Notice of Intent to Award
- P. All written amendments and other documents amending, modifying, or supplementing the Contract Documents which may be delivered or issued after the Effective Date of the Agreement and are not attached hereto

The documents listed in Article 10 are attached to this Agreement (except as expressly noted otherwise). There are no Contract Documents other than those listed above in this Article 10. The Contract Documents may only be amended, modified or supplemented by written amendment and signed by both Parties.

ARTICLE 11 INDEMNITY

Contractor shall at all times hereafter indemnify, hold harmless and, at the City Attorney's option, defend or pay for an attorney selected by the City Attorney to defend City, its officers, agents, servants, and employees from and against any and all causes of action, demands, claims, losses, liabilities and expenditures of any kind, including attorney fees, court costs, and expenses, caused or alleged to be caused by any intentional, negligent, or reckless act of, or omission of, Contractor, its employees, agents, servants, or officers, or accruing, resulting from, or related to the subject matter of this Agreement including, without limitation, any and all claims, losses, liabilities, expenditures, demands or causes of action of any nature whatsoever resulting from injuries or damages sustained by any person or property. In the event any lawsuit or other proceeding is brought against City by reason of any such claim, cause of action, or demand, Contractor shall, upon written notice from City, resist and defend such lawsuit or proceeding by counsel satisfactory to City or, at City's option, pay for an attorney selected by City Attorney to defend City. The obligations of this section shall survive the expiration or earlier termination of this Agreement. To the extent considered necessary by the Contract Administrator and the City Attorney, any sums due Contractor under this Agreement may be retained by City until all of City's claims for indemnification pursuant to this Agreement have been settled or otherwise resolved. Any amount withheld shall not be subject to payment of interest by City.

ARTICLE 12 REIMBURSEMENT OF CONSULTING EXPENSES

Should the completion of this Contract be delayed beyond the specified or adjusted time limit, Contractor shall reimburse the City for all expenses for consulting and inspection incurred by the City during the period between said specified or adjusted time and the actual date of final completion. All such expenses for consulting and inspection incurred by the City will be charged to Contractor and be deducted from payments due Contractor as provided by this Contract. Said expenses shall be further defined as Consultant charges associated with the construction contract administration, including resident project representative costs.

ARTICLE 13 MISCELLANEOUS

Neither this Agreement nor any right or interest herein shall be assigned, transferred, or encumbered without the written consent of the other Party. In addition, Contractor shall not subcontract any portion of the work required by this Agreement, except as may specifically provided for herein. Notwithstanding the Termination provision of this Agreement, City may terminate this Agreement, effective immediately, if there is any assignment, or attempted assignment, transfer, or encumbrance, by Contractor of this Agreement or any right or interest herein without City's written consent.

Contractor represents that each person who will render services pursuant to this Agreement is duly qualified to perform such services by all appropriate governmental authorities, where required, and that each such person is reasonably experienced and skilled in the area(s) for which he or she will render his or her services.

Contractor shall perform its duties, obligations, and services under this Agreement in a skillful and respectable manner. The quality of Contractor's performance and all interim and final product(s) provided to or on behalf of City shall be comparable to the best local and national standards.

The City and Contractor each binds itself, its partners, its successors, assigns and legal representatives to the other party hereto, its partners, successors, assigns and legal representatives in respect of all covenants, agreements and obligations contained in the Contract Documents.

The agreement shall be void if not signed by both the City and the Contractor.

ARTICLE 14 PUBLIC RECORDS

IF THE CONTRACTOR HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE CONTRACTOR DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS AGREEMENT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT CITY OF DELRAY BEACH, CITY CLERK, 100 N.W. 1ST AVE., DELRAY BEACH FLORIDA. THE CITY CLERK MAY BE REACH VIA TELEPHONE AT 561-243-7060 OR BY EMAIL AT CITYCLERK@MYDELRAYBEACH.COM.

Contractor shall comply with public records laws, specifically to:

- A. Keep and maintain public records that ordinarily and necessarily would be required by the City in order to perform the service.
- B. Upon request from the City's custodian of public records, provide the City with a copy of the requested records or allow the access to public records to be inspected or copied within a reasonable time on the same terms and conditions that the City would provide the records and at a cost that does not exceed the cost provided in Florida Statute or as otherwise provided by law.
- C. Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the Agreement term and following completion of the Agreement if the Contractor does not transfer the records to the City.
- D. Upon completion of the Agreement, meet all requirements for retaining public records and transfer, at no cost, to the City all public records in possession of the Contractor or keep and maintain public records required by the public agency to perform the service. If the Contractor transfers all public records to the City upon completion of the Agreement, the Contractor shall upon termination of the Agreement destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If the Contractor keeps and maintains public records upon completion of the Agreement, the Contractor shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the City, upon request from the City's custodian of public records, in a format that is compatible with the information technology systems of the City.
- E. All requests to inspect or copy public records relating to a City Agreement for services must be made directly to the City. If the City does not possess the requested records, the City shall immediately notify the Contractor of the request, and the Contractor must provide the records to the City or allow the records to be inspected or copied within a reasonable time.

If Contractor does not comply with the City's records request for records, the City shall enforce the Agreement provisions in accordance with the Agreement. If Contractor fails to provide the public records to the City within a reasonable time may be subject to penalties under Florida Statute Chapter 119.10.

If a civil action is filed against Contractor to compel production of public records relating to a City Agreement for services, the court shall assess and award against the Contractor the reasonable costs of enforcement, including reasonable attorney fees, if:

- A. The court determines that the Contractor unlawfully refused to comply with the public records request within a reasonable time; and
- B. At least eight business days before filing the action, the plaintiff provided written notice of the public records request, including a statement that the Contractor has not complied with the request, to the public agency and to the contractor. A notice complies if it is sent to the City's custodian of public records and to the Contractor at the Contractor's address listed on its Agreement with the City or to the Contractor's registered agent. Such notices must be sent by common carrier delivery service or by registered, Global Express Guaranteed, or certified mail, with postage or shipping paid by the sender and with evidence of delivery, which may be in an electronic format. A Contractor who complies with a public records request within eight business days after the notice is sent is not liable for the reasonable costs of enforcement.

ARTICLE 15 RIGHTS IN DOCUMENTS AND WORK

Any and all reports, photographs, surveys, and other data and documents provided or created in connection with this Agreement are and shall remain the property of City, and, if a copyright is claimed, Contractor grants to City a non-exclusive license to use the copyrighted item(s) indefinitely, to prepare derivative works, and to make and distribute copies to the public. In the event of termination of this Agreement, any reports, photographs, surveys, and other data and documents prepared by Contractor, whether finished or unfinished, shall become the property of City and shall be delivered by Contractor to the Contract Administrator within eight (8) days of termination of this Agreement by either party. Any compensation due to Contractor shall be withheld until all documents are received as provided herein.

ARTICLE 16 NON-DISCRIMINATION

No party to this Agreement may discriminate on the basis of race, color, sex, religion, national origin, disability, age, marital status, political affiliation, sexual orientation, pregnancy, or gender identity and expression in the performance of this Agreement. Failure by Contractor to carry out any of these requirements shall constitute a material breach of this Agreement, which shall permit the City, to terminate this Agreement or to exercise any other remedy provided under this Agreement, or under the Delray Beach Code of Ordinances or under applicable law, with all of such remedies being cumulative.

Contractor shall include the foregoing or similar language in its contracts with any subcontractors or subconsultants, except that any project assisted by the U.S. Department of Transportation funds shall comply with the non-discrimination requirements in 49 C.F.R. Parts 23 and 26. Failure to comply with the foregoing requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as City deems appropriate.

Contractor shall not unlawfully discriminate against any person in its operations and activities or in its use or expenditure of funds in fulfilling its obligations under this Agreement and shall not otherwise unlawfully discriminate in violation of any State or Federal law. Contractor shall affirmatively comply with all applicable provisions of the Americans with Disabilities Act (ADA) in the course of providing any services funded by City, including Titles I and II of the ADA (regarding nondiscrimination on the basis of disability), and all applicable regulations, guidelines, and

nondiscrimination on the basis of disability), and all applicable regulations, guidelines, and standards. In addition, Contractor shall take affirmative steps to prevent discrimination in employment against disabled persons.

By execution of this Agreement, Contractor represents that it has not been placed on the discriminatory vendor list as provided in Section 287.134, Florida Statutes. City hereby materially relies on such representation in entering into this Agreement. An untrue representation of the foregoing shall entitle City to terminate this Agreement and recover from Contractor all monies paid by City pursuant to this Agreement, and may result in debarment from City's competitive procurement activities.

ARTICLE 17 INSURANCE

Contractor shall maintain at its sole expense, at all times during the term of this Agreement (unless a different time period is otherwise stated herein), at least the minimum insurance coverage designated in Appendix A Insurances, in accordance with the terms and conditions stated.

ARTICLE 18 TERMINATION

This Agreement may be terminated for cause by the aggrieved party if the party in breach has not corrected the breach within ten (10) days after receipt of written notice from the aggrieved party identifying the breach. This Agreement may also be terminated for convenience by the City. Termination for convenience by the City shall be effective on the termination date stated in written notice provided by City, which termination date shall be not less than thirty (30) days after the date of such written notice. This Agreement may also be terminated by the City Manager upon such notice as the City Manager deems appropriate under the circumstances in the event the City Manager determines that termination is necessary to protect the public health, safety, or welfare. If City erroneously, improperly, or unjustifiably terminates for cause, such termination shall be deemed a termination for convenience, which shall be effective thirty (30) days after such notice of termination for cause is provided.

This Agreement may be terminated for cause for reasons including, but not limited to, Contractor's repeated (whether negligent or intentional) submission for payment of false or incorrect bills or invoices, failure to suitably perform the work, or failure to continuously perform the work in a manner calculated to meet or accomplish the objectives as set forth in this Agreement. The Agreement may also be terminated for cause if the Contractor is placed on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List created pursuant to Section 215.473, Florida Statutes, or if the Contractor provides a false certification submitted pursuant to Section 287.135, Florida Statutes. This Agreement may also be terminated by the Board:

Notice of termination shall be provided in accordance with the "NOTICES" section of this Agreement except that notice of termination by the City Manager, which the City Manager deems necessary to protect the public health, safety, or welfare may be verbal notice that shall be promptly confirmed in writing in accordance with the "NOTICES" section of this Agreement.

In the event this Agreement is terminated for convenience, Contractor shall be paid for any services properly performed under the Agreement through the termination date specified in the written notice of termination. Contractor acknowledges that it has received good, valuable and sufficient consideration from City, the receipt and adequacy of which are, hereby acknowledged by Contractor, for City's right to terminate this Agreement for convenience.

In the event this Agreement is terminated for any reason, any amounts due Contractor shall be withheld by City until all documents are provided to City.

ARTICLE 19 INSPECTOR GENERAL

Contractor is aware that the Inspector General of Palm Beach County has the authority to investigate and audit matters relating to the negotiation and performance of this contract, and may demand and obtain records and testimony from Contractor and its sub licensees and lower tier sub licensees. Contractor understands and agrees that in addition to all other remedies and consequences provided by law, the failure of Contractor or its sub licensee or lower tier sub licensees to fully cooperate with the Inspector General when requested may be deemed by the City to be a material breach of this Agreement justifying its termination.

ARTICLE 20 AUDIT RIGHTS AND RETENTION OF RECORDS

City shall have the right to audit the books, records, and accounts of Contractor and its subcontractors that are related to this Project. Contractor and its subcontractors shall keep such books, records, and accounts as may be necessary in order to record complete and correct entries related to the Project. All books, records, and accounts of Contractor and its subcontractors shall be kept in written form, or in a form capable of conversion into written form within a reasonable time, and upon request to do so, Contractor or its subcontractor, as applicable, shall make same available at no cost to City in written form.

Contractor and its subcontractors shall preserve and make available, at reasonable times for examination and audit by City, all financial records, supporting documents, statistical records, and any other documents pertinent to this Agreement for the required retention period of the Florida Public Records Act, Chapter 119, Florida Statutes, if applicable, or, if the Florida Public Records Act is not applicable, for a minimum period of three (3) years after termination of this Agreement. If any audit has been initiated and audit findings have not been resolved at the end of the retention period or three (3) years, whichever is longer, the books, records, and accounts shall be retained until resolution of the audit findings. Any incomplete or incorrect entry in such books, records, and accounts shall be a basis for City's disallowance and recovery of any payment upon such entry.

Contractor shall ensure that the requirements of this Article 20 are included in all agreements with its subcontractor(s).

ARTICLE 21 TRUTH-IN-NEGOTIATION REPRESENTATION

Contractor's compensation under this Agreement is based upon representations supplied to City by Contractor, and Contractor certifies that the information supplied is accurate, complete, and current at the time of contracting. City shall be entitled to recover any damages it incurs to the extent such representation is untrue.

ARTICLE 22 PUBLIC ENTITY CRIME ACT

Contractor represents that the execution of this Agreement will not violate the Public Entity Crime Act, Section 287.133, Florida Statutes, which essentially provides that a person or affiliate who is a contractor, consultant, or other provider and who has been placed on the convicted vendor list following a conviction for a public entity crime may not submit a bid on a contract to provide any goods or services to City, may not submit a bid on a contract with City for the construction or repair of a public building or public work, may not submit bids on leases of real property to City, may not be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a contract with City, and may not transact any business with City in excess of the threshold amount provided in Section 287.017, Florida Statutes, for category two purchases for a period of

thirty-six (36) months from the date of being placed on the convicted vendor list. Violation of this section shall result in termination of this Agreement and recovery of all monies paid by City pursuant to this Agreement, and may result in debarment from City's competitive procurement activities.

In addition to the foregoing, Contractor further represents that there has been no determination, based on an audit, that it committed an act defined by Section 287.133, Florida Statutes, as a "public entity crime" and that it has not been formally charged with committing an act defined as a "public entity crime" regardless of the amount of money involved or whether Contractor has been placed on the convicted vendor list.

ARTICLE 23 INDEPENDENT CONTRACTOR

Contractor is an independent contractor under this Agreement. Services provided by Contractor pursuant to this Agreement shall be subject to the supervision of Contractor. In providing such services, neither Contractor nor its agents shall act as officers, employees, or agents of City. No partnership, joint venture, or other joint relationship is created hereby. City does not extend to Contractor or Contractor's agents any authority of any kind to bind City in any respect whatsoever.

ARTICLE 24 THIRD PARTY BENEFICIARIES

Neither Contractor nor City intends to directly or substantially benefit a third party by this Agreement. Therefore, the Parties acknowledge that there are no third party beneficiaries to this Agreement and that no third party shall be entitled to assert a right or claim against either of them based upon this Agreement.

ARTICLE 25 NOTICES

Whenever either Party desires to give notice to the other, such notice must be in writing, sent by certified United States Mail, postage prepaid, return receipt requested, or sent by commercial express carrier with acknowledgement of delivery, or by hand delivery with a request for a written receipt of acknowledgment of delivery, addressed to the party for whom it is intended at the place last specified. The place for giving notice shall remain the same as set forth herein until changed in writing in the manner provided in this section. For the present, the Parties designate the following:

For City:

City Manager
City of Delray Beach
100 N.W. 1st Avenue
Delray Beach, Florida 33444

With a copy to:

City Attorney
City of Delray Beach
200 N.W. 1st Avenue
Delray Beach, Florida 33444

For Contractor:

President
MBR Construction
1020 NW 51st Street
Fort Lauderdale, FL 33309

ARTICLE 26 ASSIGNMENT AND PERFORMANCE

Neither this Agreement nor any right or interest herein shall be assigned, transferred, or encumbered without the written consent of the other Party. In addition, Contractor shall not subcontract any portion of the work required by this Agreement, except as may specifically provided for herein. Notwithstanding the Termination provision of this Agreement, City may terminate this Agreement, effective immediately, if there is any assignment, or attempted assignment, transfer, or encumbrance, by Contractor of this Agreement or any right or interest herein without City's written consent.

Contractor represents that each person who will render services pursuant to this Agreement is duly qualified to perform such services by all appropriate governmental authorities, where required, and that each such person is reasonably experienced and skilled in the area(s) for which he or she will render his or her services.

Contractor shall perform its duties, obligations, and services under this Agreement in a skillful and respectable manner. The quality of Contractor's performance and all interim and final product(s) provided to or on behalf of City shall be comparable to the best local and national standards.

ARTICLE 27 CONFLICTS

Neither Contractor nor its employees shall have or hold any continuing or frequently recurring employment or contractual relationship that is substantially antagonistic or incompatible with Contractor's loyal and conscientious exercise of judgment and care related to its performance under this Agreement.

None of Contractor's officers or employees shall, during the term of this Agreement, serve as an expert witness against City in any legal or administrative proceeding in which he, she, or Contractor is not a party, unless compelled by court process. Further, such persons shall not give sworn testimony or issue a report or writing, as an expression of his or her expert opinion, which is adverse or prejudicial to the interests of City in connection with any such pending or threatened legal or administrative proceeding unless compelled by court process. The limitations of this section shall not preclude Contractor or any persons in any way from representing themselves, including giving expert testimony in support thereof, in any action or in any administrative or legal proceeding.

In the event Contractor is permitted pursuant to this Agreement to utilize subcontractors to perform any services required by this Agreement, Contractor shall require such subcontractors, by written contract, to comply with the provisions of this section to the same extent as Contractor.

ARTICLE 28 MATERIALITY AND WAIVER OF BREACH

Each requirement, duty, and obligation set forth herein was bargained for at arm's-length and is agreed to by the Parties. Each requirement, duty, and obligation set forth herein is substantial and important to the formation of this Agreement, and each is, therefore, a material term hereof.

City's failure to enforce any provision of this Agreement shall not be deemed a waiver of such provision or modification of this Agreement. A waiver of any breach of a provision of this Agreement shall not be deemed a waiver of any subsequent breach and shall not be construed to be a modification of the terms of this Agreement.

ARTICLE 29 COMPLIANCE WITH LAWS

Contractor shall comply with all applicable federal, state, and local laws, codes, ordinances, rules, and regulations in performing its duties, responsibilities, and obligations pursuant to this Agreement.

ARTICLE 30 SEVERANCE

In the event a portion of this Agreement is found by a court of competent jurisdiction to be invalid, the remaining provisions shall continue to be effective unless City or Contractor elects to terminate this Agreement. An election to terminate this Agreement based upon this provision shall be made within seven (7) days of final court action, including all available appeals.

ARTICLE 31 JOINT PREPARATION

The Parties and their counsel have participated fully in the drafting of this Agreement and acknowledge that the preparation of this Agreement has been their joint effort. The language agreed to expresses their mutual intent and the resulting document shall not, solely as a matter of judicial construction, be construed more severely against one of the Parties than the other. The language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any party.

ARTICLE 32 INTERPRETATION

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. 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, unless the reference is made to a particular subsection or subparagraph of such Section or Article.

ARTICLE 33 LAW, JURISDICTION, VENUE, WAIVER OF JURY TRIAL

This Agreement shall be interpreted and construed in accordance with and governed by the laws of the state of Florida. All Parties agree and accept that jurisdiction of any controversies or legal problems arising out of this Agreement, and any action involving the enforcement or interpretation of any rights hereunder, shall be exclusively in the state courts of the Fifteenth Judicial Circuit in Palm Beach County, Florida, and venue for litigation arising out of this Agreement shall be exclusively in such state courts, forsaking any other jurisdiction which either party may claim by virtue of its residency or other jurisdictional device. BY ENTERING INTO THIS AGREEMENT, CONTRACTOR AND CITY HEREBY EXPRESSLY WAIVE ANY RIGHTS EITHER PARTY MAY HAVE TO A TRIAL BY JURY OF ANY CIVIL LITIGATION RELATED TO THIS AGREEMENT. IF A PARTY FAILS TO WITHDRAW A REQUEST FOR A JURY TRIAL IN A LAWSUIT ARISING OUT OF THIS AGREEMENT AFTER WRITTEN NOTICE BY THE OTHER PARTY OF VIOLATION OF THIS SECTION, THE PARTY MAKING THE REQUEST FOR JURY TRIAL SHALL BE LIABLE FOR THE REASONABLE ATTORNEYS' FEES AND COSTS OF THE OTHER PARTY IN CONTESTING THE REQUEST FOR JURY TRIAL, AND SUCH AMOUNTS SHALL BE AWARDED BY THE COURT IN ADJUDICATING THE MOTION.

ARTICLE 34 PRIOR AGREEMENTS

This document represents the final and complete understanding of the Parties and incorporates or supersedes all prior negotiations, correspondence, conversations, agreements, and understandings applicable to the matters contained herein. There is no commitment, agreement,

or understanding concerning the subject matter of this Agreement that is not contained in this written document. Accordingly, no deviation from the terms hereof shall be predicated upon any prior representation or agreement, whether oral or written.

ARTICLE 35 PAYABLE INTEREST

- A. Payment of Interest. Except as required by the Prompt Payment laws, City shall not be liable for interest for any reason, whether as prejudgment interest or for any other purpose, and in furtherance thereof Contractor waives, rejects, disclaims and surrenders any and all entitlement it has or may have to receive interest in connection with a dispute or claim based on or related to this Agreement.
- B. Rate of Interest. In any instance where the prohibition or limitations of Section 35 (A) are determined to be invalid or unenforceable, the annual rate of interest payable by City under this Agreement, whether as prejudgment interest or for any other purpose, shall be .025 percent simple interest (uncompounded).

ARTICLE 36 REPRESENTATION OF AUTHORITY

Each individual executing this Agreement on behalf of a party hereto hereby represents and warrants that he or she is, on the date he or she signs this Agreement, duly authorized by all necessary and appropriate action to execute this Agreement on behalf of such party and does so with full legal authority.

ARTICLE 37 MULTIPLE ORIGINALS

Multiple copies of this Agreement may be executed by all Parties, each of which, bearing original signatures, shall have the force and effect of an original document.

ARTICLE 38 PERFORMANCE BOND

Contractor will execute and deliver to the City, within ten (10) days after notification of award, a Cash Deposit, Performance Bond, or Unconditional Irrevocable Letter of Credit payable to the City, in the an amount equal to 100% of Successful Bidder's total bid amount. If the bond is on an annual coverage basis, renewal of each succeeding year shall be submitted to the City thirty (30) days prior to the termination date of the existing bond. A surety company of recognized standing, authorized to do business in the State of Florida, and having a resident agent must execute the Performance Bond. If a letter of credit is chosen, it must be in a form acceptable to the City, drawn on a bank acceptable to the City, and issued in favor of the City.

The amount herein above set is not intended to be or shall be deemed to be in the nature of liquidated damages nor is it intended to limit the liability of the Contractor to the City in the event of a material breach of the Agreement by the Contractor.

The City shall monitor the performance of Contractor. If Contractor's performance fails to meet the requirements specified within this Agreement, the City may without cause and without prejudice to any other right or remedy, terminate this Agreement whenever the City determines that such termination is in the best interest of the City.

ARTICLE 39 ORDER OF PRECEDENCE

The documents listed below are a part of this Agreement. In the event of inconsistency between the documents, unless otherwise provided herein, the terms of the following documents will govern in the following order of precedence:

- A. Terms and conditions as contained in this Agreement;

- B. ITBC No. 2017-018, Beach Master Plan; Phase 1, dated November 18, 2016, and all its addenda;
- C. Contractor's bid response to ITBC No. 2017-018, Beach Master Plan; Phase 1, and any subsequent information submitted by Contractor during the evaluation process.

[Remainder of this page left blank intentionally]

IN WITNESS WHEREOF, the Parties hereto have made and executed this Agreement:
City through its Board, signing by and through its ~~Mayor or Vice Mayor~~ ^{Interim City Manager}, authorized to execute
same by Board action on the 5th day of July, 2017, and Contractor, signing by
and through its President, duly authorized to execute same.

ATTEST: CITY OF DELRAY BEACH, FLORIDA

acting Kimberly Lynn
City Clerk

By [Signature]
Chief Neal de Jesus, Interim City Manager

13 day of March, 2017.

APPROVED AS TO FORM:

[Signature]
R. Max Lohman, City Attorney

AGREEMENT BETWEEN DELRAY BEACH, FLORIDA

AND

MBR CONSTRUCTION, INC.

MBR CONSTRUCTION, INC.
1020 NW 51ST STREET
FORT LAUDERDALE, FL 33309
954-486-8404 FAX 954-486-9579
CONTRACTOR

WITNESS:

[Signature]
(Signature)

Wendy Cole
(Printed name)

By [Signature]
(Signature)

Michael Buss Pres
(Printed name, Title)

22 day of Feb, 2017

WITNESS:

[Signature]
(Signature)

PAOLA DOVAIHI
(Printed name)

(SEAL)

License No. CGC1512261

Agent for service of process:

(If Contractor is a corporation or Partnership, attach evidence of authority to sign.)