



Presentations & Awards/City Commission Meeting
City Hall, Commission Chambers, 3rd Floor, 1700 Convention Center Drive
May 20, 2015

Mayor Philip Levine
Vice-Mayor Jonah Wolfson
Commissioner Michael Grieco
Commissioner Joy Malakoff
Commissioner Micky Steinberg
Commissioner Edward L. Tobin
Commissioner Deede Weithorn

City Manager Jimmy L. Morales
City Attorney Raul J. Aguila
City Clerk Rafael E. Granado

Visit us at www.miamibeachfl.gov for agendas and video streaming of City Commission Meetings.

ATTENTION ALL LOBBYISTS

Chapter 2, Article VII, Division 3 of the City Code of Miami Beach, entitled "Lobbyists," requires the registration of all lobbyists with the City Clerk prior to engaging in any lobbying activity with the City Commission, any City Board or Committee, or any personnel as defined in the subject Code sections. Copies of the City Code sections on lobbyists laws are available in the Office of the City Clerk. Questions regarding the provisions of the Code should be directed to the Office of the City Attorney.

To request this material in alternate format, sign language interpreter (five-day notice required), information on access for persons with disabilities, and/or any accommodation to review any document or participate in any city-sponsored proceedings, call 305.604.2489 and select 1 for English or 2 for Spanish, then option 6; TTY users may call via 711 (Florida Relay Service).

In order to ensure adequate public consideration, if necessary, the Mayor and City Commission may move any agenda item to an alternate meeting date. In addition, the Mayor and City Commission may, at their discretion, adjourn the Commission Meeting without reaching all agenda items.

AGENDA

1. Call to Order - 5:00 p.m.
2. Pledge of Allegiance
3. Requests for Additions, Withdrawals, and Deferrals

We are committed to providing excellent public service and safety to all who live, work, and play in our vibrant, tropical, historic community.

Presentations and Awards

- PA1 Certificates Of Recognition To Be Presented To Tamra Sheffman And Carol Scanlon, For Their Excellence In Participating In The 2015 All Women’s Air Race Classic, Representing The City Of Miami Beach.
(Requested By Commissioner Joy Malakoff)

- PA2 Certificate Of Recognition To Be Presented To Samantha Narson, Miami Beach Sr. High School Student, Whose Team Won First Place At The Summit 2015, Varsity All Star's Cheerleading And Dance Championship.
(Requested by Commissioner Micky Steinberg)

CONSENT AGENDA

C7 - Resolutions

- C7A Execute MOU W/ LRPOA And Call Special Mail Ballot Election To Approve Lincoln Road BID
 - 1. A Resolution Approving And Authorizing The City Manager To Execute A Memorandum Of Understanding Between The City Of Miami Beach And The Lincoln Road Property Owners Association, Inc. (“LRPOA”), To Conduct A Special Mail Ballot Election To Determine Whether A Majority Of The Affected Property Owners Approve The Creation Of A Special Assessment District To Be Known As The Lincoln Road Business Improvement District, Which Election Shall Be Conducted By The Office Of The City Clerk And Office Of The City Attorney, And To Provide That LRPOA Shall Cover The Costs Of Conducting Such Election.
(Office of the City Attorney)

 - 2. A Resolution Calling For A Special Mail Ballot Election To Be Held From June 29, 2015 To July 24, 2015, To Determine Whether A Majority Of The Affected Property Owners Approve The Creation Of A Special Assessment District To Be Known As The Lincoln Road Business Improvement District (The “District”); Providing That The Office Of The City Clerk And Office Of The City Attorney Shall Conduct Such Election; Providing For The Form Of Ballot; Directing The City Clerk To Give Notice Of Such Election As Required By The City Code And State Law; And Authorizing The City Manager To Vote In Favor Of The Creation Of The District On Behalf Of The City, Which, As The Owner/ Lessor Under The Ground Lease With The New World Symphony, Is An Affected Property Owner.
(Office of the City Attorney)
(Item to be Submitted in Supplemental)

C7 - Resolutions (Continued)

C7B A Resolution Approving And Authorizing The Mayor And City Manager To Provide City Resources In Support Of The City's Proposal To Host The U.S. Conference Of Mayors In 2018; And Further Authorizing The Mayor And City Manager To Fund Transportation And Youth And Family Programs For Attendees; And Retroactively Approving The Mayor's Execution Of The Proposal On Behalf Of The City.

(Sponsored by Mayor Philip Levine)
(Legislative Tracking: Tourism, Culture & Economic Development)
(Item to be Submitted in Supplemental)

REGULAR AGENDA

R5 - Ordinances

R5A Amend Chapter 6 - Alcoholic Beverages And Chapter 82 - Public Property Sidewalk Café Ordinance - Alcohol Regulations

1. Chapter 6 - Alcoholic Beverages

An Ordinance Amending Chapter 6, Entitled "Alcoholic Beverages," Of The Code Of The City Of Miami Beach, Florida, Article I, Entitled "In General," Section 6-3 Thereof, Entitled "Hours Of Sale," To Terminate The Sale And Consumption Of Alcoholic Beverages At Sidewalk Cafes At 2:00 a.m., Prohibit The Granting Of Variances From The Provisions Of Section 6-3(3)(d), And Provide For Penalties; And Providing For Repealer, Severability, Codification, And An Effective Date. **5:15 p.m. Second Reading Public Hearing**

(Sponsored by Mayor Philip Levine)
(Co-Sponsored by Commissioner Michael Grieco)
(Legislative Tracking: Office of the City Attorney)
(First Reading on May 6, 2015 - R5K1)

2. Chapter 82 - Public Property Sidewalk Café Ordinance - Alcohol Regulations

An Ordinance Amending Chapter 82, Entitled "Public Property," Of The Code Of The City Of Miami Beach, Florida, By Amending Article IV, Entitled "Uses In Public Rights-Of-Way," Division 5, Entitled "Sidewalk Cafes," Subdivision II, Entitled "Permit," By Creating Section 82-388 Thereof, Entitled "Hours Of Sale Of Alcoholic Beverages; Enforcement," To Terminate The Sale And Consumption Of Alcoholic Beverages At Sidewalk Cafes At 2:00 a.m., And Provide That Section 82-388 Shall Be Enforced Pursuant To Section 6-3(8) Of The City Code; And Providing For Repealer, Severability, Codification, And An Effective Date. **5:15 p.m. Second Reading Public Hearing**

(Sponsored by Mayor Philip Levine)
(Co-Sponsored by Commissioner Michael Grieco)
(Legislative Tracking: Office of the City Attorney)
(First Reading on May 6, 2015 - R5K2)

R5 - Ordinances (Continued)

R5B Sidewalk Café - Ocean Drive - Umbrellas

An Ordinance Amending Chapter 82, Entitled "Public Property," Article IV, Entitled "Uses In Public Rights-Of-Way," Division 5, Entitled "Sidewalk Cafes," Subdivision 2, Entitled "Permit," By Creating Section 82-389, Entitled "Additional Minimum Standards, Criteria, And Conditions For Operation Of Sidewalk Cafes On Ocean Drive Between 5th Street And 15th Street" To Provide Minimum Standards For Umbrellas And Awnings, Require Regular Maintenance Of Umbrellas, And Provide Prohibitions; And Providing For Repealer, Severability, Codification, And An Effective Date. **First Reading**

(Sponsored by Vice-Mayor Jonah Wolfson)
(Legislative Tracking: Office of the City Attorney)

R5C An Ordinance Amending The Firefighters' Relief And Pension Fund To Comply With Applicable Provisions Of The Internal Revenue Code And Regulations Thereunder; Amending The Related Special Acts Of The City By Amending Article VII, Entitled "Firefighters' Relief And Pension Fund," By Amending Sections 36 Through 48; Providing For Severability; Repealing All Ordinances In Conflict Therewith; Providing For Codification; And Providing An Effective Date. **First Reading**

(Sponsored by Deede Weithorn)
(Legislative Tracking: Human Resources)

R5D An Ordinance Amending And Restating The Miami Beach Employees' Retirement Plan Created By Ordinance No. 2006-3504, As Subsequently Amended, By Amending Sections 2, 4, 5, 11, And 12 Of The Plan To Comply With Applicable Provisions Of The Internal Revenue Code And Regulations Thereunder, And Deleting Outdated Language; Providing For Severability; Repealing All Ordinances In Conflict Therewith; And Providing An Effective Date. **First Reading**

(Sponsored by Deede Weithorn)
(Legislative Tracking: Human Resources)

R7 - Resolutions

R7A A Resolution Approving And Authorizing The Mayor And City Clerk To Execute A Construction Manager At Risk Agreement With Clark Construction Group, LLC ("Clark"), Pursuant To Request For Proposals (RFP) No. 2015-129-ME, For Construction Manager At Risk Services For The Miami Beach Convention Center Renovation And Expansion Project ("Project"), With A Lump-Sum Pre-Construction Phase Fee In The Amount Of \$2,594,073.

(Office of the City Manager)

R7B A Resolution Accepting The Recommendation Of The City Manager, Pursuant To Request For Proposals (RFP) No. 2015-103-ME, For The Development Of A Convention Headquarter Hotel Adjacent To The Miami Beach Convention Center ("Project"); Authorizing The Administration To Negotiate A Development And Ground Lease Agreement With Portman Holdings, LLC, With Said Agreement Subject To Prior Approval By The Mayor And City Commission Before Final Execution Thereof.

(Office of the City Manager)

R7 - Resolutions (Continued)

- R7C A Resolution Approving And Authorizing The Mayor And City Clerk To Execute Amendment No. 7 To The Professional Services Agreement Between The City Of Miami Beach And Strategic Advisory Group Dated October 19, 2011 For Consulting Services Relative To The Expansion And Enhancement Of The Miami Beach Convention Center In An Amount Not To Exceed \$358,825, Including All Reimbursable Expenses.
(Office of the City Manager)

R9 - New Business and Commission Requests

- R9A Board And Committee Appointments - City Commission Appointments.
(Office of the City Clerk)
- R9B Discussion Regarding Rescheduling The June Commission Meeting From June 10, 2015 To June 8, 2015.
(Sponsored by Mayor Philip Levine)
- R9C Discussion Regarding City Of Miami Beach Requiring Mandatory Nighttime Closure Of All Ocean Drive Sidewalk Umbrellas For The Duration Of Memorial Day Weekend.
(Sponsored by Commissioner Michael Grieco)

End of Agenda

THIS PAGE INTENTIONALLY LEFT BLANK

PA
PRESENTATIONS
AND
AWARDS

Presentations and Awards

- PA1 Certificates Of Recognition To Be Presented To Tamra Sheffman And Carol Scanlon, For Their Excellence In Participating In The 2015 All Women's Air Race Classic, Representing The City Of Miami Beach.
(Requested By Commissioner Joy Malakoff)
- PA2 Certificate Of Recognition To Be Presented To Samantha Narson, Miami Beach Sr. High School Student, Whose Team Won First Place At The Summit 2015, Varsity All Star's Cheerleading And Dance Championship.
(Requested by Commissioner Micky Steinberg)

THIS PAGE INTENTIONALLY LEFT BLANK

C7

RESOLUTIONS

C7

C7 - Resolutions

C7A Execute MOU W/ LRPOA And Call Special Mail Ballot Election To Approve Lincoln Road BID

1. A Resolution Approving And Authorizing The City Manager To Execute A Memorandum Of Understanding Between The City Of Miami Beach And The Lincoln Road Property Owners Association, Inc. ("LRPOA"), To Conduct A Special Mail Ballot Election To Determine Whether A Majority Of The Affected Property Owners Approve The Creation Of A Special Assessment District To Be Known As The Lincoln Road Business Improvement District, Which Election Shall Be Conducted By The Office Of The City Clerk And Office Of The City Attorney, And To Provide That LRPOA Shall Cover The Costs Of Conducting Such Election.

(Office of the City Attorney)

2. A Resolution Calling For A Special Mail Ballot Election To Be Held From June 29, 2015 To July 24, 2015, To Determine Whether A Majority Of The Affected Property Owners Approve The Creation Of A Special Assessment District To Be Known As The Lincoln Road Business Improvement District (The "District"); Providing That The Office Of The City Clerk And Office Of The City Attorney Shall Conduct Such Election; Providing For The Form Of Ballot; Directing The City Clerk To Give Notice Of Such Election As Required By The City Code And State Law; And Authorizing The City Manager To Vote In Favor Of The Creation Of The District On Behalf Of The City, Which, As The Owner/ Lessor Under The Ground Lease With The New World Symphony, Is An Affected Property Owner.

(Office of the City Attorney)

(Item to be Submitted in Supplemental)

THIS PAGE INTENTIONALLY LEFT BLANK

C7 - Resolutions

C7B A Resolution Approving And Authorizing The Mayor And City Manager To Provide City Resources In Support Of The City's Proposal To Host The U.S. Conference Of Mayors In 2018; And Further Authorizing The Mayor And City Manager To Fund Transportation And Youth And Family Programs For Attendees; And Retroactively Approving The Mayor's Execution Of The Proposal On Behalf Of The City.

(Sponsored by Mayor Philip Levine)

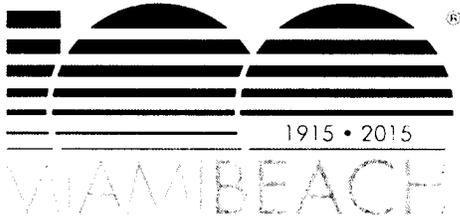
(Legislative Tracking: Tourism, Culture & Economic Development)

(Item to be Submitted in Supplemental)

THIS PAGE INTENTIONALLY LEFT BLANK

R5
ORDINANCES

R5



OFFICE OF THE CITY ATTORNEY
RAUL J. AGUILA, CITY ATTORNEY

COMMISSION MEMORANDUM

To: Mayor Philip Levine
Members of the City Commission

Date: May 20, 2015

From: Raul J. Aguila 
City Attorney

Subject: AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING CHAPTER 6, ENTITLED "ALCOHOLIC BEVERAGES," OF THE CODE OF THE CITY OF MIAMI BEACH, FLORIDA, ARTICLE I, ENTITLED "IN GENERAL," SECTION 6-3 THEREOF, ENTITLED "HOURS OF SALE," TO TERMINATE THE SALE AND CONSUMPTION OF ALCOHOLIC BEVERAGES AT SIDEWALK CAFES AT 2:00 A.M., PROHIBIT THE GRANTING OF VARIANCES FROM THE PROVISIONS OF SECTION 6-3(3)(d), AND PROVIDE FOR PENALTIES; AND PROVIDING FOR REPEALER, SEVERABILITY, CODIFICATION, AND AN EFFECTIVE DATE.

AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING CHAPTER 82, ENTITLED "PUBLIC PROPERTY," OF THE CODE OF THE CITY OF MIAMI BEACH, FLORIDA, BY AMENDING ARTICLE IV, ENTITLED "USES IN PUBLIC RIGHTS-OF-WAY," DIVISION 5, ENTITLED "SIDEWALK CAFES," SUBDIVISION II, ENTITLED "PERMIT," BY CREATING SECTION 82-388 THEREOF, ENTITLED "HOURS OF SALE OF ALCOHOLIC BEVERAGES; ENFORCEMENT," TO TERMINATE THE SALE AND CONSUMPTION OF ALCOHOLIC BEVERAGES AT SIDEWALK CAFES AT 2:00 A.M., AND PROVIDE THAT SECTION 82-388 SHALL BE ENFORCED PURSUANT TO SECTION 6-3(8) OF THE CITY CODE; AND PROVIDING FOR REPEALER, SEVERABILITY, CODIFICATION, AND AN EFFECTIVE DATE.

Introduction

Pursuant to the request of Mayor Philip Levine, the attached Ordinances are submitted for consideration by the City Commission. The first Ordinance amends Chapter 6 of the City Code, entitled "Alcoholic Beverages," Article I, Section 6-3 thereof, entitled "Hours of Sale," to terminate the sale and consumption of alcoholic beverages at sidewalk cafes at 2:00 a.m., prohibit the granting of variances from the provisions of Section 6-3(3)(d), and provide penalties for violations of Section 6-3.

The second Ordinance amends Chapter 82, Article IV, Division 5, by creating Section 82-388 thereof, to reflect that alcoholic beverages shall not be offered for sale or consumption at sidewalk cafes between the hours of 2:00 a.m. and 8:00 a.m.

The City's Authority to Regulate the Hours of Sale of Alcoholic Beverages

The State expressly grants the City the authority to establish its own regulations for the time for sale of alcoholic or intoxicating beverages. Pursuant to Section 562.14, Florida Statutes, no alcoholic beverages may be sold, consumed, served, or permitted to be served or consumed in any place licensed to sell alcoholic beverages between the hours of midnight and 7:00 a.m., unless a municipality elects to establish its own regulations for the time for sale of alcoholic or intoxicating beverages. Section 562.14, Florida Statutes, clearly indicates that the State shall not be responsible for the enforcement of the hours of sale established by municipal ordinance.

In Wednesday Night, Inc. v. City of Fort Lauderdale, 272 So. 2d 502 (Fla. 1972), the Florida Supreme Court upheld Section 562.14, Florida Statutes, holding that the statute, which relates to state, municipal, and county regulations of the time for sale of alcoholic and intoxicating beverages (1) does not contravene Federal and State constitutional guarantees of due process and equal protection of the laws; (2) does not constitute an unlawful delegation of the powers of the legislature; and (3) does not contravene any of the prohibitions against special laws or general laws of local application appearing in Section 11 of Article III of the Florida Constitution.

Florida Courts have held that a municipality exercising its inherent powers may reasonably regulate the sale of intoxicating liquors and, in providing such reasonable regulations, may prohibit sale of such liquors within certain zones. State ex rel. Floyd v. Noel, 169 So. 549 (Fla. 1936). Furthermore, the Florida Attorney General has opined that a municipality may regulate (1) the hours of sale, (2) zoning of locations in which alcoholic beverages may be sold, and (3) the sanitary conditions under which alcoholic beverages may be dispensed or served to the public. Op. Att'y Gen. Fla., 059-73 (1959).

Based upon the foregoing, it is clear that a City may regulate the hours of sale of alcoholic beverages at sidewalk cafes, provided the regulations are not exercised in an arbitrary or discriminatory manner, and are grounded upon some reasonable basis of classification with reference to the subject matter to be regulated. Makos v. Prince, 64 So. 2d 670 (1953). In regulating the sale of alcoholic beverages, the City may create regulations that establish separate zones and the Courts do not require that regulation of hours be uniform throughout the jurisdictional limits. Id. The Florida Attorney General has opined that different hours may be provided for in a municipal ordinance, provided there is reasonable relation to the health, safety, and morals of the community. Op. Att'y Gen. Fla., p. 497 (1950).

To be clear, a business is neither entitled to "grandfathered" status nor entitled to enjoin enforcement of an ordinance regulating the times during which liquor may be sold. Village of North Palm Beach v. S & H Foster's Inc., 80 So. 3d 433 (Fla. 4th DCA 2012); Other Place of Miami, Inc. v. City of Hialeah Gardens, 353 So. 2d 861 (Fla. 3d DCA 1977). Further, the courts have upheld municipal ordinances against claims for injunctive relief against municipal ordinances regulating the time at which alcoholic beverages may be sold, because municipalities have the statutory authority to set times for sale of alcoholic beverages. Id.; Playpen S., Inc. v. City of Oakland Park, 396 So. 2d 830 (Fla. 4th DCA 1981). Lastly, Florida Courts have ruled that hours of operation are not a property right. S. Daytona Rests., Inc. v. City of S. Daytona, 186 So. 2d 78 (Fla. 1st DCA 1966).

Amendments to Chapter 6, “Alcoholic Beverages”

Section 6-3 of the City Code, entitled “Hours of Sale,” of Chapter 6, entitled “Alcoholic Beverages,” regulates the hours during which alcoholic beverages may be sold in the City. The first attached Ordinance amends Section 6-3 by creating Section 6-3(3)(d) to prohibit the sale or consumption of alcoholic beverages at sidewalk cafes between the hours of 2:00 a.m. and 8:00 a.m. Section 6-3(3)(d) also prohibits the grant of any variances that would allow a sidewalk cafe permittee to offer alcoholic beverages for sale or consumption between the hours of 2:00 a.m. and 8:00 a.m.

The first Ordinance also amends Section 6-3 to provide enforcement and penalty provisions for violations of any provision of Section 6-3. Violators of Section 6-3 would face a civil fine of \$1,000 for a first offense within a 12-month period, \$5,000 for a second offense within a 12-month period, and \$10,000 for a third offense within a 12-month period. A fourth or subsequent offense within a 12-month period would result in a revocation of the violator’s certificate of use, business tax receipt, or certificate of occupancy. Upon a fourth or subsequent offense, the violator would be prohibited from applying for and obtaining a new sidewalk cafe permit for a period of two permit years following the permit year in which the sidewalk cafe permittee incurred the violations. Due to the public safety implications of the sale and consumption of alcoholic beverages at sidewalk cafes after 2:00 a.m., Section 6-3(8)(b) requires that the sale of alcoholic beverages in violation of Section 6-3 must be immediately terminated.

A citation under Section 6-3 may be appealed to the City’s Special Master within 10 days of service of the notice of violation. The failure of a named violator to appeal a violation shall constitute a waiver of the violator’s right to appeal, and shall be treated as an admission of the violation. The special master shall not hear the merits of a notice of violation or consider the timeliness of a request for appeal if a violator fails to request a hearing within ten days of the service of the notice of violation. Additionally, the special master shall not be authorized to alter the penalties prescribed in Section 6-3(8).

Amendments to the Sidewalk Cafe Ordinance

Chapter 82, at Article IV, Division 5 (the “Sidewalk Cafe Ordinance”) sets forth regulations for the City’s sidewalk cafes. The second attached Ordinance amends the Sidewalk Cafe Ordinance by creating Section 82-388, to reflect that alcoholic beverages shall not be offered for sale or consumption at sidewalk cafes between the hours of 2:00 a.m. and 8:00 a.m. The sale or consumption of alcoholic beverages in violation of Section 82-388 shall be enforced pursuant to Section 6-3(8), as amended by the first attached Ordinance.

Fiscal Impact

The Ordinances are not expected to have any fiscal impact on the City’s resources.

CHAPTER 6 – ALCOHOLIC BEVERAGES

ORDINANCE NO. _____

AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING CHAPTER 6, ENTITLED “ALCOHOLIC BEVERAGES,” OF THE CODE OF THE CITY OF MIAMI BEACH, FLORIDA, ARTICLE I, ENTITLED “IN GENERAL,” SECTION 6-3 THEREOF, ENTITLED “HOURS OF SALE,” TO TERMINATE THE SALE AND CONSUMPTION OF ALCOHOLIC BEVERAGES AT SIDEWALK CAFES AT 2:00 A.M., PROHIBIT THE GRANTING OF VARIANCES FROM THE PROVISIONS OF SECTION 6-3(3)(d), AND PROVIDE FOR PENALTIES; AND PROVIDING FOR REPEALER, SEVERABILITY, CODIFICATION, AND AN EFFECTIVE DATE.

WHEREAS, the City of Miami Beach (“City”) regulates the location, size and hours of operation, and patron age of uses, that permit the sale and consumption of alcoholic beverages in Chapter 6 of the City Code, entitled “Alcoholic Beverages”; and

WHEREAS, it is in the best interest of the City, and it serves the health, safety, and welfare of the City’s residents and visitors, to require that sidewalk cafes, which are located on public rights-of-way, terminate the sale and consumption of alcoholic beverages at 2:00 a.m., because the sale and consumption of alcoholic beverages at sidewalk cafes can disturb the quiet enjoyment of the community, cause undesirable noise, result in physical disputes amongst patrons and passers-by, and contribute to litter, noxious odors, and the general degradation of the City; and

WHEREAS, the Miami Beach Police Department has requested that the City limit the hours during which alcoholic beverages may be sold or consumed at sidewalk cafes, because the sale and consumption of alcoholic beverages at sidewalk cafes implicates the safety of the City’s residents and visitors, as well as the police officers sworn to protect them; and

WHEREAS, this amendment to Chapter 6 of the City Code is intended to ensure that Officer Eduard Alba of the Miami Beach Police Department is recognized for dedicating himself to protecting this City and its residents and visitors, and to ensure that other officers are not endangered; and

WHEREAS, the State expressly grants the City the authority to establish its own regulations for the time for sale of alcoholic or intoxicating beverages; and

WHEREAS, pursuant to Section 562.14, Florida Statutes, no alcoholic beverages may be sold, consumed, served, or permitted to be served or consumed in any place licensed to sell alcoholic beverages between the hours of midnight and 7:00 a.m., unless a municipality elects to establish its own regulations for the time for sale of alcoholic or intoxicating beverages; and

WHEREAS, Section 562.14, Florida Statutes, clearly indicates that the State shall not be responsible for the enforcement of the hours of sale established by a municipal ordinance; and

WHEREAS, in Wednesday Night, Inc. v. City of Fort Lauderdale, 272 So. 2d 502 (Fla. 1972), the Florida Supreme Court upheld Section 562.14, Florida Statutes, holding that the statute, which relates to state, municipal, and county regulations of the time for sale of alcoholic

and intoxicating beverages (1) does not contravene Federal and State constitutional guarantees of due process and equal protection of the laws; (2) does not constitute an unlawful delegation of the powers of the legislature; and (3) does not contravene any of the prohibitions against special laws or general laws of local application appearing in Section 11 of Article III of the Florida Constitution; and

WHEREAS, Florida Courts have determined that it is within the police power and authority for a municipality to change the hours of regulation of alcoholic beverages, because municipalities have the statutory authority under Section 562.14, Florida Statutes, to restrict the sale of alcohol; additionally, a municipal ordinance regulating the hours of sale of alcoholic beverages may be applied to a property incorporated later into the municipality by annexation. Village of North Palm Beach v. S & H Foster's, Inc., 80 So. 3d 433 (Fla. 4th DCA 2012); and

WHEREAS, Florida Courts have held that a municipality exercising its inherent powers may reasonably regulate the sale of intoxicating liquors and, in providing such reasonable regulations, may prohibit sale of such liquors within certain zones. State ex rel. Floyd v. Noel, 169 So. 549 (Fla. 1936); and

WHEREAS, the Florida Attorney General has opined that a municipality may regulate (1) the hours of sale, (2) zoning of locations in which alcoholic beverages may be sold, and (3) the sanitary conditions under which alcoholic beverages may be dispensed or served to the public. Op. Att'y Gen. Fla., 059-73 (1959); and

WHEREAS, the City may regulate the hours of sale of alcoholic beverages at sidewalk cafes, provided the regulations are not exercised in an arbitrary or discriminatory manner, and are grounded upon some reasonable basis of classification with reference to the subject matter to be regulated. Makos v. Prince, 64 So. 2d 670 (1953); and

WHEREAS, such regulations may establish separate zones and do not require that regulation of hours be uniform throughout the jurisdictional limits. Id.; and

WHEREAS, in fact, the Florida Attorney General has opined that different hours may be provided for in a municipal ordinance, provided there is reasonable relation to the health, safety, and morals of the community. Op. Att'y Gen. Fla., p. 497 (1950); and

WHEREAS, a business is neither entitled to "grandfathered" status nor entitled to enjoin enforcement of an ordinance regulating the times during which liquor may be sold. Village of North Palm Beach v. S & H Foster's Inc., 80 So. 3d 433 (Fla. 4th DCA 2012); Other Place of Miami, Inc. v. City of Hialeah Gardens, 353 So. 2d 861 (Fla. 3d DCA 1977); and

WHEREAS, injunctive relief is not available against the enforcement of a municipal ordinance regulating the time at which alcoholic beverages may be sold, because municipalities have the statutory authority to set times for sale of alcoholic beverages. Id.; Playpen S., Inc. v. City of Oakland Park, 396 So. 2d 830 (Fla. 4th DCA 1981); and

WHEREAS, Florida Courts have ruled that hours of operation are not a property right. S. Daytona Rests., Inc. v. City of S. Daytona, 186 So. 2d 78 (Fla. 1st DCA 1966); and

WHEREAS, the amendments set forth below are necessary to accomplish the objectives identified above.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA:

SECTION 1. That Section 6-3, entitled "Hours of Sale," of Article I, of Chapter 6, of the City Code of the City of Miami Beach is hereby amended as follows:

**CHAPTER 6
ALCOHOLIC BEVERAGES**

ARTICLE I. In General

* * *

Sec. 6-3. Hours of Sale.

The hours of sale of alcoholic beverages shall be according to the following schedule, except as may be otherwise provided pursuant to subsection ~~(7)~~ (6):

- (1) ~~*Retail stores for package sales only, either as permitted main or accessory uses.*~~ *Retail stores for package sales only, either as permitted main or accessory uses.* Vendors having a license from the state division of alcoholic beverages and tobacco for the sale of liquor and other alcoholic beverages for consumption off the premises shall only offer for sale alcoholic beverages within the hours of 8:00 a.m. and midnight on any day of the week.
- (2) ~~*Retail stores, including grocery and convenience stores, and gasoline service/filling stations, which primarily offer for sale products other than alcoholic beverages.*~~ *Retail stores, including grocery and convenience stores, and gasoline service/filling stations, either as permitted main or accessory uses, which primarily offer for sale products other than alcoholic beverages may only make sales of beer and wine in sealed containers for consumption off the premises between the hours of 8:00 a.m. and midnight on any day of the week.*
- (3) ~~*Alcoholic beverage establishments.*~~ *Alcoholic beverage establishments.* All establishments licensed as alcoholic beverage establishments ~~(midnight to 5:00 a.m.)~~, either as permitted main or accessory uses, shall only offer alcoholic beverages for sale ~~the or~~ on-premises consumption of alcoholic beverages within the hours of 8:00 a.m. and 5:00 a.m. on any day of the week.
 - a. ~~*Restaurants not operating as dance halls or entertainment establishments.*~~ *Restaurants not operating as dance halls or entertainment establishments.* Restaurants with full kitchen facilities, serving full meals, licensed as alcoholic beverage establishments ~~(midnight to 5:00 a.m.)~~, but not operating as dance halls or entertainment establishments, may remain open 24 hours a day; however, alcoholic beverages may not be offered for sale or on-premises consumption between the hours of 5:00 a.m. and 8:00 a.m.
 - b. ~~*Restaurants also operating as dance halls or entertainment establishments.*~~ *Restaurants also operating as dance halls or entertainment establishments.* Restaurants with full kitchen facilities, serving full meals, licensed as alcoholic beverage establishments ~~(midnight to 5:00 a.m.)~~, and also operating as dance halls, or entertainment establishments, may remain open 24 hours a day; however, alcoholic beverages may not be offered for sale or on-

premises consumption between the hours of 5:00 a.m. and 8:00 a.m., and dancing and entertainment shall not be conducted between the hours of 5:00 a.m. and 10:00 a.m.

- c. Other alcoholic beverage establishments. Other alcoholic beverage establishments (~~midnight to 5:00 a.m.~~), not containing restaurants with full kitchen facilities, shall close at 5:00 a.m. and keep closed the place of business and not allow any patron or other persons, other than those employed by the vendor, to remain therein between the hours of 5:00 a.m. and 8:00 a.m.
- d. Sidewalk cafes. Notwithstanding the provisions of subsections (3)(a) through (c), alcoholic beverages shall not be offered for sale or consumption at sidewalk cafes, as defined in section 82-366 of this Code and as otherwise permitted by the City in accordance with chapter 82, article IV, division 5, subdivision II of this Code (as may be amended from time to time), between the hours of 2:00 a.m. and 8:00 am. No variances may be granted from the provisions of this section 6-3(3)(d) as to the hours of sale or consumption of alcoholic beverages at sidewalk cafes.

Note: For purposes of this section, full kitchen facilities shall mean having commercial grade burners, ovens, and refrigeration units of sufficient size and quantity to accommodate the occupancy content of the establishment. Full kitchen facilities must contain grease trap interceptors, and meet all applicable city, county, and state codes.

- (4) Off-premises package sales by alcoholic beverage establishments. Off-premises package sales shall be permitted between the hours of 8:00 a.m. and midnight, for all establishments licensed as alcoholic beverage establishments.
- (5) Private clubs. ~~A Private private clubs, either as a permitted main or accessory use, shall be considered pursuant to subsection 6-2(a) shall only offer alcoholic beverages for sale or on-premises consumption if the private club, in accordance with section 6-2(a), secures a license for the distribution or sale of any alcoholic beverages from the division of alcoholic beverages and tobacco of the department of business and professional regulation of the state. Hours of operation and the consumption of alcoholic beverages will be considered Private clubs licensed as alcoholic beverage establishments, either as permitted main or accessory uses, shall only offer alcoholic beverages for sale or on-premises consumption between the hours of 8:00 a.m. and 5:00 a.m., Monday through Sunday, on any day of the week, provided that service is made only to members and guests of members pursuant to Florida Statutes. However, any private club permitted to remain open after 2:00 a.m. shall purchase an extra-hours license and must provide for security in its premises by hiring private security guards or off-duty police officers between the hours of 2:00 a.m. and 5:00 a.m. each day.~~

Private clubs securing a license from the state division of alcoholic beverages and tobacco by complying with the requirements of F.S. § 561.20 for racquetball, tennis, or golf course facilities may admit members at any time for use of such facilities, but may not serve alcoholic beverages after 2:00 a.m. each day unless

such private club is the holder of an extra-hours license and complies with the above requirements.

~~(6) Upon a finding by the special master that a violation of this section has occurred, the city may initiate proceedings to revoke the certificate of use, occupational license or certificate of occupancy of the violator. In addition, this section may be enforced and violations may be punished as second degree misdemeanors, as provided in F.S. §§ 775.082 and 775.083.~~

~~(7)~~ (6) Alcoholic beverage establishments set forth in subsections (3) and (5) permitted to remain open to serve alcoholic beverages for on-premises consumption until 5:00 a.m. may continue to serve alcoholic beverages (i) until 7:00 a.m. on January 1 (New Year's Day) or, if January 1 is on a Sunday, until 7:00 a.m. on Monday if the day that is observed as a national holiday for New Year's Day is on Monday, and (ii) until 7:00 a.m. during certain major event days or weekends as may be designated by the city commission or as may be designated by the city manager following approval by the city commission, under the following conditions:

- a. The police department and the code compliance ~~division~~ department of the city must be notified by a letter, received no later than 15 business days prior to either (a) January 1 or (b) the day on which alcohol sales are to be extended, stating that the alcoholic beverage establishment intends to serve alcoholic beverages for on-premises consumption until 7:00 a.m.;
- b. If deemed reasonably necessary by the police chief, or the police chief's designee, off-duty police officers must be provided at the alcoholic beverage establishment until 7:00 a.m.;
- c. There are no pending City Code violations against the alcoholic beverage establishment;
- d. No delinquent or past due monies are owed to the city;
- e. Outdoor entertainment or open-air entertainment is not allowed;
- f. No violation of the city's noise ordinance shall be permitted;
- g. No violation of the approved fire code occupancy load shall be permitted;
- h. All required city permits and licenses are current;
- i. The State of Florida alcoholic beverage license is current; and
- j. Any other conditions required by the city manager in order to protect the public health, safety, or welfare.

Alcoholic beverage establishments set forth in subsections (3) and (5) permitted to remain open to serve alcoholic beverages for on-premises consumption until 5:00 a.m. may continue to serve alcoholic beverages until 6:00 a.m. on the first day of daylight savings time in the spring.

~~(8)~~ (7) The city manager may suspend the provisions of subsection ~~(7)~~(6) at any time to protect the public health, safety, or welfare.

(8) Penalties and enforcement.

a. The following penalties shall be imposed for a violation of this section:

- i. The penalty for the first violation by a person or entity within a 12-month period shall be a civil fine of \$ 1,000.00;
- ii. The penalty for the second violation by a person or entity within a 12-month period shall be a civil fine of \$ 5,000.00;
- iii. The penalty for the third violation by a person or entity within a 12-month period shall be a civil fine of \$ 10,000.00;
- iv. Upon a finding by the special master that four (4) or more violations by a person or entity have occurred within a 12-month period, the city may initiate proceedings to revoke the certificate of use, business tax receipt, or certificate of occupancy of the violator.
- v. A sidewalk cafe permittee that has been issued four (4) or more violations pursuant to this section or section 82-388 within a permit year shall be prohibited from applying for and obtaining a sidewalk cafe permit for a period of two (2) permit years following the permit year in which the sidewalk cafe permittee incurred the violations.

b. Enhanced penalty. The following enhanced penalty shall be imposed, in addition to any mandatory fines set forth in subsection (8)(a) above, for violations of this section:

- i. The sale of alcoholic beverages in violation of this section must be immediately terminated, upon confirmation by the code compliance department that a violation has occurred.

c. Enforcement. The code compliance department shall enforce this section. This shall not preclude other law enforcement agencies or regulatory bodies from any action to assure compliance with this section and all applicable laws. If a code compliance officer (which, as defined in section 70-66, includes a police officer) finds a violation of this section, the code compliance officer shall issue a notice of violation in the manner prescribed in chapter 30 of this Code. The notice shall inform the violator of the nature of the violation, amount of fine for which the violator is liable, instructions and due date for paying the fine, that the violation may be appealed by requesting an administrative hearing before a special master within ten (10) days after service of the notice of violation, and that the failure to appeal the violation within ten (10) days of service shall constitute an admission of the violation and a waiver of the right to a hearing.

- d. Rights of violators; payment of fine; right to appear; failure to pay civil fine or to appeal; appeals from decisions of the special master.
- i. A violator who has been served with a notice of violation must elect to either
 - A. pay the civil fine in the manner indicated on the notice of violation; or
 - B. request an administrative hearing before a special master to appeal the notice of violation, which must be requested within ten (10) days of the service of the notice of violation.
 - ii. The procedures for appeal by administrative hearing of the notice of violation shall be as set forth in sections 30-72 and 30-73 of this Code. Applications for hearings must be accompanied by a fee as approved by a resolution of the city commission, which shall be refunded if the named violator prevails in the appeal.
 - iii. If the named violator, after issuance of the notice of violation, fails to pay the civil fine, or fails to timely request an administrative hearing before a special master, the special master may be informed of such failure by report from the officer. The failure of the named violator to appeal the decision of the officer within the prescribed time period shall constitute a waiver of the violator's right to an administrative hearing before the special master, and shall be treated as an admission of the violation, for which fines and penalties shall be assessed accordingly.
 - iv. A certified copy of an order imposing a fine may be recorded in the public records, and thereafter shall constitute a lien upon any real or personal property owned by the violator, which may be enforced in the same manner as a court judgment by the sheriffs of this state, including levy against the violator's real or personal property, but shall not be deemed to be a court judgment except for enforcement purposes. On or after the sixty-first (61st) day following the recording of any such lien that remains unpaid, the City may foreclose or otherwise execute upon the lien.
 - v. Any party aggrieved by a decision of a special master may appeal that decision to a court of competent jurisdiction.
 - vi. The special master shall be prohibited from hearing the merits of the notice of violation or considering the timeliness of a request for an administrative hearing if the violator has failed to request an administrative hearing within ten (10) days of the service of the notice of violation.
 - vii. The special master shall not have discretion to alter the penalties prescribed in subsection (8)(a) or (8)(b).

SECTION 2. CODIFICATION.

It is the intention of the Mayor and City Commission of the City of Miami Beach, and it is hereby ordained that the provisions of this Ordinance shall become and be made part of the Code of the City of Miami Beach, Florida. The sections of this Ordinance may be renumbered or re-lettered to accomplish such intention, and, the word "ordinance" may be changed to "section," "article," or other appropriate word.

SECTION 3. REPEALER.

All ordinances or parts of ordinances in conflict herewith are hereby repealed.

SECTION 4. SEVERABILITY.

If any section, subsection, clause or provision of this Ordinance is held invalid, the remainder shall not be affected by such invalidity.

SECTION 5. EFFECTIVE DATE.

This Ordinance shall take effect ten days following adoption.

PASSED and ADOPTED this _____ day of _____, 2015.

ATTEST:

Rafael E. Granado, City Clerk

Philip Levine, Mayor

(Sponsored by Mayor Philip Levine)
(Sponsored by Michael Grieco)

First Reading: May 6, 2015
Second Reading: May 20, 2015

Underscore denotes new language
~~Strikethrough~~ denotes removed language

APPROVED AS TO
FORM AND LANGUAGE
AND FOR EXECUTION

RLC 5-12-15
City Attorney Date

NK

**CHAPTER 82 – PUBLIC PROPERTY
SIDEWALK CAFE ORDINANCE – ALCOHOL REGULATIONS**

ORDINANCE NO. _____

AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING CHAPTER 82, ENTITLED “PUBLIC PROPERTY,” OF THE CODE OF THE CITY OF MIAMI BEACH, FLORIDA, BY AMENDING ARTICLE IV, ENTITLED “USES IN PUBLIC RIGHTS-OF-WAY,” DIVISION 5, ENTITLED “SIDEWALK CAFES,” SUBDIVISION II, ENTITLED “PERMIT,” BY CREATING SECTION 82-388 THEREOF, ENTITLED “HOURS OF SALE OF ALCOHOLIC BEVERAGES; ENFORCEMENT,” TO TERMINATE THE SALE AND CONSUMPTION OF ALCOHOLIC BEVERAGES AT SIDEWALK CAFES AT 2:00 A.M., AND PROVIDE THAT SECTION 82-388 SHALL BE ENFORCED PURSUANT TO SECTION 6-3(8) OF THE CITY CODE; AND PROVIDING FOR REPEALER, SEVERABILITY, CODIFICATION, AND AN EFFECTIVE DATE.

WHEREAS, there continues to exist the need for outdoor eating establishments (sidewalk cafes) in certain areas of the City of Miami Beach (“City”) to provide a unique environment for relaxation and food and/or beverage consumption; and

WHEREAS, the existence of sidewalk cafes encourages additional pedestrian traffic to these areas; and

WHEREAS, the presence of sidewalk cafes may thus impede the free and safe flow of pedestrian traffic; and

WHEREAS, in order to facilitate and ensure a safe environment for residents and visitors at sidewalk cafes, which are located on public rights-of-way, there is a need for regulations and standards for the existence and operation of sidewalk cafes, including a need to regulate the hours during which sidewalk cafes may offer alcoholic beverages for sale or consumption; and

WHEREAS, the City has established permit conditions and safety standards for sidewalk cafes in order to protect and promote the general health, safety, and welfare of the City’s residents and visitors; and

WHEREAS, it is in the best interest of the City, and it serves the health, safety, and welfare of the City’s residents and visitors, to require that sidewalk cafes, which are located on public rights-of-way, terminate the outdoor sale and consumption of alcoholic beverages at 2:00 a.m., because the outdoor sale and consumption of alcoholic beverages can disturb the quiet enjoyment of the community, cause undesirable noise, result in physical disputes amongst patrons and passers-by, and contribute to litter, noxious odors, and the general degradation of the City; and

WHEREAS, the amendments set forth below are necessary to accomplish the objectives identified above.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA:

SECTION 1. That Section 82-388 of Subdivision II, of Division 5, of Article IV, of Chapter 82 of the Code of the City of Miami Beach is hereby created as follows:

**CHAPTER 82
PUBLIC PROPERTY**

* * *

Article IV. Uses in Public Rights-of-Way

* * *

DIVISION 5. SIDEWALK CAFES

* * *

Subdivision II. Permit

* * *

Sec. 82-388. Hours of sale of alcoholic beverages; enforcement.

(a) Alcoholic beverages shall not be offered for sale or consumption at sidewalk cafes between the hours of 2:00 a.m. and 8:00 a.m. Compliance with this section shall be a condition of maintaining a sidewalk cafe permit.

(b) A violation of this section shall be enforced and penalties shall be imposed in accordance with section 6-3(8) of this Code.

Secs. ~~82-388~~ 82-389—82-410. Reserved.

SECTION 2. CODIFICATION.

It is the intention of the Mayor and City Commission of the City of Miami Beach, and it is hereby ordained that the provisions of this ordinance shall become and be made part of the Code of the City of Miami Beach, Florida. The sections of this ordinance may be renumbered or re-lettered to accomplish such intention, and, the word "ordinance" may be changed to "section," "article," or other appropriate word.

SECTION 3. REPEALER.

All ordinances or parts of ordinances in conflict herewith are hereby repealed.

SECTION 4. SEVERABILITY.

If any section, subsection, clause or provision of this Ordinance is held invalid, the remainder shall not be affected by such invalidity.

SECTION 5. EFFECTIVE DATE.

This Ordinance shall take effect ten days following adoption.

PASSED and ADOPTED this ____ day of _____, 2015.

ATTEST:

Rafael E. Granado, City Clerk

Philip Levine, Mayor

(Sponsored by Mayor Philip Levine)
(Sponsored by Michael Grieco)

First Reading: May 6, 2015
Second Reading: May 20, 2015

Underscore denotes new language
~~Strikethrough~~ denotes removed language

APPROVED AS TO
FORM AND LANGUAGE
AND FOR EXECUTION

Rand Coyne 5/12/15
City Attorney Date

NK



CITY OF MIAMI BEACH NOTICE OF PUBLIC HEARING

NOTICE IS HEREBY given that a public hearing will be held by the Mayor and City Commissioners of the City of Miami Beach, Florida, in the Commission Chambers, Third Floor, City Hall, 1700 Convention Center Drive, Miami Beach, Florida, on **Wednesday, May 20, 2015 at 5:15 p.m.**, or as soon thereafter as the matter can be heard, to consider:

Chapter 6 - Alcoholic Beverages

An Ordinance Amending Chapter 6, Entitled "Alcoholic Beverages," Of The Code Of The City Of Miami Beach, Florida, Article I, Entitled "In General," Section 6-3 Thereof, Entitled "Hours Of Sale," To Terminate The Sale And Consumption Of Alcoholic Beverages At Sidewalk Cafes At 2:00 a.m., Prohibit The Granting Of Variances From The Provisions Of Section 6-3(3)(d), And Provide For Penalties; And Providing For Repealer, Severability, Codification, And An Effective Date. *Inquiries may be directed to the Office of the City Attorney at 305.673.7470.*

Chapter 82 - Public Property Sidewalk Café Ordinance - Alcohol Regulations

An Ordinance Amending Chapter 82, Entitled "Public Property," Of The Code Of The City Of Miami Beach, Florida, By Amending Article IV, Entitled "Uses In Public Rights-Of-Way," Division 5, Entitled "Sidewalk Cafes," Subdivision II, Entitled "Permit," By Creating Section 82-388 Thereof, Entitled "Hours Of Sale Of Alcoholic Beverages; Enforcement," To Terminate The Sale And Consumption Of Alcoholic Beverages At Sidewalk Cafes At 2:00 A.M., And Provide That Section 82-388 Shall Be Enforced Pursuant To Section 6-3(8) Of The City Code; And Providing For Repealer, Severability, Codification, And An Effective Date. *Inquiries may be directed to the Office of the City Attorney at 305.673.7470.*

INTERESTED PARTIES are invited to appear at this meeting, or be represented by an agent, or to express their views in writing addressed to the City Commission, c/o the City Clerk, 1700 Convention Center Drive, 1st Floor, City Hall, Miami Beach, Florida 33139. These items are available for public inspection during normal business hours in the City Clerk's Office, 1700 Convention Center Drive, 1st Floor, City Hall, Miami Beach, Florida 33139. This meeting, or any item herein, may be continued, and under such circumstances, additional legal notice need not be provided.

Pursuant to Section 286.0105, Fla. Stat., the City hereby advises the public that if a person decides to appeal any decision made by the City Commission with respect to any matter considered at its meeting or its hearing, such person must ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based. This notice does not constitute consent by the City for the introduction or admission of otherwise inadmissible or irrelevant evidence, nor does it authorize challenges or appeals not otherwise allowed by law.

To request these materials in alternate format, sign language interpreter (five-day notice required), information on access for persons with disabilities, and/or any accommodation to review any document or participate in any City-sponsored proceedings, call 305.604.2489 and select 1 for English or 2 for Spanish, then option 6; TTY users may call via 711 (Florida Relay Service).

Rafael E. Granado, City Clerk
City of Miami Beach

THIS PAGE INTENTIONALLY LEFT BLANK



To: Mayor Philip Levine
Members of the City Commission
Jimmy Morales, City Manager
Raul Aguila, City Attorney

Date: May 20, 2015

COMMISSION MEMORANDUM

From: Commissioner Jonah Wolfson

Subject: AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING CHAPTER 82, ENTITLED "PUBLIC PROPERTY," ARTICLE IV, ENTITLED "USES IN PUBLIC RIGHTS-OF-WAY," DIVISION 5, ENTITLED "SIDEWALK CAFES," SUBDIVISION 2, ENTITLED "PERMIT," BY CREATING SECTION 82-389, ENTITLED "ADDITIONAL MINIMUM STANDARDS, CRITERIA, AND CONDITIONS FOR OPERATION OF SIDEWALK CAFES ON OCEAN DRIVE BETWEEN 5TH STREET AND 15TH STREET" TO PROVIDE MINIMUM STANDARDS FOR UMBRELLAS AND AWNINGS, REQUIRE REGULAR MAINTENANCE OF UMBRELLAS, AND PROVIDE PROHIBITIONS; AND PROVIDING FOR REPEALER, SEVERABILITY, CODIFICATION, AND AN EFFECTIVE DATE.

Introduction

The attached Ordinance is submitted for consideration by the Mayor and City Commission. The ordinance modifies Chapter 82, at Article IV, Division 5, which regulates Sidewalk Cafes. Section 82-389 was added to the code to reflect specific provisions relating to utilization of umbrellas along the sidewalk cafes located on Ocean Drive between 5th Street and 15th Street (hereinafter Ocean Drive sidewalk cafes).

As you may be aware, there continues to exist the need for outdoor eating establishments (sidewalk cafes) in certain areas of the city to provide a unique environment for relaxation and food and/or beverage consumption. The existence of sidewalk cafes encourages additional pedestrian traffic to these areas. However, due to the size of the sidewalks along Ocean Drive, the presence of sidewalk cafes may impede the free and safe flow of pedestrian traffic. As a result, there is a need for additional regulation and standards for the existence and operation of sidewalk cafes along Ocean Drive between 5th Street and 15th Street, to facilitate and ensure a safe environment in these areas, including regulations on umbrella installation and use, particularly as the conditions on Ocean Drive deteriorated along the pedestrian pathway. Currently there are large umbrellas attached to one another, which are then attached to awnings projecting from the buildings, which results in a tunnel effect along the pedestrian pathway.

A majority of the buildings along Ocean Drive between 5th Street and 15th Street are listed as contributing buildings within the Ocean Drive – Collins Avenue Local Historic District, and the National Register of Historic Places Miami Beach Architectural District, the umbrellas and awnings hide all the architectural beauty that is South Beach. Oversized umbrellas and

awnings have the potential to block historically and aesthetically significant architectural features.

In order to protect the health, safety, welfare and tranquility of the community, has established permit conditions and safety standards, including conditions and standards relating to street furniture, for sidewalk cafes within the Ocean Drive sidewalk café area, which are necessary to protect and promote the general health, safety, and welfare of the residents of the City. The draft ordinance is a second step by the City (the first step being the Mayor's ordinance amendment as to the hours of alcohol consumption and sales at sidewalk cafes) to protect the integrity of Ocean Drive.

Content of Ordinance:

The proposed supplemental regulations would provide the following requirements as it relates to the use of umbrellas within the Ocean Drive sidewalk café area:

- (1) All umbrella canopies shall be supported by no more than one center post or one cantilevered post.
- (2) All umbrella canopies shall provide a minimum clearance of seven (7) feet in height as measured from the sidewalk. The highest point of the umbrella canopy or frame shall not exceed nine (9) feet in height as measured from the sidewalk.
- (3) All umbrella canopies shall be installed parallel to the sidewalk. No canopy shall be allowed to tilt or be installed on a bias. All open canopies shall remain in a horizontal position, parallel to the sidewalk.
- (4) All umbrella posts or frames shall be installed perpendicular to the sidewalk. No post or frame may be allowed to tilt or be installed on a bias.
- (5) When the canopy is closed the umbrella shall be removed from the sidewalk café and stored inside the permittee's restaurant, cafe, or bar.
- (6) All umbrella canopies shall be round or octagonal.
- (7) The umbrella canopy shall bear a circumference of no greater than 36 square feet.
- (8) All umbrella bases shall be bolted down into the sidewalk, and the sidewalk cafe permittee shall obtain a right-of-way revocable permit pursuant to chapter 82, article III, division 2 of this Code. The pole or frame shall be removable from the base.
- (9) The minimum distance or spacing between umbrella canopies shall be two (2) feet.

(10) Each sidewalk café permit shall require a uniform color pattern for installed umbrellas subject to planning staff approval. The umbrella canopy may consist of no more than two colors. No umbrella canopies may contain fringes, scallops, or other ornamentation.

(11) The business name or logo may be placed on the umbrella, but may not exceed one foot in height.

(12) All umbrella canopies shall be fire-retardant, pressure-treated or manufactured of fire-resistant material.

(13) Rechargeable – battery operated lights facing the table may be installed on the post or frame, within inside of canopy.

Advertising would be prohibited. Also prohibited would be the clipping, zipping, or fastening of umbrellas together. No clear plastic or other material could be fastened to the umbrellas. Further, no awnings or canopies other than those umbrellas specifically authorized in this new ordinance, may be installed on or over a sidewalk cafe.

Fiscal Impact: The City requires a sidewalk café permit, and if the umbrella stands are to be installed in the ROW permanently, a revocable right-of-way permit will be required. Each permit has an associated fee, and as such there should not be any fiscal impact to the City from the implementation of this Ordinance.

Recommendation

Approval of ordinance at first reading and schedule second reading, public hearing.

SIDEWALK CAFE – OCEAN DRIVE - UMBRELLAS

ORDINANCE NO. _____

AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING CHAPTER 82, ENTITLED “PUBLIC PROPERTY,” ARTICLE IV, ENTITLED “USES IN PUBLIC RIGHTS-OF-WAY,” DIVISION 5, ENTITLED “SIDEWALK CAFES,” SUBDIVISION 2, ENTITLED “PERMIT,” BY CREATING SECTION 82-389, ENTITLED “ADDITIONAL MINIMUM STANDARDS, CRITERIA, AND CONDITIONS FOR OPERATION OF SIDEWALK CAFES ON OCEAN DRIVE BETWEEN 5TH STREET AND 15TH STREET” TO PROVIDE MINIMUM STANDARDS FOR UMBRELLAS AND AWNINGS, REQUIRE REGULAR MAINTENANCE OF UMBRELLAS, AND PROVIDE PROHIBITIONS; AND PROVIDING FOR REPEALER, SEVERABILITY, CODIFICATION, AND AN EFFECTIVE DATE.

WHEREAS, there continues to exist the need for outdoor eating establishments (sidewalk cafes) in certain areas of the City to provide a unique environment for relaxation and food and/or beverage consumption; and

WHEREAS, the existence of sidewalk cafes encourages additional pedestrian traffic to these areas; and

WHEREAS, there is a need for additional regulation and standards for the existence and operation of sidewalk cafes along Ocean Drive, between 5th Street and 15th Street, to facilitate and ensure a safe environment in these areas, including regulations on umbrella installation and use; and

WHEREAS, since the inception of the Sidewalk Cafe Ordinance, the experience along Ocean Drive has deteriorated along the pedestrian pathway; and

WHEREAS, currently there are large umbrellas attached to one another, which are then attached to awnings projecting from the buildings; and

WHEREAS, this results in a tunnel effect along the pedestrian pathway; and

WHEREAS, a majority of the buildings along Ocean Drive between 5th Street and 15th Street are listed as contributing buildings within the Ocean Drive – Collins Avenue Local Historic District, and the National Register of Historic Places Miami Beach Architectural District, and the umbrellas and awnings hide all the architectural beauty that is South Beach; and

WHEREAS, oversized umbrellas and awnings have the potential to block historically and aesthetically significant architectural features; and

WHEREAS, the City, in order to protect the health, safety, welfare and tranquility of the community, has established permit conditions and safety standards, including conditions and standards relating to street furniture, for sidewalk cafes within the Ocean Drive sidewalk café area, which are necessary to protect and promote the general health, safety, and welfare of the residents of the City; and

WHEREAS, the amendment set forth below is necessary to accomplish all of the above objectives.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA:

SECTION 1. That Chapter 82, Article IV, Division 5, Subdivision 2 is hereby amended as follows:

CHAPTER 82

PUBLIC PROPERTY

* * *

ARTICLE IV. – USES IN PUBLIC RIGHTS-OF-WAY

* * *

DIVISION 5. - SIDEWALK CAFES

* * *

Subdivision II. – Permit

* * *

Sec. 82-389. Additional minimum standards, criteria, and conditions for operation of sidewalk cafes on Ocean Drive between 5th Street and 15th Street.

(a) In addition to the minimum standards, criteria, and conditions for operation of sidewalk cafes codified in section 82-385 of this Code, which shall apply to all sidewalk cafes in the city, the following minimum standards, criteria, and conditions shall also apply to those sidewalk cafes located on Ocean Drive between 5th Street and 15th Street (hereinafter Ocean Drive sidewalk cafes). In the event of a conflict between this section and section 82-385 of this Code, the more stringent of the two provisions shall apply to Ocean Drive sidewalk cafes.

(b) Umbrellas.

- (1) All umbrella canopies shall be supported by no more than one center post or one cantilevered post.
- (2) All umbrella canopies shall provide a minimum clearance of seven (7) feet in height as measured from the sidewalk. The highest point of the umbrella canopy or frame shall not exceed nine (9) feet in height as measured from the sidewalk.
- (3) All umbrella canopies shall be installed parallel to the sidewalk. No canopy shall be allowed to tilt or be installed on a bias. All open canopies shall remain in a horizontal position, parallel to the sidewalk.

- (4) All umbrella posts or frames shall be installed perpendicular to the sidewalk. No post or frame may be allowed to tilt or be installed on a bias.
- (5) When the canopy is closed the umbrella shall be removed from the sidewalk café and stored inside the permittee's restaurant, cafe, or bar.
- (6) All umbrella canopies shall be round or octagonal.
- (7) The umbrella canopy shall bear a circumference of no greater than 36 square feet.
- (8) All umbrella bases shall be bolted down into the sidewalk, and the sidewalk café permittee shall obtain a right-of-way revocable permit pursuant to chapter 82, article III, division 2 of this Code. The pole or frame shall be removable from the base.
- (9) The minimum distance or spacing between umbrella canopies shall be two (2) feet.
- (10) Each sidewalk café permit shall require a uniform color pattern for installed umbrellas subject to planning staff approval. The umbrella canopy may consist of no more than two colors. No umbrella canopies may contain fringes, scallops, or other ornamentation.
- (11) The business name or logo may be placed on the umbrella, but may not exceed one foot in height.
- (12) All umbrella canopies shall be fire-retardant, pressure-treated or manufactured of fire-resistant material.
- (13) Rechargeable – battery operated lights facing the table may be installed on the post or frame, within inside of canopy.

(c) Prohibitions.

- (1) No advertising may be placed or installed on umbrellas.
- (2) No umbrella canopy may be clipped, zipped, or otherwise fastened to another umbrella. Clear plastic or other materials may not be fastened, rolled or otherwise be attached to umbrella edges in order to create an enclosure.
- (3) Candles, gas lighting, or electric lighting other than the lighting authorized pursuant to subsection (b)(12) shall not be installed on umbrellas.
- (4) No awnings or canopies other than those umbrellas specifically authorized in subsection (b) may be installed on or over a sidewalk cafe.

THIS PAGE INTENTIONALLY LEFT BLANK

Condensed Title:

An Ordinance of the Mayor and City Commission of the City of Miami Beach, Florida, amending the Firefighters; Relief and Pension Fund to comply with applicable provisions of the Internal Revenue Code and Regulations Thereunder; amending the Related Special Acts of the City by amending ARTICLE VII, entitled "Firefighters' Relief and Pension Fund," by amending sections 36 through 48; providing for severability; repealing all ordinances in conflict therewith; providing for codification; and providing an effective date.

Key Intended Outcome Supported:

Ensure expenditure trends are sustainable over the long term

First Reading

Item Summary/Recommendation:

The amendments are technical in nature, and should not result in additional cost to the City since all funding comes from state premium taxes in Ch. 175, Florida Statutes.

The proposed amendments are required by the Internal Revenue Code (IRC) and IRS regulations, in order for the Plan to retain its qualified status and comply with the favorable determination letter from the IRS. Among the changes are amendments making references throughout the document gender neutral, i.e., firefighters rather than firemen. More substantial elements include the addition of 16 newly defined terms and amendments to the eight originally included in the ordinance.

Additionally, the proposed ordinance specifies how a retired/separated member's account is to be treated until such time as the funds are withdrawn and how survivor benefits are disbursed. Language further indicates that amounts allocated to a participant's account may not exceed the limitations set forth in Section 415 of the Code.. The current maximum limit on annual additions to a participant's defined contribution account under section 415 is \$53,000.

Adoption of the ordinance is recommended. It is further recommended that the second reading and public hearing be scheduled for the June 10, 2015, meeting.

The City has been informed that changes to the ordinance do not have an actuarial impact. A statement to that effect shall be provided for the second reading and public hearing.

Advisory Board Recommendation:

N/A

Financial Information:

| Source of Funds: | | Amount | Account |
|------------------|--------------|--------|---------|
| | 1 | | |
| | 2 | | |
| | 3 | | |
| | Total | | |

Financial Impact Summary:

City Clerk's Office Legislative Tracking:

Sylvia Crespo-Tabak, Human Resources Director

Sign-Offs:

| Department Director | Assistant City Manager | City Manager |
|---------------------|------------------------|------------------------|
| SCT <u>SC1</u> | KGB _____ | JLM <u>[Signature]</u> |

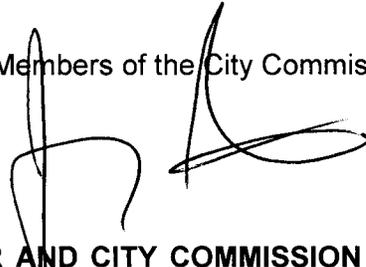


MIAMI BEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, FL 33139, www.miamibeachfl.gov

COMMISSION MEMORANDUM

TO: Honorable Mayor Philip Levine and Members of the City Commission
FROM: Jimmy L. Morales, City Manager
DATE: May 20, 2015



SUBJECT: **AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING THE FIREFIGHTERS' RELIEF AND PENSION FUND TO COMPLY WITH APPLICABLE PROVISIONS OF THE INTERNAL REVENUE CODE AND REGULATIONS THEREUNDER; AMENDING THE RELATED SPECIAL ACTS OF THE CITY BY AMENDING ARTICLE VII, ENTITLED "FIREFIGHTERS' RELIEF AND PENSION FUND," BY AMENDING SECTIONS 36 THROUGH 48; PROVIDING FOR SEVERABILITY; REPEALING ALL ORDINANCES IN CONFLICT THEREWITH; PROVIDING FOR CODIFICATION; AND PROVIDING AN EFFECTIVE DATE.**

FIRST READING

BACKGROUND

We have reviewed the proposed amendments to the Miami Beach Firefighters' Relief and Pension Fund, attached to the Internal Revenue Service (IRS) determination letter dated December 5, 2014 (attached).

An Internal Revenue Service "determination letter" is issued in response to a request as to the qualified status of a retirement plan under IRC section 401(a). The determination letter expresses the Service's opinion regarding the form of the plan, and applies only to the employer and the plan participants on whose behalf it was issued.

The proposed amendments are required by the Internal Revenue Code (IRC) and IRS regulations, in order for the Plan to retain its qualified status and comply with the favorable determination letter from the IRS. Among the changes are amendments making references throughout the document gender neutral, i.e., firefighters rather than firemen. More substantial elements include the addition of 16 newly defined terms and amendments to the eight originally included in the ordinance.

Additionally, the proposed ordinance specifies how a retired/separated member's account is to be treated until such time as the funds are withdrawn and how survivor benefits are disbursed. Language further indicates that amounts allocated to a participant's account may not exceed the limitations set forth in Section 415 of the Code.. The current maximum limit on annual additions to a participant's defined contribution account under section 415 is \$53,000.

In summary, the proposed amendments satisfy the IRS requirements for plan qualification. Further, the amendments memorialize the City's current intent regarding the benefits derived from the premium taxes as set forth in Ch. 175, Florida Statutes.

While public employers that sponsor retirement plans are not required to apply for a determination letter, receiving a favorable determination letter provides documentation that the plan satisfies the applicable qualification standards.

There are several legal and practical advantages to obtaining a determination letter. One legal advantage is that an IRS determination letter provides a definitive analysis of whether a plan is qualified. It also provides the basis for retroactive relief if the Service later changes its position. One practical advantage of obtaining a determination letter is that the City's auditors will be less likely to question the qualified status of the Plan.

We have prepared an ordinance incorporating the IRC compliance amendments. The amendments are technical in nature, and should not result in additional cost to the City since all funding comes from state premium taxes in Ch. 175, Florida Statutes.

RECOMMENDATION

Adoption of the ordinance is recommended. It is further recommended that the second reading and public hearing be scheduled for the June 10, 2015, meeting.

The City has been informed that changes to the ordinance do not have an actuarial impact. A statement to that effect shall be provided for the second reading and public hearing.

Attachment

JLM/KGB/SC-T 

INTERNAL REVENUE SERVICE
P. O. BOX 2508
CINCINNATI, OH 45201

DEPARTMENT OF THE TREASURY

Date **DEC 05 2014**

CITY OF MIAMI BEACH
C/O ROBERT J FRIEDMAN
HOLLAND & KNIGHT LLP
701 BRICKELL AVE SUITE 3000
MIAMI, FL 33131

Employer Identification Number:
59-1604527
DLN:
201024047
Person to Contact:
RUTH CHEN ID# 95048
Contact Telephone Number:
(626) 927-1423
Plan Name:
CITY OF MIAMI BEACH FIREFIGHTERS'
RELIEF AND PENSION FUND
Plan Number: 001

Dear Applicant:

We have made a favorable determination on the plan identified above based on the information you have supplied. Please keep this letter, the application forms submitted to request this letter and all correspondence with the Internal Revenue Service regarding your application for a determination letter in your permanent records. You must retain this information to preserve your reliance on this letter.

Continued qualification of the plan under its present form will depend on its effect in operation. See section 1.401-1(b)(3) of the Income Tax Regulations. We will review the status of the plan in operation periodically.

The enclosed Publication 794 explains the significance and the scope of this favorable determination letter based on the determination requests selected on your application forms. Publication 794 describes the information that must be retained to have reliance on this favorable determination letter. The publication also provides examples of the effect of a plan's operation on its qualified status and discusses the reporting requirements for qualified plans. Please read Publication 794.

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other federal or local statutes.

This determination letter gives no reliance for any qualification change that becomes effective, any guidance published, or any statutes enacted, after the issuance of the Cumulative List (unless the item has been identified in the Cumulative List) for the cycle under which this application was submitted.

This letter may not be relied on after the end of the plan's first five-year remedial amendment cycle that ends more than twelve months after the application was received. This letter expires on January 31, 2014. This letter considered the 2009 Cumulative List of Plan Qualification Requirements.

This determination letter is applicable for the amendment(s) executed on 4-29-14.

Letter 2002

CITY OF MIAMI BEACH

This determination letter is based solely on your assertion that the plan is entitled to be treated as a Governmental plan under section 414(d) of the Internal Revenue Code.

This determination letter is applicable to the plan and related documents submitted in conjunction with your application filed during the remedial amendment cycle ending 1-31-11.

This is not a determination with respect to any language in the plan or any amendment to the plan that reflects Section 3 of the Defense of Marriage Act, Pub. L. 104, 110 stat. 2419 (DOMA) or U.S. v. Windsor, 570 U.S. 12 (2013), which invalidated that section.

We have sent a copy of this letter to your representative as indicated in the Form 2848 Power of Attorney or appointee as indicated by the Form 8821 Tax Information Authorization.

If you have questions concerning this matter, please contact the person whose name and telephone number are shown above.

Sincerely,



Andrew E. Zuckerman
Director, EP Rulings & Agreements

Enclosures:
Publication 794

Letter 2002

ORDINANCE NO. _____

AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING THE FIREFIGHTERS' RELIEF AND PENSION FUND TO COMPLY WITH APPLICABLE PROVISIONS OF THE INTERNAL REVENUE CODE AND REGULATIONS THEREUNDER; AMENDING THE RELATED SPECIAL ACTS OF THE CITY BY AMENDING ARTICLE VII, ENTITLED "FIREFIGHTERS' RELIEF AND PENSION FUND," BY AMENDING SECTIONS 36 THROUGH 48; PROVIDING FOR SEVERABILITY; REPEALING ALL ORDINANCES IN CONFLICT THEREWITH; PROVIDING FOR CODIFICATION; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA:

Section 1. Section 36 of Article VII of the Related Special Acts of the City of Miami Beach, is amended to read:

Sec. 36. Purpose of Act; supplementary to other Acts.

The purpose of this Act is to implement the provisions of chapter 19112, Acts of Florida, 1939, and to provide means whereby firefighters ~~firemen~~ ~~[firefighters]~~ of the City of Miami Beach, Florida, may receive benefits from the funds provided for that purpose by Chapter 19112, Acts of Florida, 1939. This Act shall be deemed to supplement any other pension plan of the City of Miami Beach insofar as benefits to firefighters ~~firemen~~ ~~[firefighter]~~ are concerned, and nothing herein shall be construed to in any way affect the operation or benefits of any other pension plan of the City of Miami Beach, Florida. Sections 5, 6, 7, 8, 9 and 10 of Chapter 19112, Acts of Florida, 1939, shall continue to apply to the City of Miami Beach except as otherwise specifically provided for in this Act.

Section 2. Section 37 of Article VII of the Related Special Acts of the City of Miami Beach, is amended to read:

Sec. 37. Definitions.

The following words and phrases shall, for the purposes of this Act, have the meanings hereafter respectively ascribed to them. Other words and phrases shall have meanings as commonly understood with respect to the context; the singular shall include the plural, and the masculine the feminine:

- (a) Account: shall mean the individual account credited on behalf of each Participant with contributions pursuant to this Act, eligible forfeiture contributions and earnings on such contributions.
- (b) Account Balance: shall mean the value of a Participant's Account as of the last Valuation Date.

(ca) Active duty: shall mean actual service as a firefighter firemen ~~firefighter~~ with regular status in the fire division of the City of Miami Beach, or absent from duty on an approved leave of absence, all as of the time under consideration.

(db) Board: shall ~~be understood to~~ mean the Board of Trustees of the Miami Beach Firefighters' Firemen's ~~Firefighters'~~ Relief and Pension Fund, as provided for herein.

(de) City: shall ~~be understood to~~ mean the City of Miami Beach, Florida.

(f) Code: shall mean the Internal Revenue Code of 1986, as amended from time to time.

(g) Designated Beneficiary: shall mean any person, persons or entity designated by a Participant to receive any benefits payable under the Fund in the event of the Participant's death under Code Section 401(a)(9) and Treasury Regulation Section 1.401(a)(9)-4. If no Designated Beneficiary has been so designated by a Participant prior to the Participant's death, or if no person, persons or entity so designated survives the Participant, the Participant's surviving spouse, if any, shall be deemed to be the Designated Beneficiary; otherwise the Designated Beneficiary shall be the Participant's estate.

(h) Direct Rollover: shall mean a payment by the Fund directly to the eligible retirement plan specified by the Distributee.

(i) Distributee: shall mean a Firefighter or former Firefighter. In addition, effective for distributions made after December 31, 2001, the Firefighter's or former Firefighter's surviving spouse or former spouse who has an interest in the Firefighter's benefits under the Fund pursuant to a domestic relations order honored by the State or the City (if any) are Distributees with regard to such interest.

(j) Eligible Retired Public Safety Officer: shall mean a Participant who has retired from the fire division of the City (i) by reason of disability or (ii) on or after his or her Normal Retirement Age and who is also a "public safety officer" as defined in Section 402(l)(4)(C) of the Code and any applicable guidance thereunder.

(k) Eligible Retirement Plan: shall mean, effective for distributions made after December 31, 2001, any of the following types of plans that accept the Distributee's Eligible Rollover Distribution: (i) a qualified plan described in Section 401(a) of the Code; (ii) an annuity plan described in Section 403(a) of the Code; (iii) an individual retirement account or individual retirement annuity described in Section 408(a) or 408(b) of the Code, respectively; (iv) effective for plan years after December 31, 2001, an annuity contract described in Section 403(b) of the Code; and (v) effective for plan years after December 31, 2001, an eligible plan under Section 457(b) of the Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state and which agrees to separately account for amounts transferred into such plan from this Fund.

(l) Eligible Rollover Distribution: shall mean, effective for distributions made after December 31, 2001, any distribution of all or any portion of the balance to the credit of the Distributee, except that an Eligible Rollover Distribution does not include: (i) any distribution that is one of a series of substantially equal periodic payments (not

less frequently than annually) made for the life (or life expectancy) of the Distributee or the joint lives (or joint life expectancies) of the Distributee and the Distributee's Designated Beneficiary, or for a specified period of ten years or more; (ii) any distribution to the extent such distribution is required under Section 401(a)(9) of the Code; and (iii) effective for plan years after December 31, 2001, after-tax amounts unless such amount is transferred to an individual retirement account or individual retirement annuity described in Section 408(a) or 408(b) of the Code, respectively, or transferred to a defined contribution plan qualified under Section 401(a) of the Code that agrees to separately account for such amount.

(~~md~~) Firefighters ~~firemen [firefighters]~~: the fire chief, officers, inspectors, enginemen and ~~firemen[firefighters]~~, and such other employees of the fire division of the City of ~~Miami Beach~~ as the ~~bBoard~~ shall determine to be engaged directly in fire fighting or fire prevention work, shall be deemed ~~firemen [firefighters]~~ Firefighters for the purposes of this Act.

(~~en~~) Fund: shall ~~be understood to mean the Miami Beach Firemen's [Firefighters'] Relief and Pension Fund, as provided for herein.~~

(~~o~~) Participant: ~~every fireman [firefighter] of~~ Fund Year: shall mean the calendar year.

(~~p~~) Normal Retirement Age: shall mean attainment of age 50; provided, however, that "normal retirement age" shall be adjusted to be the same as such term used in the City Pension Fund for Firefighters and Police Officers in the City of Miami Beach, as amended from time to time.

(~~q~~) Participant: shall mean every Firefighter of the City eligible to have moneys credited to his ~~individual account~~ Account and to receive benefits therefrom under the Fund and this Act shall automatically become a participant.

(~~f~~)(~~r~~) Qualified Health Insurance Premiums: shall mean premiums for coverage for the Eligible Retired Public Safety Officer (and his or her spouse and dependents, if applicable) under accident and health insurance (including an accident or health plan within the meaning of Section 105(e) of the Code) or qualified long-term care insurance contract as defined in Section 7702B(b) of the Code.

(~~s~~) Qualified Health Insurance Premium Distribution: shall mean an amount deducted from an Eligible Retired Public Safety Officer's benefit payment under the Plan and paid directly to the insurer providing coverage for which Qualified Health Insurance Premiums are paid. Such amount may not exceed the amount of the Qualified Health Insurance Premiums.

(~~g~~)(~~t~~) Regular status Status: shall have the meaning ascribed to it by Chapter 18696, Acts of Florida, 1937, commonly known as the Civil Service Act, and the Personnel Rules of the City of ~~Miami Beach~~.

(~~u~~) Retired or Separated Participant: shall mean any Participant who has separated from service as a Firefighter and has an Account Balance with the Fund.

(~~v~~) Service: shall mean all time served as a ~~fireman [Firefighter]~~ Firefighter of the City of ~~Miami Beach~~ for which regular compensation is made by the City of ~~Miami Beach~~,

and all time during which a ~~participant~~ Participant is absent on a ~~military leave of absence~~ Leave. It shall include all ~~leaves of absence~~ Leaves with pay, but shall not include ~~leaves of absence~~ Leaves during which no regular compensation is made paid by the City of Miami Beach.

(w) State: shall mean the state of Florida.

(h)(x) Valuation Date: shall mean June 30 of each year and each other date(s) as the Board may deem necessary.

Section 3. Section 38 of Article VII of the Related Special Acts of the City of Miami Beach, is amended to read:

Sec. 38. Creation of fund; origin of moneys.

There is hereby created in the City of Miami Beach, Florida, a special fund to be known as the Miami Beach Firemen's ~~{Firefighters'}~~ Relief and Pension Fund, into which shall be paid all moneys previously received by the City of Miami Beach under the provisions of Chapter 19112, Acts of Florida, 1939, and Ordinance Number 558 of the City of Miami Beach, which moneys are now held in trust under Pension Ordinance Number 498 of the City of Miami Beach, and all moneys which subsequently inure to the City of Miami Beach under the provisions of Chapter 19112, Acts of Florida, 1939. Immediately upon taking office, the ~~board~~ Board shall request, and the ~~board~~ Board of trustees Trustees of the Miami Beach Employees Retirement System shall make payment to the Miami Beach Firemen's ~~{Firefighters'}~~ Relief and Pension Fund of the accumulated moneys referred to above and held in trust under Ordinance Number 498.

No part of the corpus or income of the Fund shall be used for, or diverted to, purposes other than for the exclusive benefit of Participants and other persons entitled to benefits under the Fund and paying the expenses of the Fund not paid directly by any other party. No person shall have any interest in, or right to, any part of the earnings of the assets of the Fund, or any right in, or to, any part of the assets held under the Fund, except as and to the extent expressly provided in this ordinance.

There will be no reversion of the assets of the Fund or City or State contributions, except as permitted by Internal Revenue Service Revenue Ruling 91-4.

Section 4. Section 39 of Article VII of the Related Special Acts of the City of Miami Beach, is amended to read:

Sec. 39. Board of trustees Creation creation; composition; terms of office; officers; proceedings; compensation.

There is hereby created a board of trustees of the Miami Beach Firemen's ~~{Firefighters'}~~ Relief and Pension Fund, which ~~board~~ Board shall consist of the fire chief, the director of ~~personnel~~ human resources, the assistant ~~city~~ City manager or other responsible officer or employee of the ~~city~~ City appointed by him, and two employees of the fire division to be elected from among the ~~participants~~ Participants of the ~~fund~~ Fund by such ~~participants~~ Participants. The fire chief, director of ~~personnel~~ human resources and the assistant ~~city~~ City manager shall serve so long as they continue to hold their respective offices, and upon replacement their successors

shall succeed to their positions as trustees. The first election of trustees from among the ~~participants~~ Participants shall be for one office as trustee for a one-year term, and one office as trustee for a two-year term; thereafter elections shall be for overlapping terms of two-years. The ~~board~~ Board shall annually elect from its membership a chairman and secretary who shall keep complete minutes of all proceedings of the ~~board~~ Board, and all actions of the ~~board~~ Board shall be by majority vote, a quorum being present. Trustees shall receive no compensation as such.

Section 5. Section 40 of Article VII of the Related Special Acts of the City of Miami Beach, is amended to read:

Sec. 40. Same Power Board of trustees-power and authority.

The ~~board~~ Board shall have power and authority as follows:

- (a) To have exclusive charge of the investment of any assets in the ~~fund~~ Fund not needed for the ~~fund's~~ Fund's current obligations, and to invest and reinvest such assets in accordance with the written investment policy adopted by the ~~board~~ Board pursuant to paragraph (b) below. Board members must discharge their duties with respect to the ~~plan~~ Fund solely in the interest of the ~~participants~~ Participants and beneficiaries for the exclusive purpose of: (i) providing benefits to ~~participants~~ Participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the ~~plan~~ Fund; with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; by diversifying the investments of the ~~plan~~ Fund so as to minimize the risk of large losses, unless under the circumstances it is clearly not prudent to do so. Within the limitations of the foregoing standards and investment policy, the ~~board~~ Board is authorized to acquire and retain in the ~~fund~~ Fund every kind of investment specifically including, but not limited to stocks, bonds, securities, debentures, real estate, mutual funds, trusts and other obligations which persons of prudence, discretion and intelligence acquire or retain for their own account. The intent of this paragraph is to remove any and all investment restrictions which are otherwise imposed by Ch. 175, Florida Statutes, and which may be removed.
- (b) To adopt and periodically update a written investment policy in accordance with Section 112.661, Florida Statutes, as such statute may be amended in the future.
- (c) To approve loans and claims, and to authorize payments from the ~~fund~~ Fund by warrants signed by the chairman and secretary of the ~~board~~ Board.
- (d) To interpret the provisions of this Act where the meaning is not clear or ambiguity exists; and to promulgate necessary rules respecting the operation of the ~~fund~~ Fund, not in conflict with the wording or clear intent of this Act.
- (e) To authorize expenditures in connection with preliminary research and technical services, accounting, auditing and general administration of the ~~fund~~ Fund.
- (f) To do such other things as may be necessary to implement and provide for the proper functioning of the ~~fund~~ Fund.

Section 6. Section 41 of Article VII of the Related Special Acts of the City of Miami Beach, is amended to read:

Sec. 41. ~~Custodian of fund; vouchers~~ Reserved.

~~The custody of all securities and cash of the fund shall be with the chief finance officer of the city, who shall provide the same protection for such securities and cash as is provided for city funds. The chief finance officer shall issue vouchers against such cash of the fund only upon warrants as provided for in section 5 [40] hereof.~~

Section 7. Section 42 of Article VII of the Related Special Acts of the City of Miami Beach, is amended to read:

Sec. 42. ~~Individual accounts~~ Accounts of firefighters Firefighters.

~~Individual accounts~~ Accounts shall be established for every fireman ~~[firefighter]~~ of regular status (a) Firefighter of Regular Status at the effective date of this Act, ~~fireman [firefighter]~~ (b) Firefighter who has been retired under any city City pension plan since the adoption of Chapter 19112, Acts of Florida, 1939, or ~~fireman [firefighter]~~ (c) Firefighter who attains regular status Regular Status subsequent to the adoption of this Act. To each ~~individual account~~ Account there shall be credited, as of the date of each payment to the fund Fund by the state State, an amount of such payment which bears the same ratio thereto that the years of ~~service~~ Service of each participant Participant bears to the years of ~~service~~ Service of all ~~participants~~ Participants. After adjustments by the proration of the costs of previous court action, and preliminary expense, this method of crediting ~~accounts~~ Accounts of individuals Participants shall be applied to the present accumulated moneys as of the date of each payment thereof; and to all subsequent payments to the fund Fund by the state State after proper provisions have been made for the payment of administrative expenses for the ensuing year. There shall be an annual determination of interest earned by the investments of the fund Fund, and such interest earnings shall be prorated to each of the ~~individual accounts~~ Accounts of the participants Participants in the same proportion as the invested funds of the ~~individual account~~ Account of each participant Participant bears to the total funds invested on behalf of the fund Fund. As of each ~~June 30~~ Valuation Date there shall be allocated and credited to the ~~accounts~~ Accounts of participants Participants who are firemen ~~[firefighters]~~ Firefighters of regular ~~status~~ Regular Status as of such date, their share of nonvested forfeitures of terminated ~~participants~~ Participants arising during the prior twelve months, to be made in the same proportion as is the case above with regard to payments by the state. ~~No further credits shall be made to an individual's account after he shall have retired under any other pension plan of the City of Miami Beach, or after he shall otherwise cease to be a participant~~ State.

The Board shall value the Fund's assets as of each Valuation Date and shall allocate to the Account of each Participant his or her share of the increase or decrease in the fair market value of the Fund's assets.

Except as set forth in this Section 42 and Section 43(d), no further credits shall be made to a Participant's Account after he or she shall have retired under any other pension plan of the City, or after he or she shall have separated from service with the City or otherwise ceased to be a Participant in the Fund. However, until completely distributed to him, a Participant's Account shall continue to be invested as part of the Fund and shall continue to share in the investment gains and losses of the Fund in accordance with this Section 42. A Participant shall continue to receive allocations of contributions and forfeitures after he ceases to be on Regular

Status if such contributions and forfeitures are attributable to a period when he was on Regular Status. Each Participant shall remain a Participant in the Fund until his or her Account has been fully distributed.

Notwithstanding any provision of this Act to the contrary, the maximum amount allocated to the Participant's Account for any calendar year under this Act shall not exceed the limitations set forth in Section 415 of the Code, as applicable, and any regulations issued thereunder. For purposes of Section 415 of the Code, the Limitation Year shall be the same as the Fund Year and, effective for Limitation Years beginning on or after July 1, 2007, Compensation shall have the same meaning as provided in Treasury Regulations section 1.415-(c)-2, including that, effective for plan years beginning on or after July 1, 2001, Compensation shall include amounts which would have been included in a Participant's gross income but for an election under Section 132(f)(4) of the Code.

Section 8. Section 43 of Article VII of the Related Special Acts of the City of Miami Beach, is amended to read:

Sec. 43. Rights and benefits generally of participants Participants.

The fund Fund shall provide benefits to ~~participants~~ Participants therein as follows:

(a) ~~The board~~ Board may approve loans to a ~~participant~~ Participant not to exceed the lesser of (i) his or her total vested credit, ~~nor to exceed Account Balance~~ or (ii) five hundred dollars ~~in~~. ~~Loans shall be made available to all such cases as it is established to the satisfaction~~ Participants on a reasonably equivalent basis and no loan shall be made available under this Fund unless it satisfies all of the board that such loans are required for extraordinary medical expenses of a participant or his immediate family, or for burial expenses requirements of an immediate member Section 72(p) of his family. the Code for treatment as a tax-free loan. Reasonable periods of time shall be allowed for the repayment of such loans, ~~and interest; provided that all loans must be repaid within 5 years unless such loan is used to acquire a principal residence of the Participant in which case a 10 year repayment schedule is allowed.~~ Interest shall be charged with respect to the loan amount at the rate of six percent per annum on the unpaid balance. Such loans shall be made contingent upon the right of the ~~board~~ Board to effect repayment by withholding subsequent credits, or by deducting from existing credits the amount of any loan which is in default in its repayment; and the ~~board~~ Board may refuse to make subsequent loans to ~~participants~~ Participants who so default.

(b) If a ~~participant~~ Participant shall separate from service with the fire division of the City of ~~Miami Beach~~ for any reason whatsoever prior to ~~retirement~~ Normal Retirement Age, except as provided in (c-) and (d-) below, he shall be entitled to a ~~severance payment distribution from the Fund~~ equal to the his vested amount to his credit Account Balance at that time.

(c) ~~If a participant shall die while on active duty and shall leave a surviving wife or child or children, the entire amount to his credit shall be paid to a designated person for the purpose of defraying final illness and burial expenses, the excess to be paid to the surviving wife, or if there be no surviving wife and there be surviving child or children to a designated person for the purpose of defraying final illness and burial expenses, the excess to be paid to the legal guardian of the child or children for their benefit if such~~

~~child or children is under the age of eighteen years of age or shall be paid to such child or children over the age of eighteen years of age for their benefit. If there be no surviving wife or child or children, there shall be paid to a designated person for the purpose of defraying final illness and burial expenses, an amount not to exceed the entire amount to his credit, nor to exceed such actual expenses, nor in any case to exceed five hundred dollars; and in such cases as the credit shall exceed the amount approved for payment of such expenses, any excess of such amount shall be paid to the estate of the deceased participant. In such cases as the person designated to act for a participant shall predecease him, or cannot be located by reasonable effort, or shall refuse to act, the board shall have the right to name a person to carry out the purposes of this subsection.~~

(c) If a Participant shall die while on Active Duty, he shall be 100% vested in his entire Account Balance and his Designated Beneficiary shall be paid the entire amount of his Account Balance. If no Beneficiary is designated by the Participant, the Account Balance shall be paid to the Participant's estate.

~~(d) If a participant Participant, who has been, or who shall hereafter be "retired for from service" or disability under any other pension plan of the City of Miami Beach, he shall be paid the entire amount to his credit as of the date of such retirement in such manner as he shall elect to receive it be 100% vested in his entire Account and he shall be paid the entire amount of his Account Balance, and he shall further be entitled to receive a pro-rata share of the payment to the fund Fund by the State next following the date of such retirement, such sum to be the amount as provided for in section 7 [Section 42] of this Act and the participant Participant shall be entitled to receive such amount at the time of the payment to the fund by the state in such manner as he shall elect to receive it. Fund by the State.~~

(e) In the event of the termination of the Fund, all Participants shall be 100% vested in their entire Account Balances as of such termination date.

(f) If permitted by the Board, a Participant who is an Eligible Retired Public Safety Officer and is receiving benefits under the Fund may elect to have Qualified Health Insurance Premium Distributions made in accordance with this Section 43(f). Qualified Health Insurance Premium Distributions may be excluded from the gross income of the Eligible Retired Public Safety Officer under Section 402(l) of the Code, subject to the annual dollar limitation therein.

~~(e)(g) Settlement as provided in subsection (b-), (c-) and (d-) of this section Section 43 shall be full acquittal of all claims of a participant Participant against the fund Fund, and he shall thereupon cease to be a participant Participant in the Fund.~~

(f)(h) Each participant Participant shall be fully (one hundred percent)100%) vested in the entire amount in his account Account as it exists on June 30, 1983. Any subsequent increases in such account Participant's Account, whether from allocation of premium tax refunds, investment earnings, or any other source, shall be vested in accordance with the following schedule:

TABLE INSET:

| Years of Service | Vested Percent |
|------------------|----------------|
| Less than 10 | None |
| 10 or over | 100 |

Any nonvested amounts which are not distributable under (b-), (c-) or (d-) above shall be forfeited by the ~~participant~~ Participant and reallocated to remaining ~~participants~~ Participants as provided herein in Section 42 of this Act.

(i) A Participant shall receive his benefit in a single cash lump sum.

(j) Notwithstanding anything herein to the contrary, a Participant's benefits under the Fund shall commence no later than April 1 of the calendar year following the later of (i) the calendar year in which he or she attains age 70 1/2; or (ii) the calendar year in which he or she retires. All distributions shall conform to the regulations issued under Section 401(a)(9) of the Code, including the incidental death benefit provisions of Section 401(a)(9)(G) of the Code. Further, such regulations shall override any provision that is inconsistent with Section 401(a)(9) of the Code. Notwithstanding any provision of this Act to the contrary, a form of retirement income payable from this Fund, shall satisfy the following conditions:

(i) If the retirement income is payable before the Participant's death:

(A) It shall either be distributed or commence to the Participant not later than April 1 of the calendar year following the later of the calendar year in which the Participant attains age 70 1/2, or the calendar year in which the Participant retires;

(B) The distribution shall commence no later than the calendar year defined above; and (x) shall be paid over the life of the Participant or over the lifetimes of the Participant and his or her spouse, issue or dependent, or (y) shall be paid over the period extending not beyond the life expectancy of the Participant and spouse, issue or dependent.

Where a form of retirement income payment has commenced in accordance with the preceding paragraphs and the Participant dies before his entire interest in the Fund has been distributed, the remaining portion of such interest in the Fund shall be distributed no less rapidly than under the form of distribution in effect at the time of the Participant's death.

(ii) If the Participant's death occurs before the distribution of his interest in the Fund has commenced, Participant's entire interest in the Fund shall be distributed within five years of Participant's death, unless it is to be distributed in accordance with the following rules:

(A) The Participant's remaining interest in the Fund is payable to his spouse, issue or dependent;

(B) The remaining interest is to be distributed over the life of the spouse, issue or dependent or over a period not extending beyond the life expectancy of the spouse, issue or dependent; and

(C) Such distribution begins within one year of the Participant's death unless the Participant's spouse, is the sole designated beneficiary, in which case the distribution need not begin before the date on which the Participant would have attained age 70 1/2 and if the Participant's spouse dies before the distribution to the spouse begins, this section shall be applied as if the spouse were the Participant.

(k) Direct rollovers:

(i) Notwithstanding any provision of this Fund to the contrary that would otherwise limit a Distributee's election under this paragraph, a Distributee may elect, at the time and in the manner prescribed by the Board, to have any portion of an Eligible Rollover Distribution paid directly by the Fund to an Eligible Retirement Plan specified by the Distributee in a Direct Rollover.

(ii) With respect to distributions after December 31, 2006, a non-spouse beneficiary who is a Designated Beneficiary may, by a Direct Rollover, roll over all or any portion of his or her distribution to an individual retirement account the non-spouse beneficiary establishes for purposes of receiving the distribution. In order to be able to roll over the distribution, the distribution otherwise must satisfy the definition of an Eligible Rollover Distribution. Although such non-spouse beneficiary may roll over such distribution, any distribution made prior to January 1, 2010, is not subject to the direct rollover requirements of Code Section 401(a)(31) (including Code Section 401(a)(31)(B), the notice requirements of Code Section 402(f) or the mandatory withholding requirements of Code Section 3405(c)). If a non-spouse beneficiary receives a distribution from the Fund, the distribution is not eligible for a "60-day" rollover. A non-spouse beneficiary may not roll over an amount which is a required minimum distribution, as determined under applicable Treasury Regulations and other Revenue Service guidance. If the Participant dies before his or her Required Beginning Date and the non-spouse beneficiary rolls over to an individual retirement account the maximum amount eligible for rollover, the non-spouse beneficiary may elect to use either the 5-year rule or the life expectancy rule, pursuant to Treasury Regulation Section 1.401(a)(9)-3, A-4(c), in determining the required minimum distributions from the individual retirement account that receives the non-spouse beneficiary's distribution.

(iii) If the Participant's named beneficiary is a trust, the Fund may make a Direct Rollover to an individual retirement account on behalf of the trust, provided the trust satisfies the requirements to be a Designated Beneficiary.

(iv) With respect to distributions made after December 31, 2007, a Distributee may elect to roll over via Direct Rollover an Eligible Rollover Distribution

to a Roth individual retirement account described in Code Section 408A(b).

(l) Upon the death of a Retired or Separated Participant, such Participant's surviving spouse shall have all the distribution options that were available to the Retired or Separated Participant pursuant to this Section 43.

(m) Notwithstanding any provision of this Act to the contrary:

(i) Effective for plan years beginning after December 12, 1994, contributions, benefits and service credit with respect to qualified military service will be provided in accordance with Code Section 414(u);

(ii) In the case of a death occurring on or after January 1, 2007, if a Participant dies while performing qualified military service (as defined in Code Section 414(u)), the survivors of the Participant are entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service) provided under the Fund as if the Participant had resumed and then terminated employment on account of death;

(iii) For benefit accrual purposes, the Fund will treat an Participant who dies or becomes Disabled on or after January 1, 2007, while performing qualified military service (as defined in Code Section 414(u)) as if the Participant had resumed employment in accordance with his reemployment rights under USERRA, on the day preceding death or disability (as the case may be) and separated from service on the actual date of such death or disability;

(iv) For years beginning after December 31, 2008, (1) an individual receiving a differential wage payment, as defined by Code Section 3401(h)(2), is treated as an Participant of the employer making the payment, (2) the differential wage payment is treated as compensation, and (3) the Fund is not treated as failing to meet the requirements of any provision described in Code Section 414(u)(1)(C) by reason of any contribution or benefit which is based on the differential wage payment; and

(v) Effective as of January 1, 2009, for purposes of being eligible to receive a distribution under the Fund, an individual will be treated as having been terminated from employment during any period the individual is performing service in the uniformed services described in Code Section 3401(h)(2)(A).

(n) Each Participant, beneficiary or other person entitled to a benefit, before any benefit shall be payable to him or on his Account under the Fund, shall file with the Board the information that it shall require to establish his rights and benefits under the Fund.

Section 9. Section 44 of Article VII of the Related Special Acts of the City of Miami Beach, is reenacted to read:

Sec. 44. Rights and benefits not subject to encumbrance.

The rights and benefits provided for herein shall not be subject to attachment, garnishment, execution or any other legal process.

Section 10. Section 45 of Article VII of the Related Special Acts of the City of Miami Beach, is amended to read:

Sec. 45. Responsibility of ~~city~~ City.

The City of Miami Beach shall have no responsibility for the operation of the ~~fund~~ Fund except those specified herein, and shall bear no expense in connection therewith ~~except as relates to the custody of the cash and investments thereof.~~

Section 11. Section 46 of Article VII of the Related Special Acts of the City of Miami Beach, is amended to read:

Sec. 46. Duties of ~~city~~ City attorney.

The ~~city~~ City attorney shall advise the ~~board~~ Board in all matters pertaining to their duties in the administration of the ~~fund~~ Fund, whenever requested; and shall represent and defend the ~~board~~ Board in all suits and actions at law, or in equity, that may be brought against it; and shall bring all suits and actions in its behalf that may be determined upon by the ~~board~~ Board. Anything herein to the contrary notwithstanding, the Board may elect to employ independent legal counsel as it deems necessary.

Section 12. Section 47 of Article VII of the Related Special Acts of the City of Miami Beach, is amended to read:

Sec. 47. Separability; amendment.

If any ~~portion or portions~~ provision of this Act is for any reason held unconstitutional, inoperative or void, such holding shall be declared to be invalid, not affect the remaining portions shall have provisions set forth herein.

As described in Section 36, the same force provisions of this ordinance and effect as though such invalid portion the Fund are intended to meet the requirements of a qualified plan under Section 401(a) of the Code and to be tax-exempt under Section 501(a) of the Code. Should any changes be required to comply or portions had not been included to continue to comply with the provisions of Sections 401(a) and 501(a) of the Code, the Board and the City shall take all appropriate steps to make any such required changes to the Fund.

Section 13. Section 48 of Article VII of the Related Special Acts of the City of Miami Beach, is amended to read:

Sec. 48. Repeal of conflicting laws.

~~That all All City laws, acts and ordinances, or parts of City laws, acts or ordinances, in conflict herewith are with the provisions of this Act shall be, and the same hereby are, repealed.~~

Section 14. Codification. This Ordinance shall be codified in Article VII of the Related Special Acts of the City of Miami Beach.

Section 15. Effective date. This Ordinance shall take effect ten days following adoption, except as otherwise specified herein.

PASSED and ADOPTED by the City Commission of the City of Miami Beach this ____ day of _____, 2015.

PHILIP LEVINE
MAYOR

ATTEST:

RAFAEL E. GRANADO
CITY CLERK

(Sponsored by Commissioner Deede Weithorn)

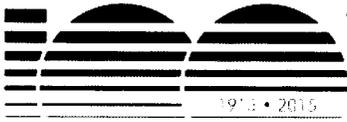
Underscore denotes new language
~~Strikethrough denotes deleted language~~

APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION



City Attorney

5/15/15
Date



City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

COMMISSION MEMORANDUM

TO: Mayor Philip Levine and Members of the City Commission

FROM: Jimmy L. Morales, City Manager

DATE: May 20, 2015

SUBJECT: **AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING AND RESTATING THE MIAMI BEACH EMPLOYEES' RETIREMENT PLAN CREATED BY ORDINANCE NO. 2006-3504, AS SUBSEQUENTLY AMENDED, BY AMENDING SECTIONS 2, 4, 5, 11, and 12 OF THE PLAN TO COMPLY WITH APPLICABLE PROVISIONS OF THE INTERNAL REVENUE CODE AND REGULATIONS THEREUNDER, AND DELETING OUTDATED LANGUAGE; PROVIDING FOR SEVERABILITY; REPEALING ALL ORDINANCES IN CONFLICT THEREWITH; AND PROVIDING AN EFFECTIVE DATE.**

HISTORY/BACKGROUND

The attached Ordinance is sponsored by Commissioner Deede Weithorn and provides amendments to the Miami Beach Employees' Retirement Plan (MBERP) in order for the Plan to comply with the applicable qualification standards under Internal Revenue Code (IRC) section 401(a) and for the Plan to retain its qualified status. The Ordinance makes various technical amendments to the MBERP to comply with IRC qualification standards for a retirement plan. As noted in the attached Memorandum from pension counsel, the proposed amendments are required by the IRC and Internal Revenue Service (IRS) regulations for the Plan to retain its qualified status.

ANALYSIS

A summary of the proposed changes to the Plan is set forth in pension counsel's attached Memorandum.

In addition to the technical amendments required for IRC and IRS compliance, the Ordinance provides a restatement of the entire Plan in one document, pursuant to pension counsel's recommendation, to reflect all ordinance amendments to the Plan that have been adopted since the Plan was established in 2006.

FINANCIAL IMPACT

The City's pension counsel has opined that the amendments should not result in any fiscal impact to the Plan or to the City. However, pursuant to the Florida Statutes, an actuarial impact statement is needed and will be provided prior to adoption on second reading.

Agenda Item RSD
Date 5-20-15



LEWIS, LONGMAN & WALKER, P.A.
ATTORNEYS AT LAW

REPLY TO: TALLAHASSEE

MEMORANDUM

TO: Raul J. Aguila, City Attorney
City of Miami Beach

FROM: Jim Linn and Jennifer Cowan

DATE: May 14, 2015

RE: Miami Beach Employees' Retirement Plan – Internal Revenue Code Compliance Amendments

As requested, we have reviewed the proposed amendments to the Miami Beach Employees' Retirement Plan enclosed with Robert Friedman's letter of February 2, 2015. In our opinion, the proposed amendments are required by the Internal Revenue Code and IRS regulations, in order for the Plan to retain its qualified status and receive a favorable determination letter from the IRS.

The amendments are technical in nature, and include the following provisions:

- Revised definition of "actuarial equivalent" (section 2.02)
- A reference to IRS regulations on differential wage payments (section 4.02).
- A provision incorporating Internal Revenue Code requirement that upon a member's attainment of the normal retirement date the member's benefits under the plan are fully vested and non-forfeitable (section 5.01(a)7).
- A provision incorporating Internal Revenue Code requirements concerning death benefits payable to a member who dies during qualified military service (section 5.08).
- Deletion of outdated language concerning the 2007-08 early retirement incentive program (sections 5.12 and 5.13(b)14).
- A provision incorporating the maximum benefit limitations of Section 415 of the Internal Revenue Code (section 5.13(b)15).
- A provision incorporating Internal Revenue Code requirements concerning the commencement of benefits (section 11.07).

Helping Shape Florida's Future®

TAMPA BAY
1001 3rd Avenue West
Suite 670
Bradenton, FL 34205
(941) 708-4040
Fax: (941) 708-4024

JACKSONVILLE
245 Riverside Avenue
Suite 150
Jacksonville, FL 32202
(904) 353-6410
Fax: (904) 353-7619

TALLAHASSEE
2600 Centennial Place
Suite 100
Tallahassee, FL 32308-0572
(850) 222-5702
Fax: (850) 224-9242

WEST PALM BEACH
1700 Palm Beach Lakes Blvd.
Suite 1000
West Palm Beach, FL 33401
(561) 640-0820
Fax: (561) 640-8202

www.llw-law.com

May 14, 2015

Page 2

- Provisions incorporating Internal Revenue Code requirements distributions and rollovers from the plan (section 12.02).

The ordinance also reflects our recommendation that the retirement plan be restated to incorporate all amendments that have been adopted since the plan was established in 2006 in one document. All the ordinances creating and amending the plan are listed at the end of the ordinance.

An Internal Revenue Service “determination letter” is issued by the IRS in response to a request as to the qualified status of a retirement plan under IRC section 401(a). The determination letter expresses the Service's opinion regarding the form of the plan, and applies only to the employer and the plan participants on whose behalf it was issued. The IRS issued a favorable determination letter for the Miami Beach Employees’ Retirement Plan on October 15, 2014, conditioned on adoption of the amendments contained in this ordinance.

While public employers that sponsor retirement plans are not required to apply for a determination letter, receiving a favorable determination letter provides documentation that the plan satisfies the applicable qualification standards.

There are several legal and practical advantages to obtaining a determination letter. One legal advantage is that an IRS determination letter provides a definitive analysis of whether a plan is qualified. It also provides the basis for retroactive relief if the Service later changes its position. One practical advantage of obtaining a determination letter is that the City’s auditors will be less likely to question the qualified status of the Plan.

We have prepared an ordinance incorporating the IRC compliance amendments. The amendments are technical in nature, and should not result in additional cost to the Plan or the City.

In accordance with section 112.63(3), Florida Statutes, an actuarial impact statement will need to be prepared before the IRC compliance ordinance is adopted on second reading.

Please let us know if you have any questions.

ORDINANCE NO. _____

AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING AND RESTATING THE MIAMI BEACH EMPLOYEES' RETIREMENT PLAN CREATED BY ORDINANCE NO. 2006-3504, AS SUBSEQUENTLY AMENDED, BY AMENDING SECTIONS 2, 4, 5, 11, AND 12 OF THE PLAN TO COMPLY WITH APPLICABLE PROVISIONS OF THE INTERNAL REVENUE CODE AND REGULATIONS THEREUNDER, AND DELETING OUTDATED LANGUAGE; PROVIDING FOR SEVERABILITY; REPEALING ALL ORDINANCES IN CONFLICT THEREWITH; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA:

Section 1. The Miami Beach Employees' Retirement Plan created by Ordinance 2006-3504, as subsequently amended, is hereby restated, and amended as follows:

Section 1. Creation and Purpose of the Retirement Plan

1. A retirement system is hereby created under and by authority of Chapter 18691, Laws of Florida, Acts of 1937, as amended, by merging the "RETIREMENT SYSTEM FOR GENERAL EMPLOYEES OF THE CITY OF MIAMI BEACH" created by Ordinance 1901, as amended (hereinafter referred to as the "Classified System"), with the "RETIREMENT SYSTEM FOR UNCLASSIFIED EMPLOYEES AND ELECTED OFFICIALS OF THE CITY OF MIAMI BEACH" created by Ordinance 88-2603, as amended (hereinafter referred to as the "Unclassified System"), to form the "MIAMI BEACH EMPLOYEES' RETIREMENT PLAN" which shall be hereinafter referred to as the "Plan" or the "Retirement Plan." Any references to the Classified System or Unclassified System in any other provision of the City Charter, Code of Ordinances, ordinances or resolutions shall be construed to apply to this Plan in the same manner as applied to the Classified System or Unclassified System.

2. The purpose of the Retirement Plan is to provide retirement and other related benefits for eligible employees and elected officials of the City and their beneficiaries or dependents.

Section 2. Definitions

For purpose of the Retirement Plan, certain words and phrases shall have the meanings ascribed to them in this Article except when the context otherwise requires. The masculine pronoun, wherever used, shall include the feminine.

2.01 "Accumulated Employee Contributions" means the required contributions paid by any Member as provided in Section 6.2 or credited to the Member pursuant to Section 6.1(b), together with any interest allowed thereon under this Plan or previous City retirement system, until such time as the Employee's service with the City is terminated at the rate, compounded annually, as determined by the Board from time to time.

2.02 "Actuarial Equivalent" means equivalent when computed at 8.0% interest per annum on the basis of the RP 2000 Combined Healthy Participant Mortality Tables with a blending of 65% male rate and 35% female rates~~regular interest on the basis of mortality tables last adopted by the Board of Trustees.~~

2.03 "Beneficiary" means, the surviving person or persons designated as such by a Member or Retirant in the last written designation on file with the Board in accordance with Section 5.10 (g); in the absence of such survivor or such designation, it means the estate of the deceased Member or Retirant, as the case may be.

2.04 "Board of Trustees" or "Board" means the managing board of the Plan as provided for in Article VII.

2.05 "City" or "Employer" means the City of Miami Beach, Florida.

2.06 "City Commission" or "Commission" means the City Commission of the City of Miami Beach, Florida.

2.07 "Classified Employee" means an Employee who is employed in a classified position under the City of Miami Beach Civil Service Act.

2.08 "Creditable Service" means service credited to a Member under the Plan as provided in Article IV.

2.09 "Defined Contribution Retirement System" means a plan established by the City pursuant to Ordinance 92-2813.

2.10 "Domestic Partner" means a person with whom a member has entered into a domestic partnership as defined in Section 62-126 of the City Code, and registered and documented according to the requirements of Section 62-127 of the City Code.

2.11 "Earnings" means base pay, including longevity pay, for personal services rendered as an Employee, but excluding any payment of overtime, shift differential or extra compensation allowances such as uniform allowances. Notwithstanding the foregoing, in the case of any Member who is in a classification within the CWA bargaining unit who entered service with the City prior to February 21, 1994 as a Classified Employee, and who was continuously a member of the Classified System from that date until March 18, 2006, "Earnings" shall include overtime pay up to a maximum of ten percent (10%)

above the Member's highest pensionable earnings each year. The definition of Earnings in the preceding sentence shall apply to Employees in classifications within the AFSCME bargaining unit who entered the service of the City prior to April 30, 1993 and to employees in classifications within the GSA bargaining unit who entered the service of the City prior to August 1, 1993, and who were Members of the Classified Plan continuously from that date until March 18, 2006, upon the ratification of a collective bargaining agreement that contains such definition. Earnings in excess of the limitations set forth in Section 401(a)(17) of the Internal Revenue Code, and regulations promulgated thereunder, shall be disregarded, and no member contributions shall be required on any such excess

2.12 "Elected Officials" means the Mayor, and the members of the City Commission of the City of Miami Beach.

2.13 "Employee" means any person employed by the City on a regular basis who is receiving compensation from the City for personal services, exclusive of the following groups and classifications:

- (a) Persons whose services are compensated on a contractual basis.
- (b) Persons employed on a provisional, original probationary or other temporary basis.
- (c) Members of boards or commissions, officers, or employees receiving no salary or a nominal salary on a fee basis.
- (d) Members of the City Pension Fund for Firemen and Policemen or the City Supplemental Pension Fund for Firemen and Policemen in the City of Miami Beach.
- (e) Persons whose regular employment with the City is for less than thirty (30) hours per week. Provided, however, all persons who were on the membership rolls of the Classified System as of August 31, 1992 and became Members of this Plan on March 18, 2006, whose regular employment is for less than thirty (30) hours per week may continue as Members of this Plan.

"Employee" also means any person employed on a regular basis for thirty (30) or more hours per week by the Miami Beach Visitor and Convention Authority, this Retirement Plan, the Classified Plan, the Unclassified Plan or the City Pension Fund for Firemen and Policemen.

2.14 (a) "Final Average Monthly Earnings" means one-twelfth of the average annual earnings of the Member during the two highest paid years of creditable service except as otherwise provided in this Section 2.14. Notwithstanding the foregoing, for any Member who became a Member of the Unclassified System prior to October 18, 1992 and was continuously a Member of the Unclassified System from that date until March 18, 2006,

"Final Average Monthly Earnings" means one-twelfth of the average annual earnings of the Member during the two highest paid years of creditable service but shall not in any event be less than one-twelfth of the earnings of the Member during the twelve months immediately preceding March 18, 2006.

(b) Notwithstanding Section 2.14(a) above, effective September 30, 2010, "Final Average Monthly Earnings" means:

1) For those Members who as of September 30, 2010 have attained normal retirement age or are within twenty-four (24) months from normal retirement age, "Final Average Monthly Earnings" shall have the same meaning as in Section 2.14(a) above.

2) For those Members who as of September 30, 2010 are between twenty-four (24) and thirty-six (36) months from normal retirement age, "Final Average Monthly Earnings" means one-twelfth (1/12) of the average annual earnings of the Member during the three (3) highest paid years of creditable service.

3) For those Members who as of September 30, 2010 are between thirty-six (36) and forty-six (46) months from normal retirement age, "Final Average Monthly Earnings" means one-twelfth (1/12) of the average annual earnings of the Member during the four (4) highest paid years of creditable service.

4) For those Members who as of September 30, 2010 are more than forty-eight (48) months from normal retirement age, "Final Average Monthly Earnings" means one-twelfth (1/12) of the average annual earnings of the Member during the five (5) highest paid years of creditable service.

(c) Effective April 23, 2014, Members within classifications in the AFSCME bargaining unit who were hired prior to September 30, 2010, may elect to retire for purposes of the Plan but continue employment with the City for up to sixty (60) months, and have their monthly retirement benefit paid into a DROP account during the DROP period, in accordance with Section 5.13.

2.15 "Finance Director" means the Finance Director of the City of Miami Beach as appointed by the City Manager or such person designated by the City Manager to perform the duties of Finance Director.

2.16 "Member" means any Employee included in the membership of the Plan, as provided in Article III. A Member who retires shall be deemed a retired member or a retiree.

2.17 "Pension" means the monthly amount payable to a Pensioner under the Plan; the pension shall be due as of the first day of the calendar month next following the death of the Member or Retirant and shall cease after the payment due on the first day of the month in which the Pensioner ceases to be entitled thereto according to the provisions of this Ordinance.

2.18 "Pensioner" means the dependent beneficiary of a Member or Retirant in receipt of a pension under the Plan as the result of the death of a Member or Retirant of this Plan, the Classified or Unclassified System, or the Predecessor System.

2.19 "Physical Examiners" means the physicians provided for in Section 8.06(j).

2.20 "Predecessor system" means the Retirement System governed by Ordinance No. 845 as in effect prior to the adoption of the Classified System and the Unclassified System.

2.21 "Regular Interest" means interest at the rate or rates determined by the Board of Trustees as provided in Section 8.6(d).

2.22 "Retirant" means a person in receipt of retirement allowance payments under the Plan on the basis of his service as an Employee.

2.23 "Retirement allowance" means monthly payments under the Plan to a Retirant during his lifetime; monthly payments shall be due as of the first day of each calendar month and shall cease after the payment as of the first day of the month in which the Retirant's death occurs.

2.24 "Retirement Plan" or "Plan" means the Miami Beach Employees Retirement Plan created by this ordinance.

2.25 "Unclassified Employee" means an Employee who is employed in a position that is not a classified position under the City of Miami Beach Civil Service Act.

2.26 Deferred Retirement Option Plan (DROP) - A program under which a Member who has reached the normal retirement date may elect to retire for purposes of the Plan but continue employment with the City for up to thirty-six (36) months, and have his/her monthly retirement benefit paid into a DROP account during the DROP period, in accordance with Section 5.13. Notwithstanding the preceding sentence:

(a) Effective July 17, 2013, Members within classifications in the CWA bargaining unit who were hired prior to October 27, 2010, and Members not included in any bargaining unit, who were hired prior to September 10, 2010, may elect to retire for purposes of the Plan but continue employment with the City for up to sixty (60) months, and have their monthly retirement benefit paid into a DROP account during the DROP

period, in accordance with Section 5.13.

(b) Effective October 16, 2013, Members within classifications in the GSAF bargaining unit who were hired prior to July 14, 2010, may elect to retire for purposes of the Plan but continue employment with the City for up to sixty (60) months, and have their monthly retirement benefit paid into a DROP account during the DROP period, in accordance with Section 5.13.

(c) Effective April 23, 2014, Members within classifications in the AFSCME bargaining unit who hired prior to September 30, 2010, may elect to retire for purposes of the Plan but continue employment with the City for up to sixty (60) months, and have their monthly retirement benefit paid into a DROP account during the DROP period, in accordance with Section 5.13.

For members in classifications within the American Federation of State, County and Municipal Employees ("AFSCME") and Communications Workers of America ("CWA") bargaining units, the terms in this Plan shall have the same meanings as in Ordinance 789, the Classified Employee's Salary Ordinance, except as otherwise specifically provided in this Plan.

Section 3. Membership

3.01 Every person who on March 18, 2006 was a Retirant, Pensioner, or vested former member under the Classified System, Unclassified System or Predecessor System shall automatically become on such date a Retirant, Pensioner or vested Member, as applicable, under this Plan, and shall continue to receive or receive in the future under this Plan the benefits paid or payable under the Classified System, Unclassified System, or Predecessor System. Every person who on March 18, 2006 was a Member of the Classified System or Unclassified System shall automatically become on such date a Member of this Retirement Plan. Any written designation of beneficiary or dependent beneficiary in effect under the Classified System, Unclassified System or Predecessor System on March 18, 2006 shall continue to be in effect under this Plan unless subsequently changed or revoked by the Member or Retirant, in writing, in accordance with the provisions of this Plan Ordinance.

3.02 Any person, other than as provided in Section 3.3 herein, who becomes an Employee on or after March 18, 2006 shall be a Member of this Plan as a condition of his employment or office, as of the first day of City employment. An Employee's acceptance of employment with the city shall constitute authorization for the city to deduct contributions from the Earnings of the Employee in accordance with Section 6.02. unless and until the Employee elects not to participate in this Plan to Section 3.03.

3.03 Any person serving as an Elected Official, City Manager or City Attorney shall have the option to reject membership in this Plan, and to participate in another plan that is approved by the City Commission. Any employee in a classification within the AFSCME or GSA bargaining units who enter the service of the City on or after March 18, 2006, and who would otherwise become a Member of this Retirement Plan, shall have an irrevocable option to reject membership in this Plan, and elect instead to participate in the Defined Contribution Retirement System, until such time as a collective bargaining agreement is ratified that provides for mandatory participation in this Plan.

3.04 An Employee shall cease to be a Member if he dies, retires, ceases to be an Employee as defined in Section 2.13 herein for any other reason, or elects not to participate in this Plan in accordance with Section 3.03.

3.05 Any Employee who previously elected to participate in the Defined Contribution Retirement System, or a defined contribution retirement plan established for employees of the Miami Beach Visitor and Convention Authority, the Classified Plan, the Unclassified Plan or the City Pension Fund for Firemen and Policemen, prior to March 18, 2006 shall have a one-time, irrevocable option to transfer to this Plan by filing a written election with the Board within six months from March 18, 2006, but in no event later than the last day of employment. Employees who elect to participate in this Plan pursuant to this Section 3.5 may purchase Creditable Service under the Plan for all or a portion of the period of their participation in the Defined Contribution Retirement System, or a defined contribution retirement plan established for employees of the Miami Beach Visitor and Convention Authority, the Classified Plan, the Unclassified Plan or the City Pension Fund for Firemen and Policemen, in accordance with Section 4.04. Notwithstanding the foregoing, Employees in classifications within the AFSCME and GSA bargaining units who previously elected to participate in the Defined Contribution Retirement System, shall not be eligible to participate in this Plan unless and until a collective bargaining agreement is ratified that provides for such participation.

Section 4. Creditable Service

4.01 Each Employee who was a member of the Classified System or Unclassified System and becomes a Member of this Plan on March 18, 2006 shall be credited with the same amount of creditable service under this Plan to which the member was credited as of such date under the Classified System or Unclassified System. A Member shall be credited with creditable service for all periods of service as an Employee on or after March 18, 2006 during which the Member makes contributions to the Plan in accordance with Article 6. The creditable service of a Member shall not include service prior to the date the member elects to receive a refund of Accumulated Employee Contributions in accordance with Section 5.9 (a).

4.02 A member who separates from City employment for active duty service in the Armed Forces of the United States, the United States Merchant Marine or the United States Coast Guard, voluntarily or involuntarily, shall be entitled to creditable service under the Plan for the period of such service, provided:

(a) The Member must return to City employment within one (1) year from the earlier of the date of military discharge or release from active service, unless otherwise provided by the Uniformed Services Employment and Reemployment Rights Act (USERRA), (P.L. 103-353).

(b) The Member is entitled to reemployment with the City under the provisions of the Uniformed Services Employment and Reemployment Rights Act (USERRA), (P.L. 103-353).

(c) The member pays into the Plan the amount of contributions that would have been required had the Member remained continuously employed by the City, based on the member's earnings on the date of separation from City employment.

(d) The maximum amount of creditable service available under this paragraph shall be five (5) years.

In addition, for years beginning after December 31, 2008, (i) an individual receiving a differential wage payment, as defined in Section 3401(h)(2) of the Internal Revenue Code, shall be treated as an employee of the employer making the payment, (ii) the differential wage payment shall be treated as compensation, and (iii) the plan shall not be treated as failing to meet the requirements of any provision described in Section 414(u)(1)(C) of the Internal Revenue Code by reason of any contribution or benefit which is based on the differential wage payment.

4.03

(a) A Member with five (5) or more years of creditable service may, at any time prior to retirement, elect to purchase up to a maximum of two (2) years of additional creditable service may at any time prior to retirement elect to purchase a maximum of two years of additional creditable service as provided in Section 4.03. Notwithstanding any provision of this Section 4.03, effective September 30, 2013, Members whose classification is included in the CWA bargaining unit and Members who are not included in any collective bargaining unit shall not be eligible to purchase additional creditable service under this Section 4.03. Notwithstanding any provision of this Section 4.03, effective September 30, 2013, Members whose classification is included in GSAF bargaining unit shall not be eligible to purchase additional creditable service under this Section 4.03. Notwithstanding any provision of this Section 4.03, effective April 23, 2015, Members whose classification is included in the AFSCME

bargaining unit shall not be eligible to purchase additional creditable service under this Section 4.03. The benefit multiplier that the Member is earning at the time of the election to purchase additional creditable service pursuant to this Section 4.03 shall be applied to the additional credited service purchased. To be eligible to purchase additional creditable service under this Section 4.03, a Member who previously elected to participate in the Defined Contribution Retirement System (401(a) Plan) must first purchase all available creditable service in accordance with Section 4.4. An eligible Member may elect to purchase additional creditable service under this Section 4.3 for any of the following types of employment prior to the employee's date of hire by the City, provided that the Member may not purchase such service if the Member has received or will receive a pension benefit for the same period of employment under another retirement plan:

- 1) Active duty military service in the Armed Forces of the United States or the Coast Guard.
- 2) Full-time employment with another governmental entity.
- 3) Full-time employment in the private sector performing the same or very similar duties the employee is performing for the City at the time of his/her election to purchase additional service.

(b) In order to receive the additional creditable service, the Member shall pay ten percent (10%) of his/her annual rate of pensionable Earnings, multiplied by the number of years and fractions of a year purchased, up to a total of two years. For the purpose of this section, the annual rate of pensionable earnings shall be the rate in effect on the date of payment and shall include the annual amount of overtime pay for those Members whose overtime pay is included in Earnings. Payment shall be made in a single lump sum to the Plan within six (6) months following the date of the member's election to purchase the additional service. Notwithstanding the preceding sentence, effective July 17, 2013, Members whose classification is included in the CWA bargaining unit and Members who are not included in any collective bargaining unit shall make payment in a single lump sum to the Plan within twelve (12) months following the date of the Members election to purchase the additional service.

(c) For purposes of this Section 4.3, Members may use the value of accrued sick and/or annual leave for the purchase of additional creditable service, as follows. Accrued sick leave may be used at the rate of 2 hours of accrued sick leave for the value of each hour used toward the purchase, provided that the Member must retain at least 120 hours of accrued sick leave after the purchase. Annual leave may be used at the rate of 1 hour of accrued annual leave for the value of each hour used toward the purchase. The total amount of sick and annual leave used for the purchase of additional creditable service under this Section 4.03 shall

be deducted from the maximum amount of leave allowed for payout to the Member upon termination of employment.

(d) Members may pay for some or all of the cost of additional creditable service purchased pursuant to this Section 4.03 by direct transfer or rollover of funds from a 401 (a) or 457 plan, provided the 401(a) plan or 457 plan permits such direct transfers.

(e) Notwithstanding the forgoing, Employees in classifications within the AFSCME bargaining unit and the GSA bargaining unit shall not be eligible to purchase additional creditable service under this Section 4.03 unless and until a collective bargaining agreement is ratified that provides for such purchase.

(f) Amounts paid or transferred to this Plan for the purchase of creditable service under this Section 4.03 shall be considered accumulated employee contributions as that term is defined herein, and Members shall be 100% vested in such amounts.

(g) Notwithstanding any other provision of this Section 4.3, in no event may the maximum benefit percentage applicable to the member be exceeded as the result of any purchase of creditable service.

4.04 Purchase of Creditable Service by Members Who Previously Participated in the Defined Contribution Retirement System.

(a) Any Employee who previously elected to participate in the Defined Contribution Retirement System (401(a) Plan) prior to March 18, 2006, and who becomes a Member of this Plan on or after March 18, 2006, may purchase Creditable Service under this Plan for all or a portion of the period of their participation in the Defined Contribution Retirement System, by paying into the Plan an amount equal to the sum of the required employer and employee contributions to the Classified Plan or Unclassified Plan (whichever plan in which the Member was eligible to participate) for each fiscal year of service, or portion thereof, purchased, as reflected in the actuarial valuation report for that year; plus interest at the rate of 8.5 percent for Classified Employees and 9.0 percent for Unclassified Employees, calculated from the end of each applicable fiscal year through the date of payment. Notwithstanding the preceding sentence, for any Creditable Service purchased pursuant to this subsection (a) that relates to employment during the 2005-2006 fiscal year, if full payment for such service is made on or before May 1, 2006, the payment amount for such service shall be twenty percent (20%) of the Employee's earnings for the period purchased, with no interest on the amount paid for such service. In any event, full payment all service purchased pursuant to this subsection (a) must be made within six (6) months from March 18, 2006 and cost estimates have been provided to

the Employee, but in no event later than the last day of employment. In the case of an employee who elects to transfer or roll over assets from the Defined Contribution Retirement System to purchase creditable service pursuant to this subsection (a), the requirements of the preceding sentence as to such assets shall be satisfied by the employee's irrevocable authorization to transfer or roll over such assets, executed on or before the last day of employment. Each employee electing this option may purchase creditable service under this Plan for the period from the date the employee entered the Defined Contribution Retirement System through the effective date of membership in this Plan, or any portion thereof. If a Member elects to purchase less than the full period of participation in the Defined Contribution Retirement System, the first period of purchase shall be for the same fiscal year in which the Employee was first authorized to purchase service pursuant to this subsection (a), the second period of purchase shall be for the immediately preceding fiscal year and so on, until the Member purchases the amount of creditable service desired. A Member shall not be permitted to select those years that result in the lowest purchase amount. Notwithstanding any other provision of this Section 4.4, in no event may the maximum benefit percentage applicable to the member be exceeded as the result of any purchase of Creditable Service.

(b) Any Employee who previously elected to participate in a defined contribution retirement plan established for employees of the Miami Beach Visitor and Convention Authority, the Classified Plan, the Unclassified Plan or the City Pension Fund for Firemen and Policemen, prior to March 18, 2006, and who becomes a Member of this Plan on or after March 18, 2006, may purchase Creditable Service under this Plan for all or a portion of the period of their participation in such defined contribution retirement plan on or after October 18, 1992, during which such Member was employed on a regular basis for thirty (30) or more hours per week, by paying into the Plan an amount equal to the sum of the required employer and employee contributions to the Classified Plan for each fiscal year of service, or portion thereof, purchased, as reflected in the actuarial valuation report for that year; plus interest at the rate of 8.5 percent calculated from the end of each applicable fiscal year through the date of payment. Notwithstanding the preceding sentence, for any Creditable Service purchased pursuant to this subsection (b) that relates to employment during the 2005-2006 fiscal year, if full payment for such service is made on or before May 1, 2006, the payment amount for such service shall be twenty percent (20%) of the Employee's earnings for the period purchased, with no interest on the amount paid for such service. In any event, full payment for all service purchased pursuant to this subsection (b) must be made within six (6) months after March 18, 2006 and cost estimates have been provided to the Employee, but in no event later than the last day of employment. In the case of a Member who elects to transfer or roll over assets from a defined contribution retirement

plan established for employees of the Miami Beach Visitor and Convention Authority, the Classified Plan, the Unclassified Plan or the City Pension Fund for Firemen and Policemen to purchase creditable service pursuant to this subsection (b), the requirements of the preceding sentence as to such assets shall be satisfied by the Member's irrevocable authorization to transfer or roll over such assets, executed on or before the last day of employment. If a Member elects to purchase less than the full period of participation in the defined contribution retirement plan, the first period of purchase shall be for the same fiscal year in which the Employee was first authorized to purchase service pursuant to this subsection (b), the second period of purchase shall be for the immediately preceding fiscal year and so on, until the Member purchases the amount of creditable service desired. A Member shall not be permitted to select those years that result in the lowest purchase amount. Notwithstanding any other provision of this Section 4.4, in no event may the maximum benefit percentage applicable to the Member be exceeded as the result of any purchase of creditable service.

(c) A Member who elects to purchase creditable service under this Section 4.4 may pay for such service in one or a combination of the following manners:

1) Direct transfer or rollover from the Defined Contribution Retirement System, 457 plan or other eligible plan in accordance with Section 12.3, provided the other retirement system or plan permits such direct transfers or rollovers for the purchase of creditable service under this Plan. The full value of assets, including any outstanding loans, transferred from a Member's account in the Defined Contribution Retirement System, or from a defined contribution retirement plan established for employees of the Miami Beach Visitor and Convention Authority, the Classified Plan, the Unclassified Plan or the City Pension Fund for Firemen and Policemen that permits such direct transfers or rollovers for the purchase of creditable service under this Plan, will be credited toward the purchase of creditable service under this Section 4.4. A Member must pay off any loan balance existing at the time of transfer from the Defined Contribution Retirement System, or from a defined contribution retirement plan established for employees of the Miami Beach Visitor and Convention Authority, the Classified Plan, the Unclassified Plan or the City Pension Fund for Firemen and Policemen, by making payments to this Plan in the same manner and at the same rate of interest as the payments that were made to the Defined Contribution Retirement System or defined contribution retirement plan prior to the transfer. In the event full payment of all outstanding loan balances is not made prior to termination of employment, the Member's creditable service shall be adjusted to reflect the payments actually made.

2) Cash Payment.

3) A Member who is employed by the City at the time creditable service is purchased pursuant to this Section 4.4 may use the value of accrued sick and/or annual leave as follows. Accrued sick leave may be used at the rate of 2 hours of accrued sick leave for the value of each hour used toward the purchase, provided that the Member must retain at least 120 hours of accrued sick leave after the purchase. Annual leave may be used at the rate of 1 hour of accrued annual leave for the value of each hour used toward the purchase. The total amount of sick and annual leave used for the purchase of additional creditable service under this Section 4.4 shall be deducted from the maximum amount of leave allowed for payout to the Member upon termination of employment.

(d) Amounts paid or transferred to this Plan for the purchase of creditable service under this Section 4.4, excluding any outstanding loan balances, shall be considered accumulated employee contributions as that term is defined herein, and Members shall be 100% vested in such amounts.

(e) Notwithstanding any other provision of this Section 4.4, the provisions of this Section 4.4 shall not apply to Employees within classifications in the AFSCME and GSA bargaining units until a collective bargaining agreement containing such provisions is ratified. If a collective bargaining agreement applying the provisions of this Section 4.4 to Employees within classifications in the AFSCME or GSA bargaining units is ratified on or before April 1, 2006, for any Employee who purchases Creditable Service purchased pursuant to subsection (a), above, that relates to employment during the 2005-2006 fiscal year, and makes full payment for such service within sixty (60) days following ratification of the collective bargaining agreement, the payment amount for such service shall be twenty percent (20%) of the Employee's earnings for the period purchased, with no interest on the amount paid for such service.

4.05 Purchase of Creditable Service by Members Who Previously had Creditable Service Under the Classified Plan.

(a) Any Employee who was employed on March 18, 2006, and becomes a Member of this Plan on or before September 18, 2006, and who previously had creditable service under the Classified Plan but who separated from employment as a Classified Employee prior to becoming fully vested in the Classified Plan, may purchase Creditable Service under this Plan for all or a portion of the period of their creditable service under the Classified Plan, by paying into the Plan an amount equal to the sum of the required employer and employee contributions to the Classified Plan for each fiscal year of service or portion thereof purchased, plus interest at

the rate of eight and one-half percent (8.5%) from the end of each applicable fiscal year through the date of payment. Full payment must be made within six (6) months after March 18, 2006.

(b) Notwithstanding the provisions of subsection (a), above, any Employee who was employed on March 18, 2006 and becomes a Member of this Plan on or before September 18, 2006, and who was promoted from a classified position to an unclassified position with no break in City service prior to March 18, 2006 and received a refund of member contributions from the Classified Plan, may purchase Creditable Service under this Plan for all or a portion of the period of their creditable service under the Classified Plan, by paying into the Plan an amount equal to ten percent (10%) of their annual rate of pensionable Earnings, multiplied by the number of years and fractions of a year purchased, plus interest at the rate of 9.0% calculated from the end of each applicable fiscal year through the date of payment. Full payment for Creditable Service purchased pursuant to the preceding sentence must be made within six (6) months from March 18, 2006.

(c) Notwithstanding any provision of this Section 4.05, this Section 4.05 shall have no application to persons employed by the Miami Beach Visitor and Convention Authority, the Classified Plan, the Unclassified Plan or the City Pension Fund for Firemen and Policemen on March 18, 2006.

4.06 Purchase of Creditable Service for Initial Probationary Period. Any Member who did not receive credit under a City retirement plan, other than a Section 457 plan, during their employment as a provisional or probationary employee, may, at any time prior to retirement, purchase Creditable Service under this Plan for all or a portion of such provisional or probationary employment, by paying into the Plan an amount equal to member contribution rate in effect during the period of such provisional or probationary employment, plus interest compounded annually based on the regular rate of interest in effect at the time of the purchase. If the member elects to purchase Credited Service for less than the entire period of provisional or probationary employment, only the most recent period of provisional or probationary employment shall be claimed. Notwithstanding, any other provision of this Section 4.06, in no event may the maximum benefit percentage applicable to the member be exceeded as the result of any purchase of Creditable Service.

Section 5. Benefits

5.01 Normal Retirement

(a) Normal Retirement Date

- 1) Except as otherwise provided in this subsection (a), the

normal retirement date shall be the first day of the calendar month coincident with or next following the attainment of age fifty-five (55) and completion of five (5) or more years of creditable service.

2) Notwithstanding the provisions of paragraph (1), above, the normal retirement date of a Member who became a member of the Unclassified System prior to October 18, 1992 and was continuously a member of the Unclassified System from that date until March 18, 2006, shall be the first day of the calendar month coincident with or next following the attainment of age fifty (50) and completion of five (5) or more years of creditable service.

3) Notwithstanding the provisions of paragraph (1), above, the normal retirement date for Members in classifications within the CWA (MBEBA) bargaining unit who entered the service of the City prior to February 21, 1994 and who were Members of the Classified Plan continuously from that date until March 18, 2006, shall be the first day of the calendar month coincident with or next following the attainment of age 50 and completion of five (5) or more years of creditable service.

4) Notwithstanding the provisions of paragraph (1), above, the normal retirement date for Members in classifications within the AFSCME bargaining unit who entered the service of the City prior to April 30, 1993 and who were Members of the Classified Plan continuously from that date until March 18, 2006, shall be the first day of the calendar month coincident with or next following the attainment of age fifty (50) and completion of five (5) or more years of creditable service, until a collective bargaining agreement is ratified that provides a normal retirement date in accordance with paragraph (1), above.

5) Notwithstanding the provisions of paragraph (1), above, the normal retirement date for Members in classifications within the GSA bargaining unit or any Employee classified as "Other" who entered the service of the City prior to August 1, 1993 and who were Members of the Classified Plan continuously from that date until March 18, 2006, shall be the first day of the calendar month coincident with or next following the attainment of age fifty (50) and completion of five (5) or more years of creditable service, until a collective bargaining agreement is ratified that provides a normal retirement date in accordance with paragraph (1), above.

6) Notwithstanding the provisions of paragraph (1), above, the normal retirement date for Members in classifications within the AFSCME bargaining unit who entered the service of the City after on or April 30, 1993, and Members in classifications within the GSA

bargaining unit who entered the service of the City on or after August 1, 1993, shall be the first day of the calendar month coincident with or next following the attainment of age sixty (60) and the completion of ten (10) or more years of creditable service, until a collective bargaining agreement is ratified that provides a normal retirement date in accordance with paragraph (1), above.

7) Upon attainment of the Member's normal retirement date as provided for in this subsection (a), the Member's benefits under this Plan shall be fully vested and nonforfeitable.

(b) Normal Retirement Benefit

1) Except as otherwise provided in this subsection (b), the normal retirement benefit shall be payable to a Member on or after the normal retirement date in an amount equal to three percent (3%) of final average monthly earnings multiplied by creditable service, up to a maximum of eighty percent (80%) of final average monthly earnings.

2) Notwithstanding the provisions of paragraph (1) above, the normal retirement benefit payable to Members in classifications within the AFSCME bargaining unit who entered the service of the City prior to April 30, 1993 and who were Members of the Classified Plan continuously from that date until March 18, 2006, shall be three percent (3%) of final average monthly earnings multiplied by creditable service for the first fifteen (15) years of such service, and four percent (4%) of final average monthly earnings multiplied by creditable service for each year in excess of fifteen (15), to a maximum of ninety percent (90%) of final average monthly earnings.

3) Notwithstanding the provisions of paragraph (1), above, the normal retirement benefit payable to Members in classifications within the CWA (MBEBA) bargaining unit who entered the service of the City prior to February 21, 1994 and who were Members of the Classified Plan continuously from that date until March 18, 2006, shall be three percent (3%) of final average monthly earnings multiplied by creditable service for the first fifteen (15) years of such service, and four percent (4%) of final average monthly earnings multiplied by creditable service for each year in excess of fifteen (15), to a maximum of ninety percent (90%) of final average monthly earnings.

4) Notwithstanding the provisions of paragraph (1), above, the normal retirement benefit payable to Members in classifications within the GSA bargaining unit or any Employee classified as

"Other" who entered the service of the City prior to August 1, 1993 and who were Members of the Classified Plan continuously from that date until March 18, 2006, shall be three percent (3%) of final average monthly earnings multiplied by creditable service for the first fifteen (15) years of such service, and four percent (4%) of final average monthly earnings multiplied by creditable service for each year in excess of fifteen (15), to a maximum of ninety percent (90%) of final average monthly earnings.

5) Notwithstanding the provisions of paragraph (1), above, the normal retirement benefit payable to a Member who became a member of the Unclassified System prior to October 18, 1992 and was continuously a member of the Unclassified System from that date until March 18, 2006, shall be four percent (4%) of final average monthly earnings multiplied by creditable service prior to that date, and three percent (3%) of final average monthly earnings multiplied by creditable service after that date, up to a maximum of eighty percent (80%) of final average monthly earnings. Notwithstanding any other provision of this Plan, in determining the normal retirement benefit payable to Unclassified Employees, earnings shall be as defined in Section 2.11 except that annual payments for unused leave (excluding annual or sick leave) shall be included.

6) Notwithstanding the provisions of paragraph (1), above, the normal retirement benefit payable to a Member who has served as an Elected Official, City Manager or City Attorney shall be four percent (4%) of final average monthly earnings multiplied by the number of years of creditable service as an Elected Official, City Manager or City Attorney; and the percentage rate in effect under the Classified System, Unclassified System or this Plan, as applicable, for any other periods of City employment multiplied by the number of years of creditable service in such employment; up to a maximum of eighty percent (80%) of final average monthly earnings. Notwithstanding any other provision of this Plan, in determining the benefit payable under this paragraph (6), earnings as an Elected Official, City Manager or City Attorney shall include total W-2 compensation plus any other payments or allowances, up to the limitations set forth in Section 401(a)(17) of the Internal Revenue Code and regulations promulgated thereunder. Notwithstanding any other provision of this Plan, the normal retirement benefit payable to a Member who has served as an Elected Official and is subsequently employed, without a break in service, by the City in another position as a member of this Plan for a period of at least five additional years, shall be equal to the sum of the retirement allowance payable based on the member's creditable service and final average monthly earnings as an Elected

Official, plus the retirement allowance payable based on the member's creditable service and final average monthly earnings for the period of employment subsequent to service as an Elected Official, up to a maximum of eighty percent (80%) of final average monthly earnings during employment subsequent to service as an Elected Official. In the event a Member who has served as an Elected Official and is subsequently employed, without a break in service, by the City in another position as a member of this Plan for a period of less than five additional years, such Member shall not be entitled to a benefit from this Plan for the period of employment subsequent to service as an Elected Official, but shall be entitled to a refund of accumulated employee contributions for such period of service.

5.02 Early Retirement

(a) Any Member who was a member of the Classified System and became a Member of this Plan on March 18, 2006, may retire prior to the normal retirement date and receive an early retirement benefit in accordance with this Section 5.2. To be eligible for an early retirement benefit, such Member must have attained age fifty (50), and the sum of the Member's attained age (last birthday) and complete years of creditable service must not be less than seventy-five (75). The early retirement benefit shall commence on the first day of the calendar month next following receipt of written application therefor by the Board.

(b) The early retirement benefit shall be the actuarial equivalent of a deferred benefit commencing on the Member's normal retirement date and computed in accordance with Section 5.1 on the basis of final average monthly earnings and creditable service as of the date of retirement.

5.03 Partial Lump Sum Distribution. A Member who terminates City employment and retires on or after the normal retirement date and on or after March 18, 2006, shall have the option of receiving up to twenty-five percent (25%) of the actuarial value of his/her normal retirement allowance in a lump sum distribution. For example, if a member's normal retirement allowance is \$2,000 per month, the Member may elect to receive, in lieu of such monthly benefit, a monthly benefit in the amount of \$1,500 per month plus a single lump sum distribution equal to the actuarial value of the other \$500 monthly benefit. The lump sum distribution shall be calculated using the same discount rate, mortality rates and other assumptions and cost methods used in the most recent actuarial valuation report for the Plan. The partial lump sum distribution option is available only to Members who are eligible for a normal retirement allowance, and is not available in connection with any other benefit payable under the Plan.

5.04 Vested Retirement Allowance

(a) Any Member who was a member of the Unclassified System and became a Member of this Plan on March 18, 2006, with five or more years of creditable service and whose service with the City is terminated prior to the normal retirement date, shall be eligible for a refund of accumulated employee contributions; or the member may elect to not receive the refund but instead, in lieu of a refund of accumulated employee contributions, apply for a vested retirement allowance in accordance with this Section 5.4.

(b) Any Member who was a member of the Classified System and became a Member of this Plan on March 18, 2006, whose service with the City is terminated voluntarily or involuntarily, prior to the date as of which he would first become eligible for retirement on a normal or early service retirement allowance shall be entitled, in lieu of a refund of his accumulated employee contributions, to apply for a vested retirement allowance in accordance with this Section 5.04.

(c) The vested retirement allowance payable under this Section 5.4 shall be a deferred allowance commencing on the earliest date as of which a Member, with the years of creditable service upon termination of employment, would first be eligible for normal retirement benefits, and shall be equal to the amount computed in accordance with Section 5.1 on the basis of the Member's final average monthly earnings and creditable service at the time of termination, and the Member's age as of the date on which payment of the allowance commences.

5.05 Disability Retirement Allowance

(a) Upon the written application of a Member or the City Manager, a Member who has five (5) or more years of creditable service may be retired by the Board on an ordinary disability retirement allowance on the first day of a calendar month next following the granting of such application; provided that the Physical Examiners, after a medical examination of such Member, shall certify that the member is totally incapacitated, mentally or physically, for the further performance of duty, that such incapacity is not the result of habitual use of narcotics or alcohol, misconduct, service in the Armed Forces, self-inflicted injury or disability sustained through other employment, that such incapacity is likely to be permanent and that such Member should be retired.

(b) Upon the written application of a Member or the City Manager, any Member who has been totally and permanently incapacitated for the performance of his duties as the natural and proximate result of an accident occurring while in the actual performance of duty at some definite time and place, without willful negligence on the member's part, may be

retired by the Board on a Service-connected disability retirement allowance, and not on an ordinary disability retirement allowance, on the first day of a calendar month next following the execution and granting of such application; provided that the Physical Examiners, after a medical examination of the Member, shall certify that the member is totally incapacitated, mentally or physically for the further performance of duty, that such incapacity is likely to be permanent and that he should be retired.

(c) The disability retirement allowance payable to a Member retiring under the provisions of this Section 5.05 shall be an amount computed as a normal retirement benefit in accordance with Section 5.01, on the basis of the Member's final average monthly earnings and creditable service at the time of disability retirement; provided, that the amount of such allowance shall be modified in accordance with the following subsections (d) and (e).

(d)

1) The allowance payable to a disability Retirant prior to the normal retirement date shall not be less than thirty-five percent (35%) of his final average monthly earnings as of the date of disability if an ordinary disability retirement allowance is payable, and not less than sixty-five percent (65%) of such final average monthly earnings if a service connected disability retirement allowance is payable. Notwithstanding the foregoing, for Members who are in classifications within the AFSCME bargaining unit and who entered the service of the City prior to April 30, 1993, Members who are in classifications within the CWA bargaining unit and who entered the service of the City prior to February 21, 1994, Members who are in classifications within the GSA bargaining unit and who entered the service of the City prior to August 1, 1993, and Members who are classified as "Other" who entered the service of the City prior to August 1, 1993, the minimum service connected disability retirement allowance payable prior to such member's normal retirement date shall be seventy-five percent (75%) of such final average monthly earnings.

2) The allowance payable to a disability Retirant after the normal retirement date shall be an amount computed as a normal retirement benefit on the basis of the final average monthly earnings and number of years of creditable service the Member would have had if he had continued in service without interruption until the normal retirement date at the maximum rate of pay in effect at the time of his retirement for the classification from which the Member retired, provided that such allowance shall not exceed the amount payable to the Member as a disability retirement

allowance prior to the normal retirement date and shall not be less than the normal retirement benefit at the normal retirement date. "Normal retirement date" as used in this Section 5.05 means the date determined in accordance with Section 5.01(a) on the assumption that the period of disability retirement is deemed to be active service as an Employee for this purpose.

(e) Any amounts which may be paid or payable on account of disability to the Member or the Member's dependents under the Workers' Compensation Act, exclusive of fixed statutory payments for the loss of any bodily member, shall be offset against and payable in lieu of that part of the disability retirement allowance provided under the Plan for the same disability, in such equitable manner as the Board shall determine.

(f)

1) During the period of disability retirement prior to the normal retirement date, the Retirant's annual earnings from employment (including self-employment) shall not exceed an amount which, when added to the disability retirement allowance payments received by him, would result in a combined earned income of one hundred twenty-five percent (125%) of the maximum current salary for the classification from which the member retired if he is receiving a service-connected disability retirement allowance, or one hundred percent (100%) of such maximum salary if he is receiving an ordinary disability retirement allowance; otherwise payments of the disability retirement allowance shall be withheld to the extent that the combined earned income exceeds the maximum permissible amount. The Member must agree at the time of disability retirement, before any benefits are paid under the Plan, to furnish annually to the Board, before May 1 of each year, a copy of the Member's Federal Income Tax return for the prior year, and any other information which the Board may require. When the Retirant's combined earned income exceeds the maximum permissible amount determined on the basis of the maximum salary as of January 1 of the prior year for the classification from which the Member retired, future payments of the disability retirement allowance shall be withheld until the total sum withheld equals the amount by which the Member's combined earned income for the prior year exceeded the maximum permissible amount. Restrictions on earnings shall not be applicable after the Retirant's normal retirement date.

2) Notwithstanding the provisions of paragraph 1, above, any member of the Classified System who became a Member of this Plan on or after March 18, 2006, and who retires on a disability retirement on or after July 1, 1995, shall be subject to the benefit

adjustments in this paragraph 2. During the period of such Member's disability retirement, the Retirant's annual earnings from employment (including self-employment) shall not exceed an amount which, when added to the disability retirement allowance payments received by him, would result in a combined earned income of two hundred percent (200%) of the maximum current salary for the classification from which the Member retired if the Member is receiving a service-connected disability retirement allowance, or one hundred percent (100%) of such maximum salary if the Member is receiving an ordinary disability retirement allowance; otherwise payments of the disability retirement allowance shall be withheld to the extent that the combined earned income exceeds the maximum permissible amount. The Member must agree at the time of his disability retirement, before any benefits are paid under the Plan, to furnish annually to the Board, before May 1 of each year, a copy of the Member's Federal Income Tax return for the prior year, and any other information which the Board may require. When the Retirant's combined earned income exceeds the maximum permissible amount determined on the basis of the maximum salary as of January 1 of the prior year for the classification from which the Member was retired, future payments of disability retirement allowance shall be withheld until the total sum withheld equals the amount by which the Member's combined earned income for the prior year exceeded the maximum permissible amount.

3) The term "earned income" shall be defined by Section 43(c)(2) of the Internal Revenue Code to mean wages, salaries, tips, and other employee compensation, plus the amount of the taxpayer's net earnings from self-employment for the taxable year (within the meaning of Section 1402(a) of the Internal Revenue Code).

(g) Any Retirant who is receiving a disability retirement allowance shall be subject, prior to the normal retirement date, to re-examination by the Physical Examiners either upon request of the Retirant. The Board or the City Manager, and the Physical Examiners shall report their conclusions as to the continuance of the incapacity. In the event that such disability shall not continue to incapacitate the Retirant for service acceptable to the City, in accordance with requirements of the Human Resources Department, the City Manager may require that such Retirant be returned to active duty at work which is the same or of similar nature to the work he performed prior to his incapacity, or returned to other work within the limits of his mental or physical capacities, at a rate of compensation not less than seventy percent (70%) of the pay to which he would have been entitled at the time of the Member's return to active service for the grade of service occupied by the Retirant prior to incapacity. Upon any such return

to active duty, the Retirant shall be restored to service as a Member, the disability retirement allowance shall be terminated, the Member shall resume contributing to the Plan based on the earnings received upon reemployment, and the period during which the member was receiving a disability retirement allowance shall be included in creditable service for all purposes of the Plan.

(h) If any Retirant in receipt of a disability retirement allowance is found by the Physical Examiners, prior to the normal retirement date, to be no longer incapacitated but is not restored to service as a Member because of the member's own refusal to accept employment offered in accordance with the foregoing paragraph, the disability retirement allowance shall be terminated, and the period during which the member was receiving a disability retirement allowance shall in no event be added to the creditable service acquired prior to the incapacity.

5.06 Active Service Death Benefits

(a) Upon receipt of evidence, satisfactory to the Board, of the death of a Member who has three (3) or more years of creditable service, a monthly pension shall be paid to the surviving spouse or domestic partner of the deceased Member, provided that said spouse had been married to the Member, or the domestic partnership has been registered for at least one (1) year immediately prior to the date of his death. If there is no surviving spouse or domestic partner entitled to such pension, the pension shall be paid to the dependent child or children of the deceased Member, divided in such manner as the Board in its discretion shall determine, to continue until every such child dies or attains twenty-one (21) years of age.

(b) The monthly pension payable to the person or persons entitled thereto in accordance with the subsection (a), above, shall be equal to one-half of the amount computed as a normal service retirement allowance in accordance with Section 5.01, as though the date of the Member's death were the normal retirement date, on the basis of the Member's final average monthly earnings and creditable service at the time of death; provided that, for members of the Classified System who became members of this Plan on March 18, 2006, such pension shall not be less than thirty percent (30%) nor more than forty percent (40%) of final average monthly earnings; further provided that, in the case of a person who became a Member of the Classified System prior to November 1, 1976, if the Accumulated Employee Contributions credited to the Member at the time of death are less than would have been credited to him if he had contributed at the rate of six per centum (6%) of his earnings from the time he became a participant under the predecessor system governed by Ordinance No. 845, the pension computed in accordance with the foregoing provisions of this paragraph shall be reduced by half of

the amount by which the retirement allowance of the deceased Member would have been reduced if he were retiring on a normal or early service retirement allowance as of the date of his death; and further provided that, if the pension is payable to a spouse or domestic partner who is more than fifteen (15) years younger than the Member, the pension shall be reduced to an amount which is the actuarial equivalent, of the pension payable to the spouse if said spouse or domestic partner were exactly fifteen (15) years younger than the deceased Member. In the event of the death of the spouse or domestic partner after pension payments have commenced, a pension computed in accordance with the foregoing sentence but prior to any reduction because of the difference in the ages of the deceased Member and the surviving spouse or domestic partner shall be paid to the dependent child or children of the deceased Member under twenty-one (21) years of age, divided in such manner as the Board in its discretion shall determine, until every such child dies or attains twenty-one (21) years of age.

5.07 Death Benefits after Retirement

(a) Upon receipt of evidence, satisfactory to the Board, of the death of a Retirant, a monthly pension shall be payable to the surviving spouse or domestic partner of the deceased Retirant, provided that the spouse had been married to the Retirant or the domestic partnership was registered on the date of retirement or termination of service, whichever occurred first, and for a least one (1) year prior to such date; and further provided, that if the Retirant had elected an option in accordance with Section 5.09 which was in effect at the time of his death, monthly benefits shall be continued after his death, in lieu of benefits under this Section 5.07, in accordance with the option.

(b) The monthly pension payable to the surviving spouse or domestic partner of a deceased Retirant pursuant to the foregoing paragraph of this Section 5.07 shall be equal to fifty percent (50%) of the retirement allowance which would have been payable to the deceased Retirant if the Retirant had been alive at the time of the monthly payment; provided, that, if the surviving spouse or domestic partner is more than fifteen (15) years younger than the deceased Retirant, such monthly pension shall be reduced to an amount which is the actuarial equivalent of such pension for a spouse exactly fifteen (15) years younger than the deceased Retirant.

(c) If any such deceased Retirant is not survived by a spouse or domestic partner entitled to a pension in accordance with the foregoing paragraphs of this Section 5.07, or if the death of such a spouse or domestic partner occurs after pension payments have commenced in accordance with the foregoing paragraph, the pension which would otherwise have been payable to a surviving spouse or domestic partner eligible therefor and not more than fifteen (15) years younger than the

deceased Retirant shall be payable to the dependent child or children of the said deceased Retirant, if any, divided in such manner as the Board in its discretion shall determine, to continue until every such child 1) marries or dies, or 2) attains eighteen (18) years of age or twenty-two (22) years of age in the case of a child who is a full-time student in high school or college; provided that in the case of a physically or mentally disabled child, the pension shall continue until the child recovers from the disability. As used in this paragraph, a "physically or mentally disabled child" is one who 1) is unmarried, 2) is entitled to and receives a child's disability benefit based upon determination by the Social Security Administration that the child is unable to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve (12) months and 3) was suffering from such impairment prior to attaining eighteen (18) years of age (or twenty-two (22) years of age in the case of a child who was a full time student in high school or college. Notwithstanding the foregoing, only children who were dependent beneficiaries of the Retirant on the date of retirement or termination of service, whichever is first, shall be eligible for a pension under this paragraph.

(d) If there are no pension benefits payable to a surviving or domestic partner, child or children pursuant to paragraphs (a), (b) or (c) above, then the aforementioned pension shall be paid to the dependent parent, if any, of the deceased member. If both parents are dependent, such benefit shall be shared equally between them.

(e) Notwithstanding any provision of this Section 5.07 to the contrary, in the event that an optional benefit had been elected by a Retirant in accordance with Section 5.07, and such election is in effect at the time of the Retirant's death, monthly benefits, if any, shall be payable after death to the person designated as the contingent annuitant in accordance with the optional election, and no benefits shall be payable as a result of the death of the Retirant under this Section 5.07.

5.08 Death Benefits for Death During Qualified Military Service. In the case of a death or disability occurring on or after January 1, 2007, if a Member dies while performing qualified military service (as defined in Section 414(u) of the Internal Revenue Code), the survivors of the Member are entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service) provided under the Plan as if the Member had resumed and then terminated employment by the City on account of death.

5.095-08 Optional Benefits

(a) In lieu of the normal or early retirement benefits provided in

Sections 5.01 and 5.02, above, a Member may elect to receive an optional benefit under this Section 5.09. The optional benefit is the actuarial equivalent of the Member's normal or early retirement benefit. If the member's written election of an optional benefit is received by the Board at least thirty (30) days prior to the date of commencement of retirement benefits, the election of the optional benefit shall become effective on the date the retirement benefit commences. If such election is received by the Board at any later date it shall become effective thirty (30) days after the date the retirement allowance commences.

(b) A Member who elects an optional benefit must designate a contingent annuitant to receive a benefit following the Member's death. A Member may designate his/her spouse, domestic partner, child or any other person who is shown, on the basis of evidence satisfactory to the Board, to be dependent upon or receiving substantial support from the Member, as the contingent annuitant; provided, if the contingent annuitant is a minor child, the retirement benefit shall not be payable under the option after the death of the Member after the minor child attains twenty-one (21) years of age. If the designated contingent annuitant is the Member's spouse or domestic partner on the date of retirement or termination of service, whichever occurred first, and for at least one (1) year prior to such date, the monthly benefit payable under the option to the Member and the surviving contingent annuitant shall be the actuarial equivalent of the benefit which would have been payable in the absence of the member's election to receive an optional benefit, as a retirement benefit to the Member after retirement and as a pension after the Member's death to the surviving spouse or domestic partner in accordance with Section 5.07; otherwise, the monthly benefit payable under the option shall be the actuarial equivalent of the retirement allowance payable only to the Member after retirement and prior to the election of an optional benefit.

(c) The election of an optional benefit may not be revoked or changed by the Member but, if the Member or the contingent annuitant designated under the option dies prior to the date the option becomes effective, the election shall thereby be revoked.

(d) A member may elect one of the following optional benefits:

Option 1. A reduced retirement benefit payable during the Member's life, and after the Member's death the same monthly benefit shall be paid to the Member's contingent annuitant for the contingent annuitant's lifetime; or

Option 2. A reduced retirement allowance payable during the Member's life, and after the member's death an allowance equal to two-thirds (2/3) of the Member's reduced monthly allowance shall be paid to the contingent

annuitant for the contingent annuitant's lifetime.

5.105-09 Refund of Accumulated Employee Contributions

(a) A Member may elect in writing, in a form and manner determined by the Board, upon ceasing to be an Employee for any cause other than retirement or death, to receive in one sum the Accumulated Employee Contributions credited to the Member.

(b) Upon receipt of a refund of accumulated employee contributions, all creditable service shall be canceled, such creditable service shall not be reinstated if the Member is reemployed by the City in the future, and the Member shall be considered a new Member as of the date of reemployment.

(c) Upon receipt of evidence satisfactory to the Board, of the death of a Member prior to the commencement of retirement benefits, with no surviving spouse, domestic partner or dependent children entitled to receive a pension as provided in Section 5.05, the amount of the Member's Accumulated Employee Contributions at the time of death shall be payable in one sum to the Member's designated beneficiary if living, otherwise to such Member's estate.

(d) Upon receipt of evidence satisfactory to the Board, of the death of a Retirant who is not survived by a spouse, domestic partner or dependent children entitled to a pension in accordance with Section 5.07, provided the Member has not elected an optional benefit that has become effective, any excess of Accumulated Employee Contributions at retirement over the sum of the retirement benefit payments received shall be paid in one sum to the Member's designated beneficiary if living, otherwise to such Member's estate.

(e) Upon receipt of proof satisfactory to the Board, of the death of the survivor of a Retirant and the contingent annuitant under an option, if an option has been elected and has become effective, any excess of the Retirant's Accumulated Employee Contributions at the time of retirement over the sum of the benefit payments received shall be paid to the Retirant's beneficiary if living, otherwise to the estate of the survivor of such Retirant and contingent annuitant.

(f) Upon receipt of proof satisfactory to the Board, that no further benefits are payable as the result of the death of a Member prior to the commencement of any retirement benefit, the excess, if any, of the Accumulated Employee contributions at the time of his death over the benefit payments received by the Member's spouse or domestic partner and dependent children shall be paid in a single sum to the Member's

designated beneficiary if living, otherwise to such Member's estate.

(g) Upon receipt of proof satisfactory to the Board, that no further benefits are payable as the result of the death of a Retirant, the excess of the Retirant's Accumulated Employee Contributions at retirement over benefit payments received by the Retirant, the Retirant's spouse or domestic partner and dependent children shall be paid in one sum to the Retirant's designated beneficiary if living, otherwise to such Retirant's estate.

(h) A Member's beneficiary for receipt of the single sum payments in accordance with this Section 5.10 must have been designated by the Member in writing and filed with the Board prior to the member's death. A Member may designate more than one beneficiary for this purpose; provided that in such event the Member must specify the manner in which payments to the multiple beneficiaries shall be allocated, The Member may also designate alternate beneficiaries with a specified order or priorities for entitlement to single sum payments in the event of death. A Member may change the designated beneficiary or beneficiaries by similar written designation. A designation, revocation or change of the contingent annuitant under an optional benefit may be made only as provided in Section 5.09.

5.115-10 Post Retirement Adjustments

(a) The benefits payable to Retirants and Pensioners on the effective date of Ordinance 2006-3504, March 18, 2006, and the benefits commencing in accordance with Ordinance 2006-3504 on or after such date shall be continued without change except as increased in accordance with this Section 5.11

(b) "Improvement Factor" for the purpose of this Section 5.11 means an increase of two and one-half percent (2.5%) per annum in retirement allowances or pensions for each year commencing on October 1 following the completion of 364 days after the commencement date of the retirement allowance or, if applicable to pensions payable as the result of the death of a Member prior to his retirement, one full year after the commencement date of the pension. The Improvement Factor shall be compounded, and shall be applied to the retirement allowance or pension payable as the result of the retirement, termination or death of a Member, whichever is applicable.

(c) The return of a disability Retirant to employment with the City prior to the normal retirement date in accordance with Section 5.05(g) shall be governed by said Section 5.05(g). Return of such a person to employment with the City after the normal retirement date, as defined in Section 5.01(a), or after the date as of which he ceased to be entitled to a

disability retirement allowance pursuant to Section 5.05(h) shall be governed by the provisions of Paragraph (a) or (b) of this Section 5.11, whichever is applicable at the time of such return.

(d) Upon the death of a Retirant, the pension payable thereafter to his dependent beneficiary shall be based on the retirement allowance payable as of the date of such death, including the benefit improvements granted in accordance with this Section 5.11, and on each October 1 subsequent to such death the Improvement Factor shall be applied to the then-current retirement allowance.

5.125-11 Return to Active Service

(a) If a former Member who is entitled to a vested retirement allowance not yet payable returns to service with the City as an Employee before such allowance has become payable, he shall again become a Member, but benefits payable with respect to earnings and creditable service after the Member's reemployment shall be based on the provisions applicable to a Member whose employment with the City commences on the date of reemployment. He shall contribute to the Plan at the rate required, pursuant to Section 6.02, of Employees who become Members for the first time. Creditable service rendered before and after the Member's return to service shall be considered for the purpose of determining the benefit payable; provided, in the event of the Member's subsequent termination of employment for reasons other than death or retirement, only creditable service rendered after reemployment shall be considered for the purpose of determining entitlement to a vested retirement benefit based on service rendered after reemployment. Upon subsequent retirement, the Member's retirement benefit shall be equal to the sum of the amounts computed on the basis of final average monthly earnings and creditable service with respect to each period of service as an Employee; provided that the retirement allowance shall not exceed the retirement allowance which would have been payable if creditable service had been one period of continuous service.

(b) Should a Retirant, other than a disability Retirant restored to service in accordance with Section 5.05(h), be employed by the City as an Employee, such Member's retirement benefit shall cease and the Member shall again become a Member of the Plan, but benefits payable with respect to the Member's earnings and creditable service after reemployment shall be based on the provisions applicable to a Member whose employment with the city commences on the date of reemployment. The Member shall contribute at the rate required, pursuant to Section 6.02, of Employees who become Members for the first time. An amount equal to the excess, if any, of the Member's Accumulated Employee Contributions at the time of his retirement over the amount of retirement benefits received shall be credited as Accumulated

Employee Contributions as of the date of reemployment. Creditable service rendered before and after reemployment shall be considered for the purpose of determining entitlement to a normal or early service retirement allowance upon subsequent retirement. Upon subsequent retirement, the Member's retirement allowance shall be equal to the sum of the retirement allowance payable during the previous retirement, adjusted actuarially, if reemployment is prior to the normal retirement date, for the period from the date of reemployment to the date of subsequent retirement or normal retirement date, whichever occurs first, plus the amount computed as a retirement allowance on the basis of final average monthly earnings and creditable service for the period after the last date of reemployment; provided that the total retirement benefit shall not exceed the retirement allowance which would have been payable if all years of creditable service had been a continuous period. If an option had been elected and in effect at the time of reemployment, the option shall continue to be in effect after reemployment, with respect to the retirement benefit payable prior to reemployment.

(c) The return of a disability Retirant to employment with the City prior to the normal retirement date in accordance with Section 5.05(g) shall be governed by said Section 5.05(g). Return of such a person to employment with the City after the normal retirement date, as defined in Section 5.05, or after the date as of which he ceased to be entitled to a disability retirement allowance pursuant to Section 5.05(h) shall be governed by the provisions of Paragraph (a) or (b) of this Section 5.12, whichever is applicable at the time of such return.

(d) Should a Pensioner be employed by the City in any capacity for which regular compensation is paid, the Pension shall cease to be paid to said Pensioner for the period of such employment, and such person shall be subject to the provisions of this Ordinance as any other person employed by the City. Upon termination of such employment, such person shall elect to receive either the benefit to which he was previously entitled as a Pensioner if still eligible therefore or the benefit, if any, to which he is otherwise entitled on the basis of his membership in this Plan.

~~5.12 Early Retirement Incentive Program~~

~~Effective October 27, 2007, a voluntary early retirement incentive program (ERIP) shall be established in accordance with the following terms. The ERIP shall be available to all Members in classifications within the CWA, AFSCME and GSA bargaining units who are age 47 or older and have attained 25 or more years of creditable service on or before January 25, 2008. To elect the ERIP, an eligible Member must submit a completed ERIP election form to the City between October 27, 2007 and January 25, 2008. Members who elect the ERIP must terminate City employment and retire after all ERIP eligibility requirements, but not later than January 25, 2008. The amount of the retirement benefit payable to~~

~~Members who elect the ERIP shall be equal to the pension benefit accrued by such Member at the time of retirement, with no reduction for early retirement.~~

5.13 A deferred retirement option plan (DROP) is hereby established for eligible members as follows:

(a) Eligibility and participation:

1) A Member who attains the normal retirement date shall be eligible to participate in the DROP.

2) A Member's election to participate in the DROP shall be irrevocable. A Member may participate in the DROP only once.

3) An eligible Member may participate in the DROP for a maximum of thirty-six (36) months. Notwithstanding the preceding sentence:

(a) Effective July 17, 2013, Members within classifications in the CWA bargaining unit, who were hired prior to October 27, 2010, and Members not included in any collective bargaining unit, who were hired prior to September 10, 2010, may participate in the DROP for a maximum of sixty (60) months.

(b) Effective October 1, 2013, Members within classifications in the GSAF bargaining unit, who were hired prior to July 14, 2010, may participate in the DROP for a maximum of sixty (60) months.

4) An eligible Member who elects to participate in the DROP must provide at least thirty (30) days' advance written notice to the City of his or her election to participate in the DROP. A Member who elects to participate in the DROP may elect to terminate DROP participation and City employment sooner than the maximum DROP period, with thirty (30) days' advance written notice to the City.

5) Effective July 17, 2013, any Member within classifications in the CWA bargaining unit, and any Member not included in any collective bargaining unit, who previously executed an election form entitling him/her to participate in the DROP for a period of less than sixty (60) months and whose DROP period ceases between July 1, 2013 and July 16, 2016, shall have a one-time opportunity to submit an irrevocable amended election form provided by the Board, within thirty (30) calendar days following the effective date of this ordinance, extending his or her DROP period to a maximum of sixty (60) months in total. Effective October 16, 2013, any Member within classifications

in the GSAF bargaining unit, who previously executed an election form entitling him/her to participate in the DROP for a period of less than sixty (60) months and whose DROP period ceases between October 16, 2013 and October 15, 2016, shall have a one-time opportunity to submit an irrevocable amended election from provided by the Board, within thirty (30) calendar days following the effective date of this ordinance, extending his or her DROP period to a maximum of sixty (60) months in total. Effective April 23, 2014, any Member within classifications in the AFSCME bargaining unit, who previously executed an election form entitling him/her to participate in the DROP for a period of less than sixty (60) months and whose DROP period ceases between April 23, 2014 and April 22, 2015, shall have a one-time opportunity to submit an irrevocable amended election from provided by the Board, within thirty (30) calendar days following the effective date of this ordinance, extending his or her DROP period to a maximum of sixty (60) months in total.

(b) DROP plan features:

- 1) An eligible Member who elects to participate in the DROP will be considered to have retired for purposes of the Plan upon entry into the DROP, except that such Member shall be eligible to vote for and serve as an Employee member of the Board of Trustees during the DROP participation period. The Member's monthly retirement benefit, determined in accordance with the Plan based on years of creditable service and final average monthly earnings at the time the Member enters the DROP, will be paid into the Member's DROP account every month during the DROP period.
- 2) No Member contributions shall be required after a Member enters the DROP, and the Member will not accrue any additional creditable service or any additional benefits under the Plan after entering the DROP. No City normal cost contributions shall be required after a Member enters the DROP and DROP participants shall be excluded from the covered payroll for the Plan.
- 3) A Member who elects to participate in the DROP shall not be eligible for disability or preretirement death benefits under the Plan; nor shall a Member be eligible for any post retirement adjustment provided in Section 5.11 during the DROP participation period.
- 4) A Member who elects to participate in the DROP shall retain the earned balance of annual and sick leave as of the date of entry into the DROP, and shall continue to earn annual and sick leave during the DROP period, in accordance with applicable City ordinances. Alternatively, at the time of entry into the DROP, a Member may request full or partial payment of the earned balance of

annual and sick leave as of the date of entry into the DROP, up to the maximum allowed by applicable City ordinances for employees who terminate City employment, but reduced by the amount of annual and sick leave used for the purchase of additional credited service under Section 4.3, if any, at the Member's rate of compensation upon entering the DROP; provided that the Member must retain at least 120 hours of accrued sick leave after any such payment. Upon termination of City employment, a Member who has participated in the DROP shall be eligible to receive payment for the earned balance of annual and sick leave as of the date of termination, up to the maximum allowed by applicable City ordinances for employees who terminate City employment, but reduced by the amount of annual and sick leave for which payment was received upon entry into the DROP, if any; and further reduced by the amount of annual and sick leave used for the purchase of additional credited service under Section 4.3, if any. In no event shall payments for accrued annual or sick leave be included in a member's Earnings for purposes of the Plan.

5) As a condition of participating in the DROP, the Member must agree to terminate City employment at the conclusion of the DROP period, and to submit an irrevocable letter of resignation stating this prior to entering the DROP. A Member who elects to participate in the DROP must also submit an irrevocable written DROP election prior to entering the DROP on a form provided by the Board. Notwithstanding the preceding sentence:

(a) Eligible Members who are participants in the DROP on July 1, 2013, shall be given a one-time opportunity to submit an irrevocable amended election form, as provided in Section 5.13 (a) 5., extending the DROP period to a maximum of sixty (60) months in total.

(b) Eligible Members who are participants in the DROP on October 1, 2013, shall be given a one-time opportunity to submit an irrevocable amended election form, as provided in Section 5.13 (a) 5, extending the DROP period to a maximum of sixty (60) months in total. Notwithstanding the preceding sentence, eligible Members whose classifications are covered by the AFSCME bargaining unit who are participants in the DROP on April 23, 2014, shall be given a one-time opportunity to submit an irrevocable amended election form, as provided in Section 5.13 (a) 5, extending the DROP period to a maximum of sixty (60) months in total.

6) At the conclusion of the DROP period and upon termination of City employment, the Member's monthly retirement benefit shall be paid to the Member in accordance with the Plan. In the event of

the Member's death during or at the conclusion of the DROP period, a benefit may be payable in accordance with Section 5.07.

7) Participation in the DROP is not a guarantee of City employment, and DROP participants will be subject to the same terms and conditions of employment that are applicable to employees who are not DROP participants.

8) During participation in the DROP, the Member's monthly retirement benefit will be paid into the DROP account, and shall be credited/debited with earnings/losses as provided herein. The Member may direct that their DROP account be invested in any of the investment options approved by the Board, on forms provided by the Board. Any gains on the Member's DROP account investments shall be credited to the Member's DROP account; and any losses incurred by the Member shall be deducted from the Member's DROP account balance, and shall not be made up by the City or the Retirement Plan. A Member's DROP account shall only be credited or debited with earnings/losses while the Member is a participant in the DROP.

9) A DROP participant may designate a beneficiary or beneficiaries for his/her DROP account on a form provided by the Board.

10) Within thirty (30) days following a DROP participant's termination of City employment or death, whichever occurs first, the Member, or in the event of the Member's death the Member's designated beneficiary, may submit a written election on a form approved by the Board, to receive the Member's entire DROP account balance, which shall be distributed to the Member (or in the event of the Member's death, to the Member's designated beneficiary or estate in accordance with paragraph (b)9., below) in a cash lump sum, unless the Member elects to have all or any portion of an eligible rollover distribution paid directly to an IRA or eligible retirement plan specified by the Member in a direct rollover. Any such direct rollover shall be processed in accordance with Article 12 of the Plan. In the event a Member or designated beneficiary does not submit a written election to receive a distribution of the Member's DROP account balance within thirty (30) days following the Member's termination of City employment or death, the Member's DROP account shall be maintained by the Plan but shall not be credited with earnings/losses after thirty (30) days following the Member's termination of City employment or death.

11) If a DROP participant dies before his or her DROP account is distributed, the participant's designated beneficiary shall have the same rights as the participant with respect to the distribution of

the DROP account. If the participant has not designated a beneficiary, the DROP account balance shall be paid to the Member's estate.

12) The Board of Trustees shall make such administrative rules as are necessary for the efficient operation of DROP, but shall not adopt any rule that is inconsistent with this Ordinance or the Plan.

13) The DROP shall be administered so that the Plan remains qualified under the Internal Revenue Service Code and in compliance with applicable laws and regulations.

~~14) Early Retirement Incentive Program. Effective October 27, 2007, a voluntary early retirement incentive program (ERIP) shall be established in accordance with the following terms. The ERIP shall be available to all Members in classifications within the CWA, AFSCME and GSA bargaining units who are age 47 or older and have attained 25 or more years of creditable service on or before January 25, 2008. To elect the ERIP, an eligible Member must submit a completed ERIP election form to the City between October 27, 2007 and January 25, 2008. Members who elect the ERIP must terminate City employment and retire after meeting all ERIP eligibility requirements, but not later than January 25, 2008. The amount of the retirement benefit payable to Members who elect the ERIP shall be equal to the pension benefit accrued by such Member at the time of retirement, with no reduction for early retirement.~~

Limit under Section 415(b) of the Internal Revenue Code. Notwithstanding any other provisions of this Plan, the retirement benefit of a Member shall be reduced to the extent that it exceeds amounts specified in Section 415(b) of the Internal Revenue Code. For purposes of the application of Section 415(b), each Member's compensation shall be determined in accordance with Section 1.415(c)-2 and shall be defined as remuneration for services to the City including wages, salaries, fees for professional services and other amounts for personal services actually rendered in the course of employment with the City to the extent that such amounts are included in gross income (or to the extent amounts would have been received and includible in gross income but for an election under Internal Revenue Code section 125(a), 132(f)(4), 402(e)(3), 402(h)(1)(B), 402(k) or 457(b)), and compensation in excess of the limitations set forth in Section 401(a)(17) of the Internal Revenue Code, and regulations promulgated thereunder, shall be disregarded.

Section 6. Financing

6.01 Assets of Predecessor System

(a) All moneys, investments and assets of the Classified System and Unclassified System as of March 18, 2006 shall become assets of this Plan as of such date.

(b) The amount credited to each member of the Classified System and Unclassified System as "Accumulated Employee Contributions" as of March 18, 2006 shall be credited to each such Member under this Plan on such date as Accumulated Employee Contributions.

6.02 Contributions by Members

(a) Each Member shall contribute to the Plan eight percent (8%) of earnings, except as otherwise provided in this Section 6.02. Notwithstanding the preceding sentence, effective July 14, 2010 each Member in a classification within the AFSCME an GSA bargaining units, and each Unclassified and "Other" Member, shall contribute to the Plan ten percent (10%) of earnings, except as otherwise provided in this Section 6.02. Notwithstanding the first sentence of this subsection (a), effective November 27, 2010, each Member in a classification within the CWA (MBEBA) collective bargaining unit shall contribute to the Plan ten percent (10%) of earnings except as otherwise provided in this Section 6.02, and contingent on state approval of the actuarial impact statement confirming a reduction in the City's annual required pension contribution for fiscal year 2010-2011 associated with the pension changes contained in the 2009-2012 CWA collective bargaining agreement of at least \$1,000,050. The contributions made by each Member to the Plan shall be deducted from the Member's Earnings and designated as Employer contributions pursuant to section 414(h) of the Internal Revenue Code. Such designation is contingent upon the contributions being excluded from the Members' gross income for Federal Income Tax purposes. For all other purposes of the Plan, such contributions shall be considered to be Member contributions.

(b) Notwithstanding subsection (a) above, all persons entering service with the City prior to April 1, 1993 who are in the classifications within the AFSCME bargaining unit; all persons entering service with the City prior to February 21, 1994 who are in classifications within the CWA (MBEBA) bargaining unit, and all persons entering service with the City prior to August 1, 1993 who are in classifications within the GSA bargaining unit or classified as "Other" who were members of the Classified Plan continuously from the date they entered service with the City until March 18, 2006, shall contribute to the Plan ten percent (10%) of their earnings throughout their service as a Member of this Plan. Notwithstanding the

preceding sentence, effective July 14, 2010 each Member described in the preceding sentence who is in a classification within the AFSCME or GSA bargaining units shall contribute to the Plan twelve percent (12%) of earnings; and effective January 18, 2010, each Member described in the preceding sentence, classified as "Other" shall contribute to the Plan twelve percent (12%) of earnings. Notwithstanding the first sentence of this subsection (b), effective November 27, 2010, each Member described in the first sentence of this subsection (b) who is in a classification within the CWA (MBEBA) bargaining unit shall contribute to the Plan twelve percent (12%) of earnings, contingent on state approval of the actuarial impact statement confirming a reduction in the City's annual required pension contribution for fiscal year 2010-2011 associated with the pension change as contained in the 2009-2012 CWA collective bargaining agreement of at least \$1,000,050.

(c) Notwithstanding subsection (a), above, Members of the Unclassified System who entered service with the City prior to October 18, 1992, were continuously members of the Unclassified System from that date until March 18, 2006, and who became Members of this Plan on March 18, 2006, shall contribute to the Plan ten percent (10%) of their earnings. Notwithstanding the preceding sentence, effective January 18, 2010, each Member described in the preceding sentence shall contribute to the Plan twelve percent (12%) of earnings.

(d) Notwithstanding subsection (a), above, Members who are in classifications within the CWA bargaining unit, members of the Classified System who became Members of this Plan on March 18, 2006, and are not in any bargaining unit, and members of the Unclassified System who became Members of this Plan on March 18, 2006, who accrue the maximum retirement benefit payable under the Plan and continue in City employment, shall contribute to the Plan an amount equal to the applicable percentage contribution in accordance with subsections (a), (b) and (c), above, but such percentage shall be applied only to the amount of earnings in excess of such Members' rate of earnings at the time the member accrued the maximum retirement benefit payable under the Plan. For example, if a Member with earnings of \$2,000 each pay period attains the maximum benefit percentage payable under the plan (80% or 90%, depending on which cap applies to the member), the employee contribution will cease until the member has earnings in excess of \$2,000, at which time the Employee contribution would be 10% (or 12%, depending on the contribution rate that is applicable) of the excess over \$2,000. If the member's earnings increase to \$2,500 per pay period, the Member would contribute \$50.00 (at the 10% contribution rate) each pay period. The limitation on member contributions provided in this subsection shall apply to Members in classifications within the AFSCME and GSA bargaining units upon ratification of a collective bargaining agreement that provides for such limitation.

(e) Notwithstanding subsections (a) and (b) above, for members who are in classifications within the AFCSME bargaining unit:

1) For Members hired prior to April 30, 1993, the employee contribution shall be twelve percent (12%) of earnings effective July 14, 2010 through April 30, 2013; ten percent (10%) of earnings effective May 1, 2013 through April 23, 2014; and twelve percent (12%) of earnings effective April 23, 2014.

2) For Members hired on or after April 30, 1993 and before September 30, 2010, the employee contribution shall be ten percent (10%) of earnings effective July 14, 2010 through April 30, 2013; eight percent (8%) of earnings effective May 1, 2013 through April 23, 2014; and ten percent (10%) of earnings effective April 23, 2014.

3) For members hired on or after September 30, 2010, the employee contribution shall be ten percent (10%) of earnings.

4) The employee contribution provided in paragraphs 1. and 2. above shall decrease by two percent (2%) of earnings when the Plan actuary confirms that the City's annual required contribution to the Plan is twenty-three and one-half percent (23.5%) of pensionable payroll or less. The two percent decrease in the employee contribution shall take effect on the same date as the City's annual required contribution of twenty-three and one-half percent (23.5%) of pensionable payroll or less.

6.03 Contributions by City

(a) It is the intent of this Ordinance that the City contribute to the Plan each year the amounts actuarially determined to be required, in addition to contributions by Members, to cover the cost of the benefits provided by the Plan. All administrative expenses shall be paid by the Plan. Effective September 30, 2013, the City shall annually contribute no less than the net City's "normal cost" of the Plan. The net "normal cost" is the annual cost of the Plan net of Member contribution assigned to the current Plan year. If the net City "normal cost" for any Plan year exceeds the City's annual required contribution as determined in accordance with Part VII, Chapter 112, Florida Statutes, the excess shall be held in reserve as part of Fund assets, designed as the pension stabilization fund, and shall be used to offset the City's annual required contribution to any Plan year as determined by the City. The pension stabilization fund shall be accounted for separately and not included as assets of the Fund for Plan's valuation purposes, and shall be annually credited or debited with gains and losses

at the same rate of return as the overall net market rate of return on Fund investments.

(b) An actuarial valuation investigation of the Plan shall be performed annually to determine the contribution payable by the City. On the basis of regular interest and of such mortality and service tables as shall be adopted by the Board of Trustees, the actuary shall determine, immediately after making each valuation, the percentage of the compensation of all Members required, in addition to contributions payable by such Members, as contributions payable by the City to provide the benefits of the Plan currently accruing to such Members; the rate per centum so determined shall be known as the "Normal Contribution Rate" and the contributions based on this rate shall be known as "Normal Contributions." In addition, the actuary shall determine the part of the liabilities for benefits under the Plan not covered by assets in hand, future contributions of Members and future normal contributions of the City and this amount shall be known as the "Unfunded Accrued Liability"; the percentage of compensation of Members determined to be payable on account of such liability shall be known as the "Accrued Liability Contributions Rate". Also, the actuary shall determine the percentage of compensation necessary to provide for payment of the administrative expenses of the Plan and this rate shall be known as the "Administrative Cost Rate". The actuary shall recommend on the basis of each valuation a Normal Contribution Rate and an Accrued Liability Contribution Rate and an Administrative Cost Contribution Rate.

(c) It is the intention of this Ordinance that contributions be set at such levels, as recommended by the Actuary designated by the Board, as to provide for a systematic amortization of any unfunded accrued liability over a period of thirty (30) years from the date as of which such liability is incurred.

(d) During the Plan year beginning October 1, 2013, and at least once every three years thereafter, there shall be an experience study of the Plan's actuarial assumptions performed by the actuary selected by the City. The actuary shall make recommendations for any changes and assumptions based on the results of the experience study. In the event the Board of Trustees or Plan actuary disagrees with the recommended assumption changes, the Board or Plan actuary shall present the basis of their disagreement and justify any deviation from the recommended assumptions to the City Commission.

(e) Effective September 30, 2013, the City shall require five, ten and twenty year projections of required pension contributions as part of the annual actuarial valuations for the Plan. These projections shall be based on current actuarial assumptions for the Plan. The projections shall be

updated to reflect the cost of any proposed benefit enhancement before the City Commission agrees to the enhancement. The cost of these studies shall be funded separately from the annual contribution to the pension plan.

6.04 Contributions by other Agencies. The Miami Beach Visitor and Convention Authority, this Plan, the Classified Plan, the Unclassified Plan, and the City Pension Fund for Firemen and Policemen shall contribute to this Plan the same percentage of payroll rate as the City on behalf of employees who become members of this Plan.

Section 7. Preservation of Benefits Plan

7.01 The Preservation of Benefits Plan adopted in Resolution No. 89-19808 is incorporated herein and revised as set forth in this Article 7. The Preservation of Benefits Plan is established as a qualified governmental excess benefit arrangement pursuant to section 415(m) of the Internal Revenue Code. The Preservation of Benefits Plan is provided for the purpose of providing benefits to a payee (Retirant or Beneficiary) of this Retirement Plan whose benefits would otherwise be limited by section 415(b) of the Internal Revenue Code.

7.02 A payee of the Plan shall participate in the Preservation of Benefits Plan whenever his or her earned benefit under the Plan exceeds the benefit maximum established under section 415(b) of the Internal Revenue Code. Participation in the Preservation of Benefits Plan shall continue for as long as the payee's earned benefit under the Plan is reduced by the application of the maximum benefit limit under section 415(b) of the Internal Revenue Code.

7.03 On and after March 18, 2006, the City shall pay to each eligible payee of the Plan who retires on or after such date, a supplemental benefit equal to the difference between the amount of the payee's monthly retirement benefit which would have been payable under the Plan if not for a reduction due to the application of section 415(b) of the Internal Revenue Code, and the reduced monthly retirement benefit as paid to the payee. The Preservation of Benefits Plan benefit shall be computed and payable under the same terms and conditions and to the same person as would have applied under the Plan were it not for the reduction resulting from the application of section 415(b) of the Internal Revenue Code.

7.04 The benefits paid under the Preservation of Benefits Plan shall not be subject to execution, garnishment, attachment, or any other process of any court with respect to a payee under the Preservation of Benefits Plan.

7.05 The Preservation of Benefits Plan shall be unfunded within the meaning of the federal tax laws. No payee contributions or deferrals, direct or indirect, by election or otherwise shall be made or allowed under the Preservation of Benefits Plan.

7.06 The Preservation of Benefits plan shall be administered by the City. Benefits due under the Preservation of Benefits plan as determined by the City Finance Director shall be paid timely by the City. The Finance Director may make modifications to the benefits payable under the preservation of benefits plan as may be necessary to maintain compliance with section 415(m) and other relevant sections of the Internal Revenue Code. The Board of Trustees shall furnish to the City all records necessary for the administration of the Preservation of Benefits Plan, including, but not limited to, the making of requisite calculations and disbursements under the Preservation of Benefits Plan.

Section 8. Board of Trustees

8.01 The Plan created by this Ordinance shall be construed as a trust and shall be administered by a Board of Trustees. The Board shall have the general responsibility for the proper operation and management of the Plan and for making effective the provisions of this Ordinance.

8.02 The Board shall consist of nine (9) persons, each of whom shall be designated as a trustee, as follows:

- (a) Three Members of the Plan elected by Employees who are Members of the Plan;
- (b) Two (2) Retirants elected by the retired Members of the Plan; and
- (c) Four persons appointed by the City Manager;

8.03 The elected members of the Board of Trustees of the Classified System shall continue to serve as the elected Trustees of this Plan for the remainder of their terms. The City Manager may reappoint some or all of the Trustees who were appointed to serve as Trustees of the Classified System, or may appoint new Trustees to serve as appointed Trustees of this Plan. Elected Trustees shall serve for three (3) year terms and the rules governing their election shall be as prescribed by the Board. Appointed Trustees shall serve at the pleasure of the City Manager.

8.04 Each trustee shall take an oath of office within ten (10) days after his election or appointment. A trustee shall serve without compensation but shall be reimbursed for any expenses incurred as the result of service as a trustee.

8.05 The Board shall annually elect from its membership a Chairman and a Vice Chairman and shall elect a Secretary from among the City Manager's appointees. Each trustee shall be entitled to one (1) vote, and five (5) concurring votes shall be necessary for a decision by the trustees at any meeting of the Board.

8.06 The Board shall have, in addition to all other powers and duties arising out of this Ordinance not otherwise specifically reserved or delegated to others, the

following specific powers and duties:

- (a) Hold regular meetings at least quarterly in each year and special meetings at such time as a majority of the Board or the Chairman may deem necessary.
- (b) Establish rules and regulations to implement the provisions of this Ordinance, and formulate policy for the proper administration of the Plan and the transaction of its business.
- (c) Consider and pass on all applications for retirement and other benefits, authorize the granting of all retirement allowances, pensions and lump sum settlements, and suspend any payment or payments, all in accordance with the provisions of this Ordinance.
- (d) Adopt from time to time service and mortality tables and the rate of regular interest for use in actuarial calculations in connection with the Plan.
- (e) Submit to the City Manager on or before July 1 of each year an estimate of the amount of appropriation required for the purpose of the Plan for the following fiscal year. Any expenditure of the Board in excess of the amounts appropriated by the City in any budget category must be approved in advance by the City Manager and City Commission.
- (f) Employment of such actuarial, legal or investment counsel or specialized technical assistance as may be required for the efficient operation of the Plan.
- (g) Maintain accounts and records showing the fiscal transactions of the Plan and keep in convenient form such data as may be necessary for the actuarial valuations of the Plan; require from each person covered under the Plan such information as shall be necessary for the proper operation of the Plan; require the maintenance of adequate accounting records which shall at all times reflect the financial condition of the Plan.
- (h) Provide for the receipt of all payments made to the Plan and records thereof, and cause them to be deposited immediately with the custodian of the fund.
- (i) Keep a permanent record of all proceedings of the Board which shall be tape recorded and available for examination by any Member, Retirant or Pensioner, or by any Officer of the City.
- (j) Designate for specified periods, or as occasion may require, three (3) physicians who are not eligible for membership in the Plan as Physical Examiners; such Physical Examiners shall arrange for, and conduct, all physical and mental examinations required under this Ordinance, shall

investigate all essential statements and certificates in connection with applications for disability retirement, and shall report in writing to the Board their conclusions and recommendations upon all matters referred to them.

(k) Be the legal custodian of all cash and securities of the Plan, invest and reinvest all cash not required to meet current disbursements in securities; and subject to the limitations of this Ordinance, the Board shall have full power to hold, purchase, sell, assign, transfer and dispose of any of the securities and investments as well as the proceeds of such investments.

(l) Provide for certification on its behalf of all warrants issued in accordance with actions of the Board authorizing payments for benefits, expenses and investments out of funds belonging to the Plan, and provide for certification on its behalf of all amounts required by the Plan to be levied as taxes by the City.

(m) Cause a general investigation to be made by a Consulting Actuary, at least once every three (3) years, and cause recommendations to be furnished as a result of such investigation as to the actuarial tables and rates of contributions to be used.

(n) Cause an audit of the affairs of the Plan to be made annually, with interim quarterly reports by an independent Certified Public Accountant, and submit a copy thereof to the City Manager as soon as possible after the end of each fiscal year.

(o) Accept any gift, grant or bequest of any money or securities under the terms designated by the grantor, or, if no special purpose or allocation is specified, for credit to the funds of the Plan.

(p) Make available to Members, Retirants and Pensioners a financial statement including a summary of the report of the Certified Public Accountant, and issue to each Member, as soon as practicable following the close of each fiscal year, an individual statement showing the Accumulated Employee Contributions standing to his credit.

(q) Require the preparation of an annual report as of the close of each fiscal year for submission to the City Commission; said report shall embody, among other things, a financial balance sheet and a statement of receipts and disbursements for the fiscal year, schedules of acquisitions and sales or exchanges of investments, a statement of investments owned at the close of the fiscal year and other pertinent financial and operating data.

(r) Establish rules governing the election of the trustees as described in Section 8.02 (a) and (b) and ~~(c)~~.

(s) May appoint an Administrator of such Pension Plan and fix the terms of employment of such Administrator who shall serve at the pleasure of the Board.

Section 9. Investments

9.01 The assets of the Plan, in excess of the amount required to meet current operations or pension and retirement payments, shall be invested in accordance with the following paragraph.

The trustees shall, in acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of the Plan, exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. Within the limitations of the foregoing standard, a trustee is authorized to acquire and retain every kind of property, real, personal or mixed, and every kind of investment specifically including, but not by way of limitation, bonds, debentures and other corporate obligations, and stocks, preferred or common, which men of prudence, discretion and intelligence acquire or retain for their own account and, within the limitations of the foregoing standard, a trustee may retain property acquired, without limitation as to time and without regard to its suitability for original purchase.

9.02 All investments shall be clearly marked to indicate that they are a part of the assets of the Plan, and to the extent possible they shall be so registered.

9.03 Transactions involving the sale of bonds and simultaneous purchase of other bonds for substantially the same consideration may be treated as exchanges rather than two separate transactions. No adjustments shall be made in investment valuations for ordinary current market price fluctuations, but reserves may be provided for anticipated losses upon redemption as determined by the Board.

9.04 Except as otherwise herein provided, no trustee or employee of the Board shall have any direct interest in the income, gains or profits of any investments made by the Board, nor shall any such person receive any pay or emolument for services in connection with any investment. Proof that any such person violated any of these restrictions shall make such person guilty of a misdemeanor or felony, as the case may be, and such person shall be punishable therefor as provided by law.

9.05 Beginning January 1, 2010 the Board shall proceed to sell, redeem, divest, or withdraw all publicly traded securities of any corporation or other business entity conducting business with the countries of Sudan and Iran, as follows:

(a) Sections 215.442 and 215.473, Florida Statutes, require the State Board of Administration (SBA) to make its best efforts to identify "Scrutinized Companies," as defined in section 215.473(t), Florida Statutes. The SBA has created a list of such companies ("scrutinized companies list"), which state law requires be notified and ultimately divested by the Florida Retirement System (FRS).

(b) The definition of "scrutinized company" as to Sudan generally includes a company with business operations in Sudan with revenues or assets linked to oil-related or power-production activities under certain circumstances, is complicit in Darfur genocide, or the company supplies military equipment within Sudan under certain conditions.

(c) The definition of "scrutinized company" as to Iran general includes a company with business operations that involve the Government of Iran or certain companies, and have revenues or assets linked to Iran and involve oil-related or mineral-extraction under certain conditions.

(d) "Scrutinized company" also includes any company that is complicit in the Darfur genocide.

(e) Notwithstanding any provision of this Plan to the contrary, the Board, or its designee, shall annually survey all corporations or other business entities in which the assets of the Retirement System are invested in order to ascertain whether any of the assets of the Retirement System are invested in a corporation or other business entity that is appears on the SBA Scrutinized Companies List, as periodically amended.

(f) The Board, on or before the first day of January of each year, shall make available to the public the findings of its survey.

(g) Notice of the provisions of this section shall be given to investment managers for the Retirement System.

(h) The Board and its named officers or investment advisors may not be deemed to have breached their fiduciary duty in any action taken to dispose of any such security, and the Board shall have satisfactorily discharged the fiduciary duties of loyalty, prudence, and sole and exclusive benefit to the members of the Plan and their beneficiaries if the actions it takes are consistent with the duties imposed by section 215.473, Florida Statutes and the manner of the disposition, if any, is reasonable as to the means chosen.

(i) The divestiture of any security pursuant to this section must be completed by September 30 of any year following identification of Retirement System assets invested in a corporation or other business entity appearing on the SBA Scrutinized Companies List.

Section 10. Administration

10.01 Pension Administrator

The Pension Administrator shall have responsibility for the administration of the Plan. As such, he will have responsibilities which shall include, but not necessarily be limited to, the duties specified in this Section 10.01.

- (a) The Pension Administrator shall establish and maintain records on all persons covered under the Plan.
- (b) The Pension Administrator shall verify the amounts entered by the Payroll Department as deductions for contributions by Employees to the Plan and shall certify all payrolls on which such deductions are entered.
- (c) The Pension Administrator shall receive applications for retirement and other benefits, compute retirement allowances, pensions and lump sum settlements, compute and credit interest to individual accounts and make such analyses, computations and other determinations and records as the Board may deem necessary for the efficient operation of the Plan.
- (d) It shall be the duty of the Pension Administrator to notify the Board of any new Members, withdrawal of Members, applications for retirement and lump sum payments, and such other personnel information as the Board may require.
- (e) The Pension Administrator shall maintain necessary records to show receipts by payroll deductions, City contributions, donations and investment returns, and to show disbursements for retirement allowances, pensions and lump sum settlements. He shall also keep such other financial records of the moneys and investments of the Plan as the Board deems necessary.
- (f) All payments from the funds of the Plan shall be made by the Pension Administrator only upon vouchers signed by the Chairman of the Board of Trustees. A duly attested copy of a resolution of the Board bearing on its face the specimen signature of the Pension Administrator shall be filed as authority for making payments upon such vouchers. No voucher shall be drawn unless it shall have been previously authorized by resolution of the Board, except that the Board may, by resolution authorize the Pension Administrator to issue vouchers for refunds of Accumulated Employee Contributions in accordance with Section 5.10 and for minor adjustments in contributions by Employees.
- (g) For the purpose of meeting current disbursements, cash equal in amount, as nearly as practicable, to the regular demands for the ensuing

month shall be kept available in deposit.

10.02 City Attorney

(a) The City Attorney shall serve as legal advisor of the Board when requested to do so, and his services on behalf of the Board shall not be compensated additionally.

10.03 Legal Counsel

(a) The Board shall be vested with the authority to retain private legal counsel for representation thereof.

(b) Counsel retained hereunder shall be subject to the approval of the City Commission.

Section 11. General

11.01 The Assets of the Classified and Unclassified Systems as of March 18, 2006 shall become the assets of this Plan on such date. The assets of the Plan shall be invested as one fund, and no particular person, or group of persons, shall have any right in, or to, any specific security or property, or in or to any item of cash, other than an undivided interest in the whole, as specified in the provisions of this Ordinance.

11.02 All the funds of the Plan shall be held in trust for use in providing the benefits of the Plan and paying its expenses not paid directly by the City; provided that no part of the corpus or income of the funds shall be used for, or diverted to, purposes other than for the exclusive benefit of members or their beneficiaries under the Plan prior to the satisfaction of all liabilities for benefits with respect to them or for the administrative expenses of the Plan. In case of termination of the Plan, or in the event of the discontinuance of contributions thereunder having the effect of such termination, the rights of all members of the Plan to benefits accrued to the date of such termination or discontinuance, to the extent then funded, shall be nonforfeitable.

11.03 All retirement allowances, pensions, and other benefits payable under the provisions of this Ordinance, and all accumulated credits of Employees in the Plan shall not be assignable.

11.04 Any person who shall knowingly make any false statement, or shall falsify, or permit to be falsified, any record or records of the Plan in any attempt to defraud the Plan shall be guilty of a misdemeanor, and shall be punishable therefor, upon conviction, by a fine of not more than One Thousand Dollars (\$1,000.00) or imprisonment for not more than ninety (90) days, or both, in the discretion of the Court.

11.05 No provision of any ordinance, which provides wholly or partly, at the

expense of the City, for retirement allowances, pensions, or other benefits for employees of the City, their widows or other dependents, shall apply to persons covered by the Plan established by this Ordinance.

11.06 Any changes in contributions or benefits contained in this Ordinance shall apply prospectively to Members who are employed by the City on March 18, 2006 who retire on or after such effective date, and to Members who enter the service of the City after such effective date.

11.07 Effective as of March 18, 2006, notwithstanding anything herein to the contrary, a member's benefits shall commence no later than April 1 of the calendar year following the later of (a) the calendar year in which he or she attains age 70 ½ or (b) the calendar year in which the member retires. All distributions from the Plan shall conform to the regulations issued under Section 401(a)(9) of the Internal Revenue Code, including the incidental death benefit provision of Section 401(a)(9)(G) of the Internal Revenue Code. Further, such regulation shall override any Plan provision that is inconsistent with Section 401(a)(9) of the Internal Revenue Code.

11.08 Notwithstanding any other provision of this Plan to the contrary, a form of retirement income payable from this plan shall satisfy the following conditions:

(a) If the retirement income is payable before the member's death:

1) It shall either be distributed or commence to the member not later than April 1 of the calendar year following the later of the calendar year in which the member attains age 70 1/2, or the calendar year in which member retires;

2) The distribution shall commence not later than the calendar year defined above; and (a) shall be paid over the life of the member or over the lifetimes of the member and spouse, issue or dependent, or (b) shall be paid over the period extending not beyond the life expectancy of the member and spouse, issue or dependent.

Where a form of retirement income payment has commenced in accordance with the preceding paragraphs and the member dies before his entire interest in the plan has been distributed, the remaining portion of such interest in the plan shall be distributed no less rapidly than under the form of distribution in effect at the time of the member's death.

(b) If the member's death occurs before the distribution of his interest in the plan has commenced, member's entire interest in the plan shall be distributed within five years of member's death, unless it is to be distributed in accordance with the following rules:

1) The member's remaining interest in the Plan is payable to his

spouse, issue or dependent;

2) The remaining interest is to be distributed over the life of the spouse, issue or dependent or over a period not extending beyond the life expectancy of the spouse, issue or dependent; and

3) Such distribution begins within one year of the member's death unless the member's spouse, is the sole designated beneficiary, in which case the distribution need not begin before the date on which the member would have attained age 70 1/2 and if the member's spouse dies before the distribution to the spouse begins, this section shall be applied as if the spouse were the member.

Section 12. Rollover Distributions

12.01 Election by Distributee

This Article applies to distributions made on or after January 1, 1993. Notwithstanding any provision of this Ordinance to the contrary that would otherwise limit a distributee's election under this Article, a distributee may elect, at the time and in the manner prescribed by the plan administrator, to have any portion of an eligible rollover distribution paid directly to an eligible retirement plan specified by the distributee in a direct rollover.

12.02 Definitions

For purposes of this Article, the following definitions shall apply:

(a) Eligible rollover distribution: An eligible rollover distribution is any distribution of all or any portion of the balance to the credit of the distributee, except that an eligible rollover distribution does not include: any distribution that is one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the distributee or the joint lives (or joint life expectancies) of the distributee and the distributee's designated beneficiary, or for a specified period of ten years or more; any distribution to the extent such distribution is required under Section 401(a)(9) of the Internal Revenue Code; and the portion of any distribution that is not includible in gross income.

(b) Eligible retirement plan: An eligible retirement plan is individual retirement account described in Section 408(a) of the Internal Revenue Code, an individual retirement annuity described in Section 408(b) of the Internal Revenue Code, an annuity plan described in Section 403(a) of the Internal Revenue Code, an eligible deferred compensation plan described in section 457(b) of the Internal Revenue Code which is maintained by an

eligible employer described in section 457(e)(1)(A) of the Internal Revenue Code and which agrees to separately account for amounts transferred into such plan from this Plan, an annuity contract described in section 403(b) of the Internal Revenue Code, or a qualified trust described in section 401 (a) of the Internal revenue Code that provides or accepts the distributee's eligible rollover distribution. Effective for distributions made after December 31, 2001, an eligible retirement plan shall also mean an annuity contract described in Section 403(b) of the Internal Revenue Code and an eligible plan under Section 457(b) of the Internal Revenue Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state and which agrees to separately account for amounts transferred into such plan from this Plan. ~~However, in the case of an eligible rollover distribution to the surviving spouse or domestic partner, an eligible retirement plan is an individual retirement account or individual retirement annuity.~~

(c) Distributee: A distributee includes an Employee or former Employee. In addition, the Employee's or former Employee's surviving spouse or domestic partner are distributees with regard to the interest of the spouse or domestic partner. Effective as of January 1, 2008, an Employee's or former Employee's non-spouse Beneficiary is a distributee with regard to the interest of the Employee or former Employee.

(d) Direct rollover: A direct rollover is a payment by the plan to the eligible retirement plan specified by the distributee. Effective as of January 1, 2008, a non-spouse Beneficiary may make a direct rollover only to an "inherited" individual retirement account as described in Section 408(b) of the Internal Revenue Code. If a non-spouse Beneficiary receives a distribution from the Plan, the distribution is not eligible for a 60-day (non-direct) rollover.

3. Rollovers or Transfers into the Fund. On or after March 18, 2006, the Plan will accept an eligible rollover distribution or direct transfer of distribution for the purchase of credited service pursuant to Section 4.4 as follows:

(a) Transfers, Direct Rollovers or Member Rollover Contributions from Other Plans. The Plan will accept either a direct rollover of an eligible rollover distribution or a member contribution of an eligible rollover distribution from a qualified plan described in section 403(a) of the Code, from an annuity contract described in section 403(b) of the Code, or from an eligible plan under section 457(b) of the Code, which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state. The Plan will also accept legally permissible Member requested transfers from eligible retirement plans.

(b) Member Rollover Contributions from 401 (a) Plans and IRAs. The

plan will accept a member rollover contribution of the portion of a distribution from qualified plan described in section 401 (a) of the Code, or from an individual retirement account or annuity described in section 408(a) or 408(b) of the Code, that is eligible to be rolled over and would otherwise be includible in the member's gross income.

Section 13. Employees hired on or after September 30, 2010

Notwithstanding any other provision of the Plan, for employees hired on or after September 30, 2010, other than employees hired in classifications within the CWA (MBEBA) bargaining unit, the provisions of the Miami Beach Employees' Retirement Plan created by Ordinance 2006-3504, as subsequently amended, shall be applicable, except as set forth in paragraphs (a) through (i.) below. Notwithstanding any other provision of the Plan, for employees hired on or after October 27, 2010 in classifications within the CWA (MBEBA) bargaining unit, the provisions of the Miami Beach Employees' Retirement Plan created by Ordinance 2006-3504, as subsequently amended, shall be applicable, except as set forth in paragraphs (a) through (i.) below.

- (a) The normal retirement date shall be age 55 with at least thirty (30) years of creditable service, or age 62 with at least five (5) years of creditable service.
- (b) The early retirement date shall be the date on which the member's age plus years of creditable service equal 75, with a minimum age of 55
- (c) Final average monthly earnings shall be an average of the highest five (5) years of employment.
- (d) The benefit multiplier shall be 2.5% multiplied by the member's years of creditable service, subject to a maximum of 80% of the member's FAME.
- (e) The retiree Cost of Living Adjustment shall be 1.5% per year, with the first adjustment deferred to one year after the end of the DROP.
- (f) The employee contribution shall be 10% of salary.
- (g) The standard form of benefit shall be a lifetime annuity.
- (h) Members who separate from City employment with 5 or more years of creditable service but prior to the normal or early retirement date shall be eligible to receive a normal retirement benefit at age 62.
- (i) Employees shall be eligible to enter the DROP at the normal retirement age specified in paragraph a, above, and may participate in the DROP for a maximum of 5 years.

Section 14. Application to Members of the CWA bargaining unit who terminate City employment following ratification of the 2003-2006 collective bargaining agreement and before March 18, 2006

14.01. All provisions of this plan that are applicable to employees in classifications within the CWA bargaining unit shall apply to such employees who are employed on the date the 2003-2006 collective bargaining agreement between the City and the CWA is ratified by the CWA bargaining unit and who terminate City employment after that date, but prior to March 18, 2006, under the following conditions:

- (a) On or after February 1, 2006, the employee must submit a letter of resignation/retirement to their respective Department Head and the City Labor Relations Director providing a minimum of two (2) weeks notice, (i.e., the employee will agree to work a minimum of ten (10) additional working days (not including sick or annual leave time); and
- (b) The employee will leave any accrued sick or annual leave time with the City until they exercise any retirement options contained in this ordinance; and
- (c) Following the second reading of this ordinance, the employee will have a period not to exceed twenty (20) days to submit all changes and any required monetary payments for the buyback and/or 401A conversion to the Pension Office.
- (d) In the event that the election and/or full payment is not made within the specified twenty (20) day time frame, there will be no changes made to the pension for that employee, and any accrued sick or annual leave shall be paid to the employee.

Section 2. Incorporation by Reference of Resolution No. 2013-28290.

Resolution No. 2013-28290, accepting the recommendations of the Finance and Citywide Projects Committee at its May 13, 2013 meeting, to adopt the Budget Advisory Committee's proposed policies and guidelines in order to ensure long term pension reform, is incorporated herein by reference pursuant to Ordinance No. 2013-3806.

Section 3. Conflicts and Severability.

(a) All Ordinances, and parts of ordinances, in conflict herewith shall be and the same, are hereby repealed.

(b) In the event any article, section, paragraph, sentence, clause, or phrase of this Ordinance shall be adjudicated invalid or unconstitutional, such adjudication shall in no manner affect the other articles, sections, paragraphs, sentences, clauses or phrases of this Ordinance, which shall be and remain in full force and effect as fully as if the item so adjudged invalid or unconstitutional was not originally a part hereof.

Section 4. Effective Date.

This Ordinance shall take effect the ____ day of _____, 2015.

PASSED and ADOPTED this _____ day of _____, 2015.

PHILIP LEVINE
MAYOR

ATTEST:

RAFAEL E. GRANADO
CITY CLERK

**APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION**



City Attorney



Date

(Sponsored by Commissioner Deede Weithorn)

Underscore denotes new language
~~Strikethrough denotes deleted language~~

(Ordinance Nos. 2006-3504, 2006-3530, 2007-3575, 2009-3626, 2009-3664, 2010-3693, 2010-3706, 2013-3806, 2014-3837, 2014-3864)

R7

RESOLUTIONS

R7

Condensed Title:

A Resolution Of The Mayor And City Commission Of The City Of Miami Beach, Florida, Approving And Authorizing The Mayor And City Clerk To Execute A Construction Manager At Risk Agreement With Clark Construction Group, LLC ("Clark"), Pursuant To Request For Proposals (RFP) No. 2015-129-ME, For Construction Manager At Risk Services For The Miami Beach Convention Center Renovation And Expansion Project ("Project").

Key Intended Outcome Supported:

Improve alliance with key business sectors, namely hospitality, arts & international business with a focus on enhanced culture, entertainment & tourism.

Supporting Data (Surveys, Environmental Scan, etc , N/A

Item Summary/Recommendation:

On February 11, 2015, the City Commission elected to re-bid the Project under a Construction Manager-at-Risk (CMR) project delivery method, an approach that allows for the continued development of the design for the Project with the benefit of input from the Construction Manager prior to establishment of the Guaranteed Maximum Price (GMP) for the Project, currently anticipated to occur on or about October, 2015.

On March 2, 2015 a request for proposal was issued, advertised and emailed to national and local construction management firms. Only one proposal was received from Clark Construction ("Clark").

On April 15, 2015, the City Commission authorized the Administration to eliminate the RFP Evaluation Committee and open Clark's sealed proposal, to permit the City Manager to proceed with the due diligence process and make a recommendation to the City Commission concerning award. On April 29, 2015, the City Commission accepted the recommendation of the City Manager to award the RFP to Clark and authorized the Administration to enter into negotiations with Clark, subject to prior approval of the final agreement by the Mayor and City Commission.

The Construction Manager at Risk Agreement attached and incorporated as Exhibit "A" hereto, provides for the Construction Manager to perform Pre-Construction Phase Services; creates a process for the development of a Guaranteed Maximum Price ("GMP") for the Project, subject to City Commission approval of a GMP Amendment; fixes the Construction Manager's Overhead and Profit Fee for the duration of the Project; and establishes the contract terms and provisions that detail the City's and the Construction Manager's rights and responsibilities with respect to the Project, including with respect to the construction phase and post-construction phase of the Project.

CMR Fee Proposal

Clark initially proposed a CMR fee equating to 3.95% of the work they manage. This equated to a fee of approximately \$19 million based on the current budget. Clark has agreed to reduce their fee to 3.8% of the work they manage, or to \$18.3 million based on the current budget.

Pre-Guaranteed Maximum Price ("GMP") Services Proposal

Clark initially proposed a Pre-GMP Services Fee of \$3,669,799. The Pre-GMP Services Fee has been reduced to \$2,594,073, a reduction of \$1,075,726 (assuming a successful GMP negotiation). If a successful GMP cannot be reached, the City is to pay an additional \$400,000 demobilization fee.

The Administration recommends the adoption of the Resolution.

Advisory Board Recommendation:

N/A

Financial Information:

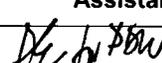
| Source of Funds: | | Amount | Account |
|---|--------------|--------------------|---------------------------|
|  | 1 | \$2,594,073 | Fund 429 – Line of Credit |
| | 2 | | |
| | Total | \$2,594,073 | |

Financial Impact Summary: N/A

City Clerk's Office Legislative Tracking:

Maria Hernandez, ext. 2584

Sign-Offs:

| Department Director | Assistant City Manager | City Manager |
|--|---|---|
| MH  |  | JLM  |

T:\AGENDA\2015\May\MBCC\CMAR Agreement with Clark Construction\MBCC CMR Agreement Execution - SUMMARY.docx

MIAMI BEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

COMMISSION MEMORANDUM

TO: Mayor Philip Levine and Members of the City Commission

FROM: Jimmy L. Morales, City Manager

DATE: May 20, 2015

SUBJECT: **A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING AND AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A CONSTRUCTION MANAGER AT RISK AGREEMENT WITH CLARK CONSTRUCTION GROUP, LLC ("CLARK"), PURSUANT TO REQUEST FOR PROPOSALS (RFP) NO. 2015-129-ME, FOR CONSTRUCTION MANAGER AT RISK SERVICES FOR THE MIAMI BEACH CONVENTION CENTER RENOVATION AND EXPANSION PROJECT ("PROJECT").**

ADMINISTRATION RECOMMENDATION

Adopt the Resolution.

FUNDING

\$2,594,073 Fund 429 - Line of Credit

KEY INTENDED OUTCOME

Improve alliance with key business sectors, namely hospitality, arts & international business with a focus on enhanced culture, entertainment & tourism.

BACKGROUND

On February 11, 2015, the City Commission elected to re-bid the Project under a Construction Manager-at-Risk (CMR) project delivery method, an approach that allows for the continued development of the design for the Project with the benefit of input from the Construction Manager prior to establishment of the Guaranteed Maximum Price (GMP) for the Project, currently anticipated to occur on or about October, 2015.

On March 2, 2015 a request for proposal was issued, advertised and emailed to national and local construction management firms. Proposals were due on April 9, 2015. Only one proposal was received from Clark Construction ("Clark").

On April 15, 2015, the City Commission authorized the Administration to eliminate the RFP Evaluation Committee and open Clark's sealed proposal, to permit the City Manager to proceed with the due diligence process and make a recommendation to the City Commission concerning award. On April 29, 2015, the City Commission accepted the recommendation of the City Manager to award the RFP to Clark and authorized the Administration to enter into negotiations with Clark, subject to prior approval of the final agreement by the Mayor and City Commission.

The negotiated Construction Manager at Risk Agreement attached and incorporated as Exhibit "A" hereto, provides for the Construction Manager to perform Pre-Construction Phase Services; creates a process for the development of a Guaranteed Maximum Price ("GMP") for the Project, subject to City Commission approval via a GMP Amendment; fixes the Construction Manager's Overhead and Profit Fee for the duration of the Project; and establishes the contract terms and provisions that specify the City's and the Construction Manager's rights and responsibilities with respect to the Project, including with respect to the construction phase and post-construction phase of the Project.

ANALYSIS

Key Contractual Terms

The attached contract includes the following key contractual terms:

1. Comprehensive scope of services for Pre-Construction Phase Services, Construction Phase Services, and the Post-Occupancy/Close-out Phase;
2. Process and timeline for development of the Guaranteed Maximum Price for the Project based on 65% completed Construction Documents, subject to City Commission approval of a GMP Amendment;
3. Competitive "open book" trade bidding for work performed by Subcontractors and Suppliers;
4. Detailed provisions for Quality Assurance/Quality Control to ensure City's quality requirements are met;
5. Schedule requirements and specified damages for failure to achieve key Art Basel milestones, as well as liquidated damages in the amount of \$15,000 per day for failure to timely achieve Substantial Completion (currently anticipated to be May 31, 2018);
6. Shared savings split in the event the final cost of the Project is certified to be within the GMP, with 75% of savings to City and 25% to Construction Manager;
7. Obligation to develop plans for local workforce hiring to maximize the employment of City of Miami Beach and Miami-Dade County residents, with periodic reporting to measure success; and
8. Detailed audit rights in favor of City of Miami Beach and Miami-Dade County (in accordance with Miami-Dade County General Obligation Bond grant requirements).

CMR Fee Proposal

Clark initially proposed a CMR fee equating to 3.95% of the work they manage. This equated to a fee of approximately \$19 million based on the current budget. Clark has agreed to reduce their fee to 3.8% of the work they manage, or to \$18.3 million based on the current budget.

Initial anecdotal research indicated CMR fees typically ranged from 2.75% to 3.0%. Detailed research has revealed that actual fees are typically higher. Below is a summary of comparable CMR fees for local and national projects:

| | | Year* | Const. Cost | Fee |
|--------------------------------|-----------------------|---------|-------------|---------|
| Miami Marlins Ballpark | Hunt/Moss JV | 2012 | \$620m | 3.15% |
| Miami Science Museum | Suffolk | Current | \$109m | 3.5% |
| Boston Conv. & Expo Center | Clark/Hubert Hunt | 2004 | \$463m | < 3.95% |
| Amway Center Orlando | Hunt | 2010 | \$480m | < 4% |
| Orlando Performing Arts Center | Balfour Beatty | 2014 | \$200m | < 4% |
| Orlando Phase V | Hunt/Clark JV | 2003 | \$520m | 4% |
| Phoenix CC Expansion | Hunt | 2008 | \$552m | 4% |
| Music City Center Nashville | Clark | 2013 | \$372m | 4.25% |
| McCormick Place HQ Hotel | Clark | Current | \$335m | 4.50% |
| McCormick Place Events Center | Clark | Current | \$142m | 5.25% |
| MIA South Terminal | Parsons- Odebrecht | 2007 | \$840m | 6% |
| MIA North Terminal | Parsons- Odebrecht | 2014 | \$1,450m | 6% |

*Date Completed

In cases where “<” is indicated, meaning less than, the project manager contacted could not recall the exact fee percentage.

While the fee is higher than the City’s budget of 3% or \$14.6 million, the additional fee will not increase the maximum construction budget of \$500.3 million. The additional fee will be funded from contingencies that are built into the current construction budget.

Pre-Guaranteed Maximum Price (“GMP”) Services Proposal

The CMR Contract incorporates three key contractual phases:

1. The contract that the City Commission is considering focuses on; i) the CMR Fee, ii) a fixed price to not exceed for Pre-GMP services (May 2015 through October 2015), and iii) the general contractual terms and conditions.
2. In October of 2015, the City Commission will consider a “GMP Amendment” that will be the result of the pre-GMP services, a five-month process to agree upon a GMP, including Clark’s long-term staffing costs to manage the construction.
3. The project will then be competitively bid over the next several months. Any savings as a result of the competitive bidding, below the GMP, is contemplated to be split 75% to the City and 25% to Clark. The \$400+ million worth of construction trade subcontracts will be competitively bid pursuant to an “open book” contracting process. In addition, the bidding of the trades following the GMP Amendment in October, 2015 will be based on much further-completed design packages, thereby bringing greater certainty to the bid

process and pricing that better reflects the costs actually required to complete the Project.

Clark initially proposed a Pre-GMP Services Fee of \$3,669,799. The Pre-GMP Services Fee has been reduced to \$2,594,073, a reduction of \$1,075,726 (assuming a successful GMP negotiation). If a successful GMP cannot be reached, the City is to pay an additional \$400,000 demobilization fee. Below summarizes the changes in the Pre-GMP Fee:

| Initial Proposal | | Negotiated Contract |
|-------------------------|----------------|---|
| \$2,424,269 | Staffing | \$2,167,898 • Reduced hours to provide for 5/21- 10/31 only • Added senior oversight & permit expeditor for non-City permits • \$160,000 average annual comp • \$255,000 average comp + burden • \$256,271 reduction |
| 530,530 | Expenses | \$326,175 • Postponed trailer costs to post GMP • Reevaluated travel expenses • \$204,355 reduction |
| 715,000 | Fee | \$100,000 • \$615,000 reduction |
| 3,669,799 | Subtotal | 2,594,073 • \$1,075,726 reduction • \$2,500,000 budget |
| -0- | Demobilization | 400,000 • Paid only if do not come to agreement on GMP |
| \$3,669,799 | Total | \$2,994,073 \$675,726 reduction |

The negotiated fee assuming a successful GMP negotiation is \$94,073 higher than the City's budget of \$2.5 million. The additional fee will not increase the maximum construction budget of \$500.3 million. The additional fee will be funded from contingencies that are built into the construction budget.

CONCLUSION / RECOMMENDATION

The Administration recommends that the Mayor and City Commission direct the Administration to execute the attached Construction Manager At Risk Agreement with Clark Construction Group, LLC ("Clark"), pursuant to Request for Proposals (RFP) No. 2015-129-ME, for construction manager at risk services for the Miami Beach Convention Center Renovation and Expansion Project ("Project").

Attachments:

Exhibit A - Construction Manager At Risk Agreement with Clark Construction Group, LLC

JLM / MT / AD/ MH

T:\AGENDA\2015\May\MBCC\CMAR Agreement with Clark Construction\MBCC CMR Agreement Execution - MEMO.docx

RESOLUTION NO. _____

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING AND AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A CONSTRUCTION MANAGER AT RISK AGREEMENT WITH CLARK CONSTRUCTION GROUP, LLC ("CLARK"), PURSUANT TO REQUEST FOR PROPOSALS (RFP) NO. 2015-129-ME, FOR CONSTRUCTION MANAGER AT RISK SERVICES FOR THE MIAMI BEACH CONVENTION CENTER RENOVATION AND EXPANSION PROJECT ("PROJECT"), WITH A LUMP-SUM PRE-CONSTRUCTION PHASE FEE IN THE AMOUNT OF \$2,594,073.

WHEREAS, Request for Proposals No. 2015-129-ME (the RFP) was issued on March 2, 2015, with an opening date of April 9, 2015; and

WHEREAS, a voluntary pre-proposal meeting was held on March 19, 2015; and

WHEREAS, the City received one (1) proposal from Clark; and

WHEREAS, on April 15, 2015, the City Commission authorized the Administration to eliminate the RFP Evaluation Committee and open Clark's sealed proposal, to permit the City Manager to proceed with the due diligence process and make a recommendation to the City Commission concerning award; and

WHEREAS, on April 29, 2015, the City Commission accepted the recommendation of the City Manager to award the RFP to Clark and authorized the Administration to enter into negotiations with Clark, subject to prior approval of the final agreement by the Mayor and City Commission; and

WHEREAS, the Construction Manager at Risk Agreement attached and incorporated as Exhibit "A" hereto, provides for the Construction Manager to perform Pre-Construction Phase Services; creates a process for the development of a Guaranteed Maximum Price ("GMP") for the Project, subject to City Commission approval of a GMP Amendment; fixes the Construction Manager's Overhead and Profit Fee for the duration of the Project; and establishes the contract terms and provisions that detail the City's and the Construction Manager's rights and responsibilities with respect to the Project, including with respect to the construction phase and post-construction phase of the Project.

NOW, THEREFORE, BE IT DULY RESOLVED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, that the Mayor and City Commission hereby approve and authorize the Mayor and City Clerk to execute the Construction Manager at Risk Agreement with Clark Construction Group, LLC attached hereto as Exhibit "A," pursuant to Request for Proposals (RFP) No. 2015-129-ME, for Construction Manager at Risk Services for the Miami Beach Convention Center Renovation and Expansion Project, with a lump-sum Pre-Construction Phase Fee in the amount of \$2,594,073.

PASSED AND ADOPTED this _____ day of _____ 2015.

ATTEST:

Rafael E. Granado, City Clerk

Philip Levine, Mayor

**APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION**

Rafael E. Granado 5/13/15

City Attorney RLP

Exhibit "A"

Construction Manager at Risk Agreement

**By and Between
The City of Miami Beach, Florida
And
Clark Construction Group, LLC**

For The

**MIAMI BEACH CONVENTION CENTER
RENOVATION AND EXPANSION PROJECT**

Resolution No. _____

RFP No. 2015-129-ME

TABLE OF CONTENTS

| | |
|--|-----------|
| ARTICLE 1 | 1 |
| THE PROJECT TEAM AND EXTENT OF AGREEMENT | 1 |
| ARTICLE 2 | 10 |
| CONSTRUCTION MANAGER'S SERVICES | 10 |
| ARTICLE 3 | 36 |
| RESPONSIBILITIES OF CITY, ARCHITECT-ENGINEER, AND OWNER'S REPRESENTATIVE | 36 |
| ARTICLE 4 | 40 |
| PERFORMANCE OF WORK AND SUBCONTRACTS | 40 |
| ARTICLE 5 | 46 |
| SCHEDULE, TIME OF COMMENCEMENT AND SUBSTANTIAL COMPLETION | 46 |
| ARTICLE 6 | 55 |
| GUARANTEED MAXIMUM PRICE FOR CONSTRUCTION | 55 |
| ARTICLE 7 | 58 |
| CONSTRUCTION MANAGER'S FEE | 58 |
| ARTICLE 8 | 62 |
| COST OF THE PROJECT | 62 |
| ARTICLE 9 | 67 |
| CHANGE IN THE PROJECT | 67 |
| ARTICLE 10 | 75 |
| RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS; MUTUAL RESPONSIBILITY | 75 |
| ARTICLE 11 | 77 |
| PAYMENTS TO THE CONSTRUCTION MANAGER | 77 |
| ARTICLE 12 | 84 |
| BONDS, INSURANCE, INDEMNITY AND WAIVER OF SUBROGATION | 84 |
| ARTICLE 13 | 86 |
| SUSPENSION OF WORK; TERMINATION OF THE AGREEMENT; CITY'S RIGHT TO PERFORM CONSTRUCTION MANAGER'S OBLIGATION | 86 |
| ARTICLE 14 | 93 |
| ASSIGNMENT AND GOVERNING LAW | 93 |
| ARTICLE 15 | 94 |
| CLAIMS; WAIVER OF REMEDIES; DISPUTE AVOIDANCE AND RESOLUTION | 94 |
| ARTICLE 16 | 96 |
| MISCELLANEOUS | 96 |

APPENDICES

| | |
|---|-----|
| APPENDIX A | 105 |
| PROJECT TEAM ASSIGNED REPRESENTATIVES | 105 |
| APPENDIX B | 106 |
| CONSTRUCTION MANAGER | 106 |
| APPENDIX C | 107 |
| PROJECT SITE | 107 |
| APPENDIX D | 108 |
| PROJECT PHASES OF THE WORK AND MILESTONES | 108 |
| APPENDIX E | 111 |
| INSURANCE AND BONDING REQUIREMENTS | 111 |
| APPENDIX F | 116 |
| DIRECT PURCHASE PROGRAM | 116 |
| APPENDIX G | 119 |
| DISPUTE AVOIDANCE PANEL | 119 |
| APPENDIX H | 125 |
| SOFTWARE FUNCTIONAL REQUIREMENTS | 125 |
| APPENDIX I | 128 |
| QUALITY CONTROL/QUALITY ASSURANCE | 128 |
| APPENDIX J | 133 |
| FORMS AND EXHIBITS | 133 |

CONSTRUCTION MANAGER AT RISK AGREEMENT

THIS AGREEMENT is made this ____ day of May, 2015, and is between the City of Miami Beach, Florida, a municipal corporation of the State of Florida ("City"), as Owner, and

Clark Construction Group, LLC
2502 North Rocky Point Drive, Suite 200
Tampa, FL 33607
Phone 813 636-4422

FED ID: 56-2447399

("Construction Manager").

RECITALS

WHEREAS, the City wishes to develop, design and construct the Project (as hereinafter defined) on a certain parcel of land located in the City, which parcel of land is more particularly described in Appendix C attached hereto (the "Project Site"); and

WHEREAS, pursuant to a Request for Proposals RFP No. 2015-129-ME (the "RFP"), the City requested proposals from qualified firms for Construction Management-at-Risk Services for the Project in accordance with the terms and conditions of the Contract Documents (as hereinafter defined); and

WHEREAS, the Construction Manager submitted its response to the RFP (the "RFP Proposal Submission") and was deemed the most qualified for the performance of the services described in the RFP, which RFP Proposal Submission and RFP are attached hereto in Appendix J; and

WHEREAS, Construction Manager represents that it possesses the requisite expertise and desires to be engaged by the City as the Construction Manager at Risk to provide the services as set forth herein; and

WHEREAS, the City Commission has authorized the Mayor to execute and enter into this Agreement by Resolution No. 2015-_____ adopted May __, 2015;

NOW THEREFORE, in consideration of the foregoing and of the mutual covenants and compensation set forth herein the City and Construction Manager agree as follows:

ARTICLE 1
THE PROJECT TEAM AND EXTENT OF AGREEMENT

The Construction Manager accepts the relationship of trust and confidence established between itself and the City by this Agreement. The Construction Manager covenants with the City to furnish the skill and judgment reflected in its RFP Proposal Submission and to cooperate with the Architect-Engineer in furthering the interests of the City. The Construction Manager agrees to furnish efficient business administration and superintendence and shall use its best efforts to complete the Project in compliance with the Contract Documents and in the most expeditious and economical manner consistent with the interest of the City and in full accordance with Applicable Laws.

1.1. The Project Team. The Project Team shall work jointly during design and through Final Acceptance and shall be available thereafter should additional services be required. The Architect-Engineer will provide leadership on all matters relating to design of that Project, with support from the Construction Manager, and the Construction Manager shall provide leadership to the Project Team on all matters relating to construction. The specific representatives of the Project Team are shown in Appendix A attached hereto.

1.2. Intent. The intent of the Contract Documents is to require all items and services necessary for the proper execution and completion of the Work, as necessary to provide the City with a fully functional and functioning Project within the scope and intent of the Contract Documents and within the Guaranteed Maximum Price and the Project Schedule, including any and all such necessary items and services consistent with, contemplated by, and reasonably inferable from the Contract Documents, whether or not such items and services are specifically mentioned therein. The City and the Construction Manager have negotiated a Pre-Construction Phase Fee for Pre-Construction Phase Services for the Project, as well as additional terms and conditions relating to the Project. The City may at a later date issue one or more Notices to Proceed for the Construction Phase for the Project to be covered under the scope of this Agreement, if the City Commission, at its sole and absolute discretion, accepts the Construction Manager's proposed GMP and the City and Construction Manager thereafter execute a GMP Amendment for the Project. The GMP shall set forth the General Conditions Fee and the Construction Overhead and Profit Fee, as well as any other terms and conditions specific to the Project. The Construction Manager shall not commence any Work until authorized in writing by the City. City shall have no duties other than those duties and obligations expressly set forth within the Contract Documents. The Construction Manager shall be responsible for the performance of all duties called for by this Agreement with regard to the Project. The services under this Agreement shall be completed when the Construction Manager fully and completely satisfies the requirements of the Contract Documents.

1.3. Extent of Agreement. This Agreement between the City and the Construction Manager supersedes any prior negotiations, representations or agreements.

1.3.1. This Agreement shall not be superseded by any provisions of the documents for construction and may be amended only by written instrument signed by both City and Construction Manager indicating a clear intent to change the terms of this Agreement.

1.3.1.1. Order of Precedence of Contract Documents. In cases of conflict between Contract Documents, the order of precedence of the Contract Documents shall be as follows:

- a. Change Orders and other Contract Modifications to this Agreement (excluding the Construction Documents);
- b. This Agreement and all appendices and schedules attached hereto (excluding the Construction Documents);
- c. Modifications to the completed Construction Documents, as approved in writing by the City;
- d. The completed Construction Documents, as approved in writing by the City.

Contract Documents shall be construed in a harmonious manner, whenever possible. The general intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Project by the Construction Manager.

1.3.1.2. The Contract Documents shall be taken as a whole and are complementary, and any item of Work called for in any Contract Document shall be as binding as if called for by all, so that any part of the Work shown or described in any of the Contract Documents, though not specifically referred to in other Contract Documents, shall be executed by Construction Manager and binding as a part of the Contract Documents, as well as any Work which, in the opinion of City, may be fairly inferred from the Contract Documents or by normal industry practice.

1.3.1.3. Detailed plans shall take precedence over general plans for the same part of the Work. Specifications and detail plans which may be prepared or approved by City after the execution of the Contract and which may be fairly inferred from the original specifications and plans are to be deemed a part of such specifications and plans, and that portion of the Work shown thereby shall be performed

without any change in the Contract Price or Project Schedule. With respect to conflicts between large-scale drawings and small-scale drawings, the larger scale drawing shall govern.

1.3.1.4. Where compliance with two or more requirements is indicated in any of the enumerated Contract Documents and where these requirements within the Contract Documents conflict in quantity or quality, the Construction Manager shall comply with the most stringent requirement as determined by the City, unless specifically indicated otherwise in the Contract Documents.

1.3.1.5. As used in the Contract Documents, (i) the singular shall include the plural, and the masculine shall include the feminine and neuter, as the context requires; (ii) "includes" or "including" shall mean "including, but not limited to" unless otherwise specifically limited; and (iii) all definitions of agreements shall include all amendments thereto in effect from time to time.

1.3.1.6. As used in the Contract Documents, references to an Article include all Sections, Subsections, and items within that Article; references to a Section include all Subsections and items within that Section; and references to a Subsection include all items within that Subsection.

1.3.1.7. Words which have a well-known technical or trade meaning are used herein in accordance with such recognized or well-known meaning, unless this Agreement otherwise specifically defines such word.

1.3.1.8. The Recitals, appendices and schedules attached hereto are incorporated into and made a part of this Agreement.

1.3.1.9. Whenever it shall be provided in this Agreement that the Construction Manager is required to perform a service or obligation "at its sole cost and expense" or words of substantially similar meaning, the Construction Manager shall not be entitled to reimbursement for such item and the cost of such service or obligation shall not be included in the Cost of the Project under Article 8 or as part of Construction Manager's fees stipulated in Article 7.

1.4. General Warranties. By their execution hereof, City and Construction Manager each represent and warrant to the other that they are authorized to enter into this Agreement and that this Agreement represents such Party's legal, valid and binding obligation, enforceable according to the terms thereof.

1.4.1. Construction Manager covenants, represents and warrants to City that:

1.4.1.1. It is a business organization duly organized, validly existing and in good standing under the laws of the State of Maryland, having full power and authority to engage in the business it presently conducts and contemplates conducting, and is and throughout the Work will be duly licensed or qualified and in good standing under the laws of said jurisdiction;

1.4.1.2. It has the required authority, ability, skills and capacity to perform, and shall perform, the Work in a manner consistent with sound engineering and construction principles, Project management and supervisory procedures, and reporting and accounting procedures;

1.4.1.3. The execution, delivery and performance of this Agreement will not conflict with any Applicable Laws or with any covenant, agreement or understanding to which it is a party or by which it or any of its properties or assets is bound or affected;

1.4.1.4. It has knowledge of all the Applicable Laws in effect on the Effective Date of the Agreement and of all business practices in the jurisdiction within which the Project Site is located that must be followed in performing the Work.

1.5 Independent Contractor. Construction Manager is an independent contractor and is not an agent or employee of City or Agent in performing the Work. Except as otherwise provided herein, Construction Manager shall maintain complete control over its own employees, agents and operations and those of its Subcontractors, Vendors and their respective employees and agents. Construction Manager hereby accepts

complete responsibility as a principal for its agents, Subcontractors, Vendors, Suppliers, their respective employees, agents and Persons acting for or on their behalf, and all others it hires to perform or assist in performing the Work.

1.6 Definitions. The following terms shall have the meanings specified herein. The definitions included in this Section are not exhaustive of all definitions used in this Agreement. Additional terms may be defined in other Contract Documents.

“Applicable Laws” means all laws, codes (including building codes), ordinances, rules and regulations of governmental authorities having jurisdiction over the Project or the Parties.

“Architect-Engineer” means Fentress Architects, the firm that has entered into a separate agreement with the City to perform architectural, engineering, or other design and construction administration services for the Project, and/or such other architects, engineers, or consultants employed by Architect-Engineer for the Project. Wherever the word "Architect" or "Engineer" appears in the Contract Documents, it shall be deemed to refer to the Architect-Engineer and/or the design professionals engaged by the Architect-Engineer. All communications, directives, instructions, interpretations and actions required of Architect-Engineer shall be issued or taken only by or through Architect-Engineer's authorized representative(s).

“Base GMP” means that portion of the GMP reflecting (a) the Cost of the Project, and (b) the Construction Manager's Fee under Subsections 7.1.2 and 7.1.3.

“Change Order” means a written document ordering a change in the Contract Price or Contract Time or a material change in the Work. A Change Order must comply with the Contract Documents.

“City” means the City of Miami Beach, a Florida municipal corporation, having its principal offices at 1700 Convention Center Drive, Miami Beach, Florida 33139. In all respects hereunder, City's obligations and performance is pursuant to City's position as the owner of the Project acting in its proprietary capacity. In the event City exercises its regulatory authority as a governmental body, including to its regulatory authority for code inspections and issuance of building or other applicable permits within its jurisdiction, the exercise of such regulatory authority and the enforcement of any rules, regulations, laws and ordinances shall be deemed to have occurred pursuant to City's regulatory authority as a governmental body and shall not be attributable in any manner to City as a Party to this Agreement.

“City Commission” means the governing and legislative body of the City.

“City's Construction Budget” means City's funds budgeted for construction of the Project, which shall include a budget for the parking components and a separate budget for the remainder of the Project (which may not utilize any of the funds allocated for parking due to bond financing constraints). The City's Construction Budget is \$500,300,000.00, including all Construction Manager fees, Costs of the Project and the Construction Manager's Contingency as defined in Articles 6, 7 and 8. This acknowledgement of the City's budgeted funds is not to be construed as the Construction Manager's Guaranteed Maximum Price. A Guaranteed Maximum Price will be offered for the Project by separate documentation as outlined in Article 6.

“City's Contingency” or **“City Contingency”** means that separate fund established outside of the GMP, which is available for City's use at its sole discretion to defray additional expenses relative to the Project, as well as additional expenses expressly chargeable to the City or otherwise deemed the responsibility of the City pursuant to the Contract Documents, as outlined in Subsection 6.4.2. The City retains exclusive use and control of the City's Contingency. The Construction Manager has no right or entitlement whatsoever to the City's Contingency, and use of such funds are subject to the City's prior written approval and issuance of a Change Order or Construction Change Directive by the City at its sole and absolute discretion. Any unused City Contingency remaining at the completion of the Project shall accrue solely to the City and shall not constitute or be used to calculate Project Cost Savings.

“City Manager” means the Chief Administrative Officer of the City. The City Manager shall be construed to include any duly authorized representatives designated in writing (including the Project Coordinator) with respect to any specific matter(s) concerning the Project and/or the Contract Documents (exclusive of those authorizations reserved to the City Commission or regulatory or administrative bodies having jurisdiction over any matter(s) related to the Project, and/or the Contract Documents).

“Claim” shall mean a demand or assertion by one of the Parties seeking, as a matter of right, adjustment or interpretation of the Contract Documents, payment of money, extension of time or other relief with respect to the Contract Documents. The term “Claim” also includes other disputes and matters in question between the City and Construction Manager arising out of or relating to the Contract Documents. Claims must be initiated by written notice. The responsibility for substantiating Claims shall rest with the Party making the Claim. All Claims submitted by Construction Manager must comply with the requirements of the False Claims Ordinance, Sections 70-300 et seq., of the City Code or shall be forfeited in accordance with the terms of the False Claims Ordinance and conclusively waived and released.

“CM’s Project Manager” means the person designated by Construction Manager as its lead representative to the City. The Construction Manager Project Manager shall have the authority to obligate and bind Construction Manager and to act on all matters on behalf of Construction Manager except for revisions to the Contract Documents and Change Orders. CM Project Manager’s responsibilities include creating clear and attainable project objectives, building the project requirements, and managing cost, time, and scope.

“Constructability” means the creative, organized process of analyzing the Construction Documents minimizing design, detailing, and specification problems which might render the Construction Documents unbuildable or require changes to the Work to make them buildable.

“Construction Change Directive” means a written directive to effect changes to the Work, prepared by the Architect-Engineer and executed by the City.

“Construction Contingency” means and is comprised of the Construction Manager’s Contingency and the separate City Contingency.

“Construction Documents” means all technical drawings and other documents issued by the Architect-Engineer identifying, among other things, the design, location, and dimensions of the Work and which set forth in detail the requirements for the construction of the Project, and generally including plans, elevations, sections, details, schedules, diagrams, Shop Drawings, and the specifications with the written requirements for materials, equipment, systems, standards and workmanship for the Work (including Division 1 through ___ of the Specifications).

“Construction Manager” means Clark Construction Group, LLC and its successors and assigns, and is the firm that shall provide comprehensive construction management services for the Project pursuant to the Contract Documents, including, preparation of cost estimates, Constructability reviews, Value Engineering and assistance with systems life cycle cost analysis, estimating, scheduling, bidding and submission of a GMP, as defined below, for construction, and construction management. Upon execution of the GMP Amendment or earlier with respect to any construction Work awarded prior to the establishment thereof, the Construction Manager shall serve as, from that point forward, and conclusively shall be deemed to be, the General Contractor under the Contract Documents, and shall construct the Project and be liable for the acceptable performance of the Work and payment of all debts pertaining to the Work.

“Construction Manager’s Contingency” means that portion of the GMP available for use by the Construction Manager to defray the increased Cost of the Project reasonably and necessarily incurred by the Construction Manager due to unforeseen circumstances relating to construction of that Project, as delineated in Subsection 6.4.1. The Construction Manager’s Contingency shall be included as a line item specified in the Schedule of Values for the Project, which amount, if accepted by the City, shall be included within the GMP for the Project and specified in the GMP Amendment. In no event shall the use

of the Construction Manager's Contingency cause for the GMP to be exceeded, and the Construction Manager shall be solely responsible for all costs that exceed the GMP (as adjusted by Change Order or Construction Change Directive), without any reimbursement from the City.

"Construction Phase" means that period set forth in the Project Schedule beginning on the effective date as set forth in a Notice to Proceed directing the Construction Manager to proceed with the Construction Work and other activities necessary to complete the Project or specified portions thereof, and ending on the date of Final Completion of the Project. The Construction Phase may include the period required to complete the Construction Documents following the issuance of the Notice to Proceed, to the extent such documents remain incomplete.

"Construction Phase Services" means the services to be performed through the Construction Manager during the Construction Phase of the Project, including, the performance of all of the Work required by this Contract Documents or reasonably inferable herein for the Construction Phase of the Project

"Construction Schedule" means the City-approved detailed cost and resource-loaded critical path method working schedule of Work activities of Construction Manager and Subcontractors, and identifying intermediate Milestones.

"Construction Superintendent" means the Construction Manager's representative who is responsible for continuous field supervision, coordination, and completion of the Work. The Construction Superintendent is responsible for management of the Project Site and tasks including organization and coordination of the Work of Subcontractor employees, keeping cost records on Work performed and materials, controlling of costs in materials and wages; exercising control over rate of construction progress to assure completion of the Project within the Project Schedule; inspecting Construction Work to enforce conformity to the Contract Documents and supervising trades, subcontractors, clerical staff, and other personnel employed in the construction.

"Contract Documents" means this Agreement and all appendices, exhibits and schedules attached hereto; Change Orders and other duly executed Contract Modifications to this Agreement, including the GMP Amendment; and the completed Construction Documents and modifications to the Construction Documents, each as approved by the City

"Contract Modification" means a written order (including Change Orders and Construction Change Directives) changing the scope of the Work, the amounts City is obligated to pay for the full and complete performance of the Work, the Project Schedule, or any other rights, duties or obligations of the Parties issued to Construction Manager by City after the Effective Date of this Agreement.

"Contract Price" means the amount established in the Contract Documents as the total amount the City is obligated to pay for full and complete performance of all of the Work required by the Contract Documents, and which shall not exceed the Guaranteed Maximum Price.

"Contract Time" means the number of days allowed for completion of all Construction Phase Work, as stipulated in the GMP Amendment, and as may be amended by Change Order.

"Convention Center" shall mean the entirety of the Miami Beach Convention Center facility located at 1901 Convention Center Drive, Miami Beach, Florida, and as depicted or described in the Project Site in Appendix C.

"Cost of the Project" means the costs necessarily incurred during the Construction Phase of the Project and paid by the Construction Manager, as prescribed by Article 8.

"Days" and/or all references to numbers of days in the Contract Documents, shall be construed to mean calendar days, unless specifically noted otherwise. The term "business days" means a day other than a Saturday, Sunday, Federal holiday or any day on which the principal commercial banks located in Miami-Dade County, Florida are not open for business during normal hours.

“Delegated Design Work” means design services and certifications the Construction Manager is required to provide with respect to certain components of the Work as may be specified by the Contract Documents involving systems, materials or equipment required for the Work to satisfy design and performance criteria pursuant to the Contract Documents. Delegated Design Work must be performed by an appropriate Subcontractor that is a registered Professional Engineer in Florida and shall include responsibility for the design, calculations, submittals, and permits with respect to Delegated Design components.

“Design Development Documents,” as to the Project, means the plans, specifications, and other documents developed by the Architect-Engineer during the Design Development phase of the Project, which fix and describe the size and character of the Project as to architectural, structural, mechanical, plumbing and electrical systems, materials, and such other elements as may be appropriate.

“Effective Date of this Agreement” means the date specified in the introductory clause of this Agreement.

“Estimate” means the Construction Manager’s latest estimate of probable Project construction cost with respect to the Project.

“Field Order” or **“Field Directive”** means a written order which further describes details or provides interpretations necessary to complete the Work of the Contract Documents in accordance with Section 9.5 but which does not involve a change in the Contract Price or Contract Time.

“Final Completion” means satisfaction of all conditions set forth in Section 5.7, at which time all conditions and requirements of the Contract Documents, permits and regulatory agencies have been satisfied; any documents required by the Contract Documents have been received by the City; any other documents required to be provided by City have been received by City; and the Work has been fully completed in accordance with the Contract Documents.

“Final Completion Date” means the date on which Final Completion is declared by City to have occurred.

“Final Inspection” means inspection of the Work by City and Construction Manager pursuant to the Contract Documents to establish Final Completion.

“GMP” or **“Guaranteed Maximum Price”** means the sum agreed to between the Construction Manager and the City and set forth in the GMP Amendment as the maximum total amount that the Construction Manager guarantees not to exceed for the completion of all Work required by or reasonably inferable from the Contract Documents, plus the Construction Manager’s Fee and General Conditions Fee, the Construction Manager’s Contingency, as such amount may be adjusted by Change Order or Construction Change Directive pursuant to the Contract Documents.

“GMP Amendment” means the GMP Proposal, as may be amended and accepted by the City Commission, at its sole and absolute discretion, which amendment shall automatically become incorporated herein upon the City and the Construction Manager’s execution of same, and shall establish, among other things, the GMP, and the Contract Time for the completion of all Construction Phase Services.

“GMP Proposal” means a proposal for completing the Construction Phase Services, which will be submitted at a date specified by the City, based on the most currently available set of Construction Documents, and which shall include the Construction Manager’s proposed GMP for the construction of the Project in accordance with the Contract Documents. However, the City has no obligation to accept the GMP Proposal.

“Hazardous Materials” means any hazardous materials or hazardous substances as defined in the Comprehensive Environmental, Response, Compensation and Liability Act (“CERCLA”) or the Resource

Conservation and Recovery Act (RCRA) as the same may be amended from time to time, or any "hazardous material" or "hazardous substance" as defined in any applicable federal or state statute or regulation or local law.

"Jobsite" means those areas of the Project Site upon which the Project will be constructed designated in writing by Construction Manager for performance of the Work and such additional areas as may, from time to time, be designated in writing by Construction Manager for Subcontractor use hereunder.

"Memorandum of Changes" means the notification provided to the City and the Architect-Engineer by the Construction Manager at the times specified in the Contract Documents that recommends changes based on the Value Engineering and Constructability reviews.

"Milestone" means an element or elements of the Work which must be completed within a specified period of time as described in the Contract Documents or Project Schedule, and shall include the specific Milestones set forth in Appendix D and further delineated in the Project Schedule.

"Notice to Proceed" means a written letter or directive issued by the Project Coordinator to Construction Manager to commence and proceed with portions of the Work as specified therein or a specific task of the Project, and stating any further limitations on the extent to which Construction Manager may commence and proceed with the Work. Unless otherwise approved by the City at its sole discretion, City's issuance of a Notice to Proceed for the Construction Phase or portions thereof shall be contingent upon Construction Manager's obtaining all appropriate permits and satisfying all requirements of agencies having jurisdiction.

"Notice to Proceed Date" means the date on which the Notice to Proceed is issued to Construction Manager, or the date stated in the Notice to Proceed as being the Notice to Proceed Date, whichever is later.

"Owner's Representative" means Hill International, Inc., the entity engaged to assist the City in monitoring all aspects of the Work to confirm that the Construction Manager delivers a Project that is in accordance with the requirements of the Contract Documents. If the City terminates its agreement with the Owner's Representative, either the City shall engage a new Owner's Representative or the Project Coordinator shall serve in the capacity of Owner's Representative and shall be responsible for all functions of the Owner's Representative delineated in this Agreement.

"Parties" means City and Construction Manager, and "Party" is a reference to either City or Construction Manager, as the context may indicate or require.

"Pre-Commissioning" means non-operating activities performed on equipment systems after installation including removal of rust preventives, charging of lubricants, chemicals and supplies, checking motor rotation and machine alignment, checking of proper valve actuation, removal of temporary bracing, pressure and leak testing, safety valve testing and adjustment, checking electrical connections, performing continuity tests, and any other activities which are evidently necessary by virtue of the nature of the Work in order that all systems are functioning properly and safely.

"Pre-Construction Phase Services" means the services the Construction Manager shall perform prior to the Notice to Proceed for the Construction Phase, as set forth more fully in Sections 2.5 and 2.6 of this Agreement.

"Project" means the complete renovation of the Convention Center, including an expansion of a ballroom and auxiliary spaces; parking above portions of the Convention Center; exterior landscaping and a 6.5 acre public park; the renovation of Convention Center Drive, including relocation of utilities; and all Work, including permitting, construction and code inspection that is required to accommodate and complete the Project in accordance with and as detailed in the Contract Documents, and as is contemplated thereby or reasonably inferable therefrom.

“Project Coordinator” means Maria Hernandez, Project Director for the Miami Beach Convention Center District, or any other individual(s) designated in writing by the City Manager, who shall be the City’s authorized representative to coordinate and facilitate (on behalf of the City) all matters related to the Project.

“Project Cost Savings” shall have the meaning ascribed to it in Subsection 7.2.1.

“Project Manager” means the Project Manager for the Construction Manager.

“Project Schedule” or **“Schedule”** means the City-approved and accepted detailed cost and resource-loaded critical path method master schedule developed in accordance with the specifications and other Contract Documents and that Construction Manager prepares and maintains for the Project, and that includes the schedule for achieving the various Milestones, the phasing and performance of all aspects of the Work, including design, pre- construction services, construction, construction engineering and observation services, testing, project closeout, warranty, City occupancy dates and all required updates to all of the foregoing, subject to the approval of the City as may be amended pursuant to a Change Order.

“Project Site” shall have the meaning ascribed to it in the Recitals.

“Project Team” means the Construction Manager, the Project Coordinator and other designated City representatives, the Owner’s Representative and the Architect-Engineer.

“Punch List” means the list or lists prepared by Construction Manager, the Architect-Engineer, Owner’s Representative, and the City, identifying matters that remain to be completed between achievement of Substantial Completion and Final Completion in order that Final Completion can be declared by City to have occurred.

“Related Party” shall mean a parent, subsidiary, affiliate or other entity having common ownership or management with the Construction Manager; any entity in which any stockholder in, or management employee of, the Construction Manager owns any direct or indirect interest in excess of ten percent in the aggregate; or any person or entity which has the right to control the business or affairs of the Construction Manager.

“RFP Proposal Submission” means the response to the RFP submitted by the Construction Manager during the selection process attached hereto as part of Appendix J, including its qualification and experience and that of its key personnel to be assigned to the Project, and including other relevant items describing the Construction Manager’s capabilities and proposed approach to the Project. The RFP Proposal Submission is included for reference purposes only and shall not be incorporated as part of this Agreement, except with respect to Construction Manager’s representations regarding the qualifications and experience of Construction Manager and its key personnel, its commitment to provide the key personnel listed therein, and its capability to perform and deliver the Project in accordance with the Contract Documents and consistent with the level of services represented therein.

“Schedule of Values” means a written schedule setting forth the detailed and itemized cost breakdown, inclusive of labor, material, and taxes of all elements comprising the GMP set forth in the GMP Amendment.

“Shop Drawings” means plans, drawings, prints, diagrams, illustrations, brochures, schedules and other data that are prepared by Construction Manager or any of its Subcontractors or Suppliers, and which illustrate how specific portions of the Work will be fabricated or installed.

“Subcontractor(s)” means any person or entity with whom the Construction Manager contracts to perform any part of the Work or to supply materials in relation to the Work. In addition, the term Subcontractor shall apply to Subcontractors of any tier and suppliers and materialmen employed on or for the Project pursuant to a subcontract or other agreement with a Subcontractor or lower-tier Subcontractor.

“Substantial Completion” shall be deemed to have occurred when the Work (including all meeting rooms, all exhibition space, all food service facilities, all vertical transportation, all life support and safety systems, all ballrooms and all public space), as certified in writing by the Architect-Engineer and determined by the City in its sole discretion, has been developed, designed, engineered and constructed in accordance with the Contract Documents such that all conditions of permits and regulatory agencies have been satisfied and the Project is ready for occupancy, utilization and continuous commercial operation for the uses and purposes intended by the City, without material interference from incomplete or improperly completed Work and with only Punch List items remaining to be completed, all as reasonably determined by the City and evidenced by the issuance of a certificate of occupancy or completion by the authority having jurisdiction, and a Certificate of Substantial Completion by the Architect-Engineer and acceptance of such certificate by the City.

“Substantial Completion Date” means the date on which Substantial Completion of the Work is declared by City to have occurred.

“Value Engineering (VE)” means the detailed analysis of systems, equipment, materials, services, facilities and supplies required by the Contract Documents for the purpose of achieving the desired and essential functions at the lowest cost consistent with required and necessary performance, reliability, quality and safety through the elimination or modification of those features which add cost without contributing to the facility’s required function or design value.

“Vendor” or **“Supplier”** means any person who supplies machinery, equipment, materials, consumables, support services, utilities, etc. to Construction Manager or to any Subcontractor in connection with the performance of Construction Manager’s obligations under the Contract, but who does not perform labor at the Jobsite other than delivery.

“Work” means all Pre-Construction Phase Services, Construction Phase Services, and other services required by or reasonably inferable from the Contract Documents for the completion of the Project, including all labor, materials, equipment, supplies, tools, machinery, utilities, procurement, fabrication, transportation, construction and erection, installation, insurance, bonds, permits and conditions thereof, building code changes and government approvals, licenses, tests, inspections, training, surveys, studies, supervision, administration and management services to be provided by the Construction Manager, that are necessary or appropriate for the total construction, installation, furnishing, equipping, and functioning of the Project, together with all additional, collateral and incidental items, work and services required to achieve Final Completion in accordance with the Contract Documents, wherever the same are being engineered, designed, procured, manufactured, delivered, constructed, installed, trained, erected, tested, started-up or operated during start-up and testing and whether the same are on or off the Jobsite.

1.7 The Parties acknowledge that the progress of the Project is subject to the continued participation and cooperation of third parties, which can affect both the availability and timing of funding, as well as critical path activities involving the design and construction of projects that are outside of this Agreement, but affect this Project. Accordingly, there is no representation by City that the amount, timing, or sequence of the Work will occur as anticipated. Construction Manager will have no Claim for delay in initiating the Work.

ARTICLE 2

CONSTRUCTION MANAGER'S SERVICES

The Construction Manager’s services shall be those necessary and appropriate to the successful completion of the Project in a timely and cost-effective manner and shall include, but are not limited to, those described or specified herein. The Construction Manager shall provide all requested services according to the capabilities reflected in its RFP Proposal Submission. The services described or specified shall not be deemed to constitute a comprehensive specification having the effect of excluding services not specifically mentioned. Unless otherwise provided in this Agreement, or as agreed in writing between City and Construction Manager, the form and content of all systems, reports, forms and regular submittals by Construction Manager to City shall be subject to prior approval of the City or Owner’s Representative, and Construction Manager shall submit such materials to Owner’s Representative for

City's approval prior to implementation. City's approval thereof shall not limit City's right to thereafter require reasonable changes or additions to approved systems, reports, forms and regular submittals by Construction Manager to City. Except as to Shop Drawings and other design work performed by Construction Manager, its Subcontractors or agents pursuant to this Agreement, Construction Manager's services hereunder are not intended to include the performance of design work and Construction Manager does not assume any responsibility for the design of any Work, except for Construction Manager-initiated design such as subcontracted Delegated Design Work.

2.1. General Services.

2.1.1. Project Management Information System (PMIS).

2.1.1.1. Commencing immediately after the Effective Date of this Agreement, the Construction Manager shall implement and utilize throughout the life of this Agreement the Project Management Information System (PMIS) as described herein or modified by mutual agreement. The PMIS shall include suitable management systems and work plans, including software, for the Project relative to Project safety, quality assurance, managing and controlling the Work and all construction, scheduling and contracting services and all other services to be provided to the City hereunder, and shall substantially meet the functional single source solution requirements set forth in Appendix H. Construction Manager shall implement and use the City's e-Builder™ system for data warehousing and document management and shall procure all licenses that may be necessary to cover its staff for the entire length of the Project, through Project close out.

2.1.1.2. The reports, documents, and data to be provided under the PMIS shall represent at all times an accurate assessment of the current status of the Project and its component Projects and of the work remaining to be accomplished. Furthermore, the PMIS shall provide a sound basis for identifying variances and problems and shall serve as a resource for making management decisions. Utilizing computerized systems, reports shall be prepared and furnished to the members of the Project Team monthly. Data within the PMIS shall be accessible electronically (via website) at all times by the members of the Project Team and sent as requested to Project Team.

2.1.1.3. If requested by the Project Coordinator or Owner's Representative, the Construction Manager shall conduct a comprehensive workshop for participants designated by the Project Coordinator and additional seminars as required to provide instruction to members of the Project Team to facilitate each participant's use and understanding of the PMIS. Furthermore, the workshop shall emphasize function and organization of the PMIS during the design and construction of the Project; and shall establish, with the full concurrence of the Project Team, procedures for accomplishing the management control aspect of the Project. All information conveyed in the instruction workshop shall have the full concurrence of the Project Coordinator or Owner's Representative.

2.1.1.4. The PMIS shall include the following major elements:

- Narrative Reports and Monthly Progress Reports
- Schedule Control,
- Cost Control, and Estimating,
- Project Accounting,
- Accounting and Payment,
- Action Reports,
- Critical Issues Look Ahead,
- Test and Inspection Reports,
- Permits,
- Request for Information (RFI's),
- Submittals,
- Non-Conforming Work Reports,
- Safety and Incident Reports,
- Meeting Minutes, and
- Site CM and Subcontractor Daily Reports

2.1.2. Narrative Reporting.

2.1.2.1. The Construction Manager shall prepare monthly written reports as described hereunder. All written reports shall be in 8 1/2" X 11" format. The Construction Manager shall ensure that each member of the Project Team is provided a copy.

2.1.2.2. The Narrative Reporting Subsystem shall include the following reports:

a. A Monthly Executive Summary which provides an overview of the Project's progress, current issues and pending decisions, future developments and expected achievements, and any problems or delays, including code violations found by any permitting authority.

b. A Monthly Cost Narrative describing the current construction cost estimate status of the overall Project. Contract Modification or potential Claim status (i.e., amount, reason for change, responsibility) shall be addressed in detail.

c. A Monthly Scheduling Narrative summarizing the current status of the overall Project Schedule. This report shall include an analysis of the various Project Schedule components, a description of the critical path, and other analyses as necessary to compare planned performance with actual performance. The Narrative should include descriptions of any logic or other changes to the updated Schedule versus the baseline Project Schedule and previous updates.

d. A Monthly Accounting Narrative describing the current cost and payment status of the entire Project. This report shall relate current encumbrances and expenditures to the budget allocations.

e. A Monthly Construction Progress Report during the Construction Phase summarizing the Work of the various Subcontractors. This report shall include information from the weekly Jobsite meetings as applicable such as general conditions, long lead supplies, current deliveries, safety and labor relations Projects permits, construction problems and recommendations, and plans for the succeeding month. The format for the Monthly Progress Report must be approved and accepted by the City, the Owner's Representative and Architect-Engineer, and will establish the format to be used for each subsequent monthly Progress Report. Construction Manager shall index, bind and tabulate the monthly Progress Report in a manner acceptable to the City. The Progress Reports shall include photos documenting the progress of the Work. The photos will be 8" x 10" in size, with the date and location noted on the back of each photo. A back-up flash drive or CD of the photos is to accompany the photographs. The Progress Reports and Project photos are to be made an attachment to the Construction Manager's monthly Application for Payment.

f. A Daily Construction Diary during the Construction Phase describing events and conditions on the Project Site. The diary shall be maintained at the Project Site and available to members of the Project Team. A bound copy of the complete diary shall be submitted to the City at the conclusion of the Project.

g. A monthly participation report during the Construction Phase summarizing the local workforce participation of City of Miami Beach and Miami-Dade County firms or residents for the current month and Project to date in the form prescribed by the Project Coordinator or Owner's Representative.

2.1.2.3. The written reports outlined in Subsection 2.1.2.2 above shall be bound with applicable computer reports and submitted monthly during the Pre-Construction Phase based on the then-current available Construction Documents, and monthly during the Construction Phase. Copies shall be transmitted to the members of the Project Team and others designated by the Project Coordinator with the monthly Application for Payment. Additional copies of the report outlined in Subsection 2.1.2.2(a) shall be bound separately and distributed monthly as directed by the Project Coordinator. Certain electronic

copies of reports shall be transmitted electronically to the Project Coordinator and others as may be designated by the Project Coordinator.

2.1.3. Schedule Control.

2.1.3.1. Master Project Schedule. Within thirty (30) days after the effective date of this Agreement, the Construction Manager shall develop and submit a master Project Schedule covering the planning and design approvals, phasing of the Work, construction and City occupancy of the Project. The Project schedule will serve as the framework for the subsequent development of all detailed schedules. The Project Schedule shall be produced and updated monthly throughout the Project. A final Project Schedule shall be submitted to the City at the time of the submission of the GMP. Once accepted by the City, the applicable Project schedule will be the basis for payment to the Construction Manager for Construction Phase Services for the Project and will also serve to determine the impact of all proposed changes on the Project and the Project as a whole. As the Project Schedule will be the basis for payment, no payment for Construction Phase Services can be made until the Construction Manager has submitted an acceptable City-approved Project Schedule.

2.1.3.2. Construction Schedule. Construction Manager shall prepare and submit to the Project Team a Construction Schedule, using the latest version of Primavera software, along with its GMP Proposal. Within thirty (30) days after the date of the City's execution of the GMP Amendment, the Construction Manager shall prepare and submit to the Project Team an updated Construction Schedule, consistent with the Project Schedule, graphically depicting the activities contemplated to occur as a necessary incident to performance of the Work required to complete this Project, and showing the sequence in which the Construction Manager proposes for each such activity to occur and duration (dates of commencement and completion, respectively) of each such activity.

2.1.3.3. Following development and submittal of the Construction Schedule described above, the Construction Manager shall, at the end of each calendar month occurring thereafter during the period of time required to finally complete this Project, or at such earlier intervals as circumstances may require, update and/or revise the Construction Schedule to show the actual progress of the Work performed, variance from scheduled completion dates, the occurrence of all events which have affected the progress of performance of the Work already performed or will affect the progress of the performance of the Work yet to be performed in contrast with the planned progress of performance of such Work, as depicted on the original Construction Schedule, and all updates and/or revisions thereto as reflected in the updated and/or revised Construction Schedule last submitted prior to submittal of each such monthly update and revision. The Construction Manager shall also provide a short-term, three-week look-ahead schedule and a summary schedule for this Project. Each such update and/or revision to a Construction Schedule for the Project and the overall Project Schedule shall be submitted to the Owner's Representative and shall be available electronically to all members of the Project Team. Such submissions shall be in both .pdf and native file formats. The Construction Manager shall make recommendations to the Project Coordinator in order to meet the milestone dates of the Project Schedule.

2.1.3.4. The Construction Manager shall prepare and incorporate into the schedule data base for the Construction Schedule and Project Schedule, at the required intervals, the following schedules for this Project:

a. Pre-Bid Schedules. The Construction Manager shall prepare a pre-bid construction schedule for Work encompassed in each bid scope. The schedule shall be sufficiently detailed as to be suitable for inclusion in the bid scope as a framework for contract completion by the successful bidder, shall show the interrelationships between the work of the successful bidder and that of other Subcontractors for the applicable Work, and shall establish milestones keyed to the Project Schedule.

b. Subcontractor Construction Schedules. Upon the award of each subcontract, the Construction Manager shall jointly with the Subcontractor, develop a schedule that is more detailed than the pre-bid construction schedule, taking into account the work schedule of the other Subcontractors. The Subcontractor construction schedules shall include as many activities as necessary

to make the schedule an effective tool for construction planning and for monitoring the performance of the Subcontractor. The Subcontractor construction schedule shall also show pertinent activities for material purchase orders, manpower supply, shop plan schedules and material delivery schedules. All Subcontractor schedules shall be integrated into, made a part of and conform to the Project Schedule.

c. Occupancy Schedule. The Construction Manager shall jointly develop with the Project Team a detailed occupancy schedule plan, inclusive of substantial completion inspections, completion of punch lists, final inspections, maintenance training and turn-over procedures. The plan shall be used to ensure accomplishment of a smooth and phased transition from construction to City or tenant occupancy. The Occupancy Schedule shall be produced and updated monthly from its inception through final occupancy of the Project.

2.1.4. Cost Control. The Construction Manager shall provide sufficient timely written detail in monthly Cost Control reports for the Project to permit the Project Team to control and adjust Project requirements, needs, materials, equipment and systems by building and site elements so that construction for the Project will be completed at a cost that will not exceed the City's Construction Budget.

2.1.5. Project Accounting. The Construction Manager shall utilize its standard accounting system that will enable the Project Team to plan effectively and to monitor and control for the Project the funds available, cash flow, costs, Contract Modifications, payments, and other major financial factors by comparison of budget, estimate, total commitment, amounts invoiced, and amounts payable. The Project accounting system utilized by Construction Manager will serve as a basic accounting tool and an audit trail. The Construction Manager will retain all Project files in a manner consistent with proper accounting procedures in accordance with GAAP standards (or other comparable standards if specified by the City) that are sufficient for an audit by the City for a period of 5 years after Final Completion. The Project accounting system will include the following reports:

a. Cost Status Report presenting the budget, estimate, and baseline costs (awarded subcontracts and purchase orders) for any given subcontract or budget line item, including notations of remaining subcontracts necessary for complete buyout of the Work. It shall show approved Contract Modifications for each subcontract that, when added to the base-line costs, will become the revised costs. Pending contract modifications will also be specifically identified and incorporated into the Cost Status Report to illustrate the total estimated probable cost to complete the Project.

b. Payment Status Report showing the value in place (both current and cumulative), the amount invoiced to Construction Manager (both current and cumulative), the amount paid by the Construction Manager to date, the retainage, the amount payable (both current and cumulative), and the balance remaining. A summary of this report shall accompany each Application for Payment.

c. Detailed Status Report showing the complete activity history of each item in the Project accounting structure. It shall include the budget, estimate and base-line costs figures for each subcontract. It shall give the contract modification history including contract modification numbers, description, proposed and approved dates, the proposed and approved dollar amounts and detailed reasons for the contract modification, and parties responsible. It shall also show all pending or rejected contract modifications. The payment history shall include the date, value-in-place, retainage, and accounts payable.

d. Cash Flow Diagram showing the Projected accumulation of cash payments by the Construction Manager against the applicable Project Cash flow Projections shall be generated for anticipated monthly payments as well as cumulative payments.

e. Job Ledger shall be maintained as necessary to supplement the operation of the Project accounting system. The job ledger will be used for this Project to provide construction cost accountability for general conditions work, on-site reimbursable expenses, and costs requiring accounting needs.

f. Report on Construction Manager's Contingency, reconciling the Construction Manager's Contingency to the GMP, along with an itemization of expenditures charged to the Construction Manager Contingency.

2.1.6. Project Manual/Management Plans.

2.1.6.1. Within forty-five (45) days of the Effective Date of this Agreement, the Construction Manager shall develop, in conjunction with the Project Team, comprehensive Project management plans describing the services set forth in this Agreement and document such plans in the Project Manual. The Construction Manager shall provide a plan collectively for the Project and for each phase thereof, where appropriate, for the control, direction, coordination and evaluation of Work performed by members of the Project Team throughout the Project organization, including identification of key personnel, responsibilities, work flow diagrams, and strategy for bidding the Work. The Project management plans shall be updated as necessary throughout the design, construction and City occupancy phases with any such updates. The Project Manual shall be available electronically to the members of the Project Team. In addition five copies of the Project Manual and any updates shall be submitted to the Project Coordinator and Owner's Representative.

2.1.6.2. Contents of Project Manual. The Project Manual shall describe in detail the procedures for executing the Work and the organizations participating in the Project. The Project Manual shall serve as the Project management plan, and shall include as a minimum the following sections:

a. Project and Project Definition. The known characteristics of the Project shall be described in general terms that will provide the participants a basic understanding of the Project.

b. Project and Project Goals. A description of the goals and objectives for the Project including a general discussion of schedule, budget, physical, technical and other objectives.

c. Project and Project Strategy. A narrative description of the Project delivery methods to be utilized to accomplish the Project and Project goals.

d. Project and Project Work Plan. A matrix display of the Work to be performed by the each member of the Project Team during each phase of the Project, including a matrix for email distribution lists, identifying the members of the Project Team and their respective personnel who should receive email communications with respect to the various aspects of the Project.

e. Project Organization. A summary organization chart showing the interrelationships between the members of the Project Team, other supporting organizations, and permitting review agencies. Detailed charts showing organizational elements participating in this Project shall be included for each member of the Project Team.

f. Responsibility Performance Chart. A detailed matrix showing the specific responsibilities and interrelationships of the Project Team. The responsibility performance chart shall indicate primary and secondary responsibility for each specific task required to deliver this Project. The Construction Manager shall develop a similar chart for the personnel within its own organization who are assigned to the Project, and for the personnel of the members of the Project Team from data supplied by each.

g. Construction Plan. Construction Manager shall develop and submit to the Project Coordinator, Owner's Representative and Architect-Engineer the construction plan which will include a Work breakdown structure based upon the approved Project Schedule and the phasing plan reflected therein.

h. Flow Diagrams. Charts displaying the flow of information and the decision process for the review and approval of Shop Drawings and submittals, progress and contract modifications.

i. Communication Procedures. The Construction Manager shall establish written procedures for communications and coordination required between Project Team members throughout the Project. Procedures shall cover such items as correspondence, minutes, reports, inspections, team meetings, technical reviews, design reviews, and other necessary communications. The Construction Manager shall use electronic communication whenever possible.

j. Safety Plan. The Construction Manager shall develop a comprehensive safety program for the Project to meet all applicable federal, state and local safety requirements including provisions to be included in the Contract Documents. This will include an aggressive program for ensuring safety of all persons and property affected by the Work.

k. Quality Assurance/Quality Control (QA/QC Plan). The Construction Manager shall develop and maintain an effective quality assurance and quality control plan and procedures as delineated in Appendix I to ensure that materials furnished and quality of Work performed are in accordance with the Construction Documents.

l. Crisis Management Plan. The Construction Manager shall develop a crisis management plan describing a general approach to and contacts in case of crisis situations, e.g., hurricane, riot, etc. that permits, to the fullest extent possible, uninterrupted Work or prompt resumption of the Work.

m. Labor Relations Plan. The Construction Manager shall develop, in consultation with the Project Team, an approach to labor relations for the Project that assures, to the fullest extent possible, the uninterrupted completion of the Project in accordance with the Project Schedule and budget, and a plan for maximizing the employment of Miami Beach and Miami-Dade County residents in the construction of the Project. The plan will include provisions for monthly progress reporting in a format approved by the Owner's Representative to monitor success.

n. Security Plan. The Construction Manager shall develop and maintain a comprehensive plan to protect the Project Site and materials stored off-site against theft, vandalism, fire, and accidents, etc., as required by job and location conditions. Mobile equipment and operable equipment at the Project Site, and hazardous parts of new construction subject to mischief, shall be locked or otherwise made inoperable or protected when unattended.

o. Public Relations Plan. The Construction Manager shall assist the Project Team, as requested, in developing and implementing a comprehensive public relations plan including community outreach efforts to inform local small and medium size businesses of potential impacts of the construction on their operations. The Construction Manager shall assist the Project Team in coordination with other entities impacted by the Project.

p. Commissioning Plan. The Construction Manager, in coordination with the Project Team, shall develop a commissioning plan that will be implemented during the design and Construction Phase, which will provide a smooth and successful City or tenant occupancy of the Project. The purpose of the commissioning plan is to ensure that building systems perform interactively according to the design intent and the City's and it's tenant's operational needs. Specific objectives include:

- i. Applicable equipment/systems are installed properly and receive adequate operational checkout by installing Subcontractors;
- ii. Verification and documentation of proper performance for installed equipment and systems;
- iii. Verification that the design intent is being met continually;
- iv. Documentation that operations and maintenance plans left on site are complete;

adequately trained;

v. Documentation that the City's operating personnel are

vi. Documentation that record plans are accurately prepared during the construction of the Project;

vii. Interaction with permitting authorities to facilitate the issuance of a Certificate of Occupancy; and

viii. Review of Contract Documents for warranty effective dates to coincide with Substantial Completion for the Project, or such other dates as provided for by the Contract Documents.

q. Market Analysis and Bidders Plan. Within sixty (60) days after the effective date of this Agreement, the Construction Manager shall submit a written "Construction Market Analysis and Prospective Bidders Report" reporting on availability of labor, material, equipment, potential bidders, and possible impact of any shortages or surpluses of labor or material, setting out recommendations and providing information as to prospective bidders for the Project. The Construction Manager shall develop a plan for stimulating interest of qualified contractors in bidding on the Work and familiarizing those potential bidders with the requirements of the Project.

r. Maintenance of Traffic and Jobsite Logistics. The Construction Manager shall prepare a logistics, access staging and maintenance of traffic plan for this Project. The plans shall contain specific procedures for minimizing the disruption of surrounding operations and inconvenience to the public accessing the Project Site. The plan shall include plans and other documents illustrating the scale and relationship of Project components based on the Project's current and known future requirements, planned road closures, Project Schedule and construction budget requirements. The Construction Manager shall ascertain what temporary enclosures, if any, of building areas should be provided for and may be provided as a practical matter, in order to assure orderly progress of the Work in periods when extreme weather conditions are likely to be experienced.

s. Risk Management Plan. The Construction Manager will identify those issues which could impact the successful and timely completion of the Project within the approved Project baseline on a risk register. The Construction Manager will identify, evaluate, and assess Project risks using a SWOT analysis (strengths, weaknesses, opportunities and threats) sufficiently to develop customized Project control strategies that maintain visibility and ensure timely initiation of corrective actions should they be required. Assessed risk levels will determine the control level to be used for each project element incorporating planned risk responses to mitigate potential impacts.

t. Direct Purchase Program Plan. Construction Manager shall develop a plan and procedures to implement the Direct Purchase Program in accordance with Appendix F of this Agreement.

2.2. Construction Manager's Staff. The Construction Manager shall maintain competent and qualified staff in all positions for each phase of the Project. The Construction Manager shall submit a staffing plan for each phase. The staffing plan shall detail the Construction Manager's organization for all applicable work levels, including the superintendent level and on-site and off-site personnel.

2.2.1. Key Personnel. The personnel presented in the Construction Manager's RFP Proposal Submission shall staff key positions, including the position of CM's Project Manager and Construction Superintendent ("Key Personnel"). Such Key Personnel shall remain assigned to the Project through the duration of this Project and shall not be reassigned without the prior written approval of the City's Project Coordinator, unless the individual has left the employment of the Construction Manager. The City will not unreasonably withhold its consent to additions of or substitutions for Key Personnel, with new personnel of comparable qualifications in the event of death, promotion, retirement, job changes, firing, failure to perform or other good cause shown. The Construction Superintendent and CM's Project Manager shall be authorized to act on behalf of the Construction Manager to coordinate,

inspect provide general direction of the Work in progress. The CM's Project Manager and the Construction Superintendent shall be assigned to the Project on a full-time basis, on-site, for 100% of their time, with no allocations or commitments to other clients or projects. At all times when the Project Site is accessible by anyone providing labor, material or services in connection with the Work, either the Project Manager, Construction Superintendent, or other senior staff acceptable to the City shall be present at the Project Site.

2.2.2. Other Personnel. For all other positions listed in the staffing plan, if applicable, the Construction Manager shall provide resumes to the Project Coordinator of the persons being proposed to staff those positions. The City reserves the right to disapprove any person proposed, and the Construction Manager shall offer substitutes therefore. It is expressly understood that failure of the City to disapprove a person does not confer the City's approval of such person. At any time, the Project Coordinator has the reasonable right to request removal and replacement of any Construction Manager's personnel. Once in place, the Construction Manager shall not change any person filling a position listed in the organizational charts without the prior consent of the Project Coordinator unless the City requests it or unless the person is leaving the employ of the Construction Manager. The employee(s) of the Construction Manager and Subcontractors shall be considered to be at all times employee(s) of the Construction Manager or the Subcontractors, as applicable, and not an employee(s) or agent(s) of the City or any of its departments. The Construction Manager and Subcontractors agrees to adjust staffing levels or to replace any staff personnel if so requested by the Project Coordinator, should the Project Coordinator make a determination that said staffing is unacceptable or that any individual is not performing in a manner consistent with the requirements for such a position.

2.2.3. Cooperation with Project Team. The Construction Manager shall cooperate with and assist the Owner's Representative, Architect-Engineer, City's staff and its legal, financial, design and construction consultants, and all other consultants or designated representatives of the City at all times during the development of the Project as necessary to complete the Project in a manner reasonably satisfactory to the City.

2.3. Jobsite Facilities/Access to Project Site.

2.3.1. The Construction Manager shall arrange for all Jobsite facilities at the Project Site as necessary to enable the members of the Project Team to effectively perform their respective duties in the management, inspection, and supervision of construction. The Construction Manager shall develop a proposal for Project Team approval, describing the facilities to be provided, the methods of acquisition of the facilities and disposition of the acquired facilities and equipment upon completion of the Project.

2.3.2. The Construction Manager shall afford the City and its authorized designees, the Architect-Engineer, and Owner's Representative safe access to the Project Site at all times. Access to the Project Site shall also be permitted at all times to all Federal, State, County and City safety, regulatory and inspection departments, personnel and agencies and other governmental entities having jurisdiction over the Work and the Project Site. The City, the Owner's Representative, the Architect-Engineer and their respective representatives will make periodic visits to the Project Site to become generally familiar with the progress and quality of the Work, and to determine if the Work is proceeding in accordance with the Contract Documents, provided such visits and inspections shall be for the City's own internal purposes and shall not relieve the Contractor any of its obligations pursuant to the Contract Documents.

2.4. Administrative Records. The Construction Manager will maintain at the Project Site, unless agreed to otherwise by the Project Coordinator, on a current basis, files and records including the following:

- Punch Lists
- Cost Proposal Requests
- Bid Analysis/Negotiations/Award Information Contracts/Purchase Orders w/changes
- Material/Equipment Records
- Delivery Logs
- Payment Records

- Transmittal Records
- Inspection Reports
- Project Schedule and Construction Schedule and Updates thereto
- Suspense (Tickler) Files of Outstanding Requirements
- Prevailing Wage Reports
- Shop Plan Submittal/Approval Logs
- Contract Documents
- Warranties and Guarantees
- Cost Accounting Records:
- Labor Cost Records
- Material Cost Records
- Equipment Cost Records
- Payment Record Requests
- Subcontractor Pay Exception Report
- Meeting Minutes
- Cost-Estimates
- Bulletin Quotations
- Lab Test Reports
- Insurance Certificates and Bonds
- Technical Standards
- Design Handbooks
- "As-Built" Marked Prints
- Operating & Maintenance Instruction
- Daily Progress Reports & Subcontractor Daily Reports
- RFIs, RFCs and associated logs
- Monthly Progress Reports
- Correspondence Files
- Project Manual

The above Records shall be available to the members of the Project Team for reference or review at any time.

2.5. Pre-Construction Services.

In addition to any other services to be performed during the pre-Construction Phase as may be specified elsewhere in the Contract Documents, the Construction Manager shall perform the following Pre-Construction Phase Services:

2.5.1. Preliminary Evaluation. The Construction Manager shall provide a preliminary evaluation of the City's Project and construction budget and Project Schedule and phasing plan requirements, including a review of all background data made available by City as to requirements, criteria, priorities, feasibility, and physical and financial limitations with regard to the Project. The Construction Manager shall become thoroughly familiar with the Project Site and surrounding conditions and document the conditions observed on the Project Site with photos or videos as required by the City or Owner's Representative. The Construction Manager shall review with the members of the Project Team site data such as access, location of services, security, surveys, soils information, and other relevant information. The Construction Manager shall be responsible for the proper identification and location of all utilities, services and other underground facilities that may impact the Project. The Construction Manager shall participate in a kick-off meeting with the Project Team to establish rapport and develop a common appreciation of the goals of the Project.

2.5.1.1. Project Schedule and Phasing Plan Review and Recommendations. Construction Manager shall develop a phasing plan that is consistent with the Convention Center Construction Period Booking Policy set forth in City Resolution No. 2015-28995 and permits 100% of the Convention Center and other areas of the Project Site (as listed in Sections 2.1 and 2.2 of Appendix D) to be available for the Art Basel exhibition events each year. Within sixty (60) days after the effective date of this Agreement, Construction Manager shall provide an assessment of and recommendations with

respect to the phasing plan, including accelerated or fast-track scheduling, procurement and long-lead procurement, trade bid packaging, phasing of construction and other activity, and any other matter that may assist Construction Manager and its Subcontractors in achieving the Project Schedule and in particular, the Art Basel 2016 Milestone and Art Basel 2017 Milestone. The Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities and procurement and construction scheduling issues.

2.5.2. Design Review and Recommendations

2.5.2.1. Review and Recommendations

a. The Construction Manager, as part of its Pre-Construction Phase Services, shall follow the development of design through final Construction Documents, reviewing the in-progress Design Development Documents, and familiarize itself thoroughly with the evolving Construction Documents.

b. The Construction Manager shall analyze the design for Constructability, including construction feasibility and practicality, compliance with all Applicable Laws bearing on the performance of the Work, and alternative materials/methods, to ensure that design in the Construction Documents is achievable within the City's Construction Budget and Project Schedule. Construction Manager shall make recommendations to suggest modifications to improve completeness or clarity of the Construction Documents. The results of such reviews shall be provided in a format approved by the Owner's Representative.

c. The Construction Manager shall assist and advise the Project Team in exploring alternative approaches, materials, systems, including Value Engineering to minimize total construction and operation costs. The Construction Manager shall assist City and Architect-Engineer in preparing comparative life-cycle studies of ownership, operating, and maintenance costs for each schematic design alternative considering costs relating to efficiency, usable life, maintenance, energy and operation. The results of such reviews shall be provided to the City and Architect-Engineer in the form of a Memorandum of Changes in a format acceptable to the City within fifteen (15) days receipt of documents from the Architect-Engineer. If the City and the Architect-Engineer agree with such Memorandum of Changes, the Construction Manager shall be so notified and the Architect-Engineer shall incorporate the changes described in the Memorandum of Changes into the Construction Documents. Architect-Engineer retains responsibility and its liability for any and all changes made as a result of the Value Engineering and Constructability reviews.

d. The Construction Manager shall review with the Architect-Engineer and the City alternative approaches to design and construction of the Project, site use and improvements; selections of materials, building systems and equipment; potential construction means and methods; phasing; and, if requested, shall make a recommendation among such alternatives. Where alternative approaches are presented, a comparison of costs shall be provided as well as the benefits in the completion of the Work or other aspect of the Project.

e. Construction Manager shall provide information as to the availability of materials and what equipment and systems have long lead times, together with the anticipated lead times. The Architect-Engineer shall keep the Construction Manager and the City informed of any proposed changes in requirements or in construction materials, systems or equipment as the Construction Documents are developed so that Construction Manager can adjust its estimate of construction cost (prior to establishment of the GMP) appropriately. Proposed changes must be approved in writing by the City prior to incorporation into the design or Construction Documents.

f. The Construction Manager shall continuously monitor the impact of proposed design on the Project Schedule and recommend adjustments in the Design Development Documents, Construction Documents or construction bid packaging to ensure completion of the Project in the most expeditious manner possible.

g. The Construction Manager shall advise and assist the Architect-Engineer, and represent City, if requested, in dealing appropriately with all Applicable Laws and with local utilities, communications, and other related infrastructure issues, as necessary.

h. The Architect-Engineer shall coordinate with the Construction Manager and the City by participating and taking a leadership role in reviewing and commenting on Constructability and Value Engineering studies performed by Construction Manager, and attending meetings where the content of Design Development Documents and Construction Documents will be coordinated and reconciled, scheduled during any phase of the Work.

i. Construction Manager shall use diligent good-faith efforts to determine the proper identification and location of all utilities, services, and other underground facilities which may impact the Project.

j. Construction Manager shall be fully responsible for the coordination of the Construction Documents with the Contract Documents. This includes the Construction Manager's review and coordination of the Construction Documents with other Construction Documents (e.g., coordination of the drawings with the written specifications), as well as coordination of the Construction Documents with existing facilities or conditions, to ensure proper coordination and constructability and lack of conflict, and to minimize unforeseen conditions.

2.5.2.2. Preliminary Estimates

a. Cost Model. The Construction Manager shall prepare a cost model for estimating program costs and provide a copy of such model to the Owner's Representative within forty-five (45) days after the effective date of this Agreement. Such cost model shall serve as a basis for all estimates for the program including the development of all proposed GMPs.

b. Initial Project Estimate. The Construction Manager shall prepare an Estimate for the Project (based on the most current Design Development Documents available on the Effective Date of this Agreement) on or about July 2, 2015.

c. Project Estimate Updates. The Construction Manager shall prepare several levels of budgeting, estimating and pricing appropriate to each level of design, as described in the applicable Construction Documents or trade bid packages for the Work. The Construction Manager shall continue to refine cost estimates prior to its submission of the GMP Proposal, with input to the Program Team on clarifications needed to reduce allowances for contingencies. The Construction Manager shall continue to review and refine the estimate as Construction Documents are prepared for the Project and advise the Project Team immediately if it appears that any portion of the Project cannot be completed within the City's Construction Budget or Schedule.

2.5.2.3. Local Conditions. As part of its Pre-Construction Phase Services, Construction Manager shall be responsible for, and shall represent and warrant in the GMP Amendment, that it has taken all steps reasonably necessary to ascertain the nature and location of the Work, and that it has investigated and satisfied itself as to the general and local conditions which may affect the Project (as may be reasonably inferred), the performance of the Work and/or the Project Site, including 1) conditions bearing upon transportation, disposal, handling, and storage of materials; 2) the availability of labor, water, electric power, and roads; 3) uncertainties of weather and observable physical conditions at the Project Site or otherwise affecting the Project; 4) the adequacy of the Project Site for lay-down, storage and parking; and 5) the character of equipment and facilities needed preliminary to and during the performance of the Work. The Construction Manager agrees that it bears all risk associated with any general or local condition that can affect the Project, the Project Site and/or the performance of the Work. Any act or omission by the Construction Manager with respect to the actions described and acknowledged in this subsection will not relieve the Construction Manager from responsibility for estimating properly the difficulty and cost of successfully performing the Work, as time is of the essence for proceeding to successfully perform the Work within the Project Schedule and the Guaranteed Maximum Price. In confirmation and furtherance of the foregoing, the Construction Manager shall

acknowledge and agree in the GMP Amendment that it shall not be entitled to an adjustment in the Project Schedule or the Guaranteed Maximum Price based on general or local conditions affecting the Project, the Project Site and/or the performance of the Work, and the Construction Manager waives and releases City from any and all Claims associated therewith.

2.5.2.4. Review of Construction Documents, Construction Manager's Warranty, and City's Disclaimer of Warranty. Within forty-five (45) days after receiving Construction Documents for this Project, the Construction Manager shall perform a specific review of the Construction Documents for each of the following: clarity, consistency and coordination; construction feasibility; practicality; and apparent defects. Promptly after completion of the review, the Construction Manager shall submit to the Project Team a written report covering suggestions or recommendations previously submitted; additional suggestions or recommendations, if any; any comments it may deem to be appropriate, including with respect to separating the Work into separate subcontracts, alternative materials, and the like; and all actions taken by the Architect-Engineer with respect to the foregoing.

AT COMPLETION OF THE CONSTRUCTION MANAGER'S REVIEW OF THE CONSTRUCTION DOCUMENTS FOR THE PROJECT AT THE GMP PROPOSAL STAGE, EXCEPT ONLY AS TO SPECIFIC MATTERS AS MAY BE IDENTIFIED BY APPROPRIATE COMMENTS PURSUANT TO THIS SECTION, THE CONSTRUCTION MANAGER SHALL WARRANT, WITHOUT ASSUMING ANY ARCHITECTURAL OR ENGINEERING RESPONSIBILITY, THAT THE CONSTRUCTION DOCUMENTS ARE COORDINATED, CONSISTENT, PRACTICAL, FEASIBLE AND CONSTRUCTIBLE. CONSTRUCTION MANAGER SHALL WARRANT THAT THE WORK DESCRIBED IN THE CONSTRUCTION DOCUMENTS FOR THE VARIOUS BIDDING PACKAGES OF THE PROJECT IS CONSTRUCTIBLE WITHIN THE SCHEDULED TIME FOR COMPLETION THEREOF.

ACCORDINGLY, EXCEPT AS INCLUDED IN THE GMP AMENDMENT, CONSTRUCTION MANAGER SHALL HAVE NO ENTITLEMENT WHATSOEVER TO ANY CONTRACT MODIFICATION FOR ADDITIONAL COSTS OR TIME DUE TO REASONS INVOLVING CONFLICTS IN THE CONSTRUCTION DOCUMENTS; QUESTIONS OF CLARITY WITH REGARD TO THE CONSTRUCTION DOCUMENTS; AND INCOMPATIBILITY, OR CONFLICTS BETWEEN THE CONSTRUCTION DOCUMENTS AND THE EXISTING CONDITIONS, KNOWN UTILITIES, CODE ISSUES BEARING ON THE PERFORMANCE OF THE WORK AND UNFORESEEN CONDITIONS (EXCEPT DIFFERING SITE CONDITIONS AS PROVIDED IN SECTION 9.2).

CITY'S DISCLAIMER OF WARRANTY: THE CITY DISCLAIMS ANY EXPRESS WARRANTY THAT THE CONSTRUCTION DOCUMENTS ARE ACCURATE, PRACTICAL, CONSISTENT, COORDINATED OR CONSTRUCTIBLE, AND CITY'S REVIEW OR APPROVAL OF THE CONSTRUCTION DOCUMENTS SHALL NOT CONSTITUTE A REPRESENTATION WITH RESPECT THERETO. CITY'S REVIEW AND/OR APPROVAL OF THE CONSTRUCTION DOCUMENTS SHALL IN NO WAY DIMINISH OR RELEASE THE CONSTRUCTION MANAGER'S WARRANTY OF ADEQUACY AND FITNESS FOR INTENDED PURPOSES.

2.6. Procurement Planning.

2.6.1. Long Lead Procurements. The Construction Manager shall review the Design Development Documents for the purpose of identifying long lead procurement items (machinery, equipment, materials and supplies) for this Project. When each item is identified, the Construction Manager shall notify the Project Team of the required procurement and schedule. Such information shall be included in the bid documents and be made a part of all affected subcontracts and included in the Construction Schedule. As soon as the Architect-Engineer has completed the applicable Construction Documents and the Construction Manager has obtained permitting approval or is otherwise authorized by the City, the Construction Manager shall arrange for procurement of such long-lead items, as authorized by City. The Construction Manager shall keep informed of the progress of the respective Subcontractors or Suppliers, manufacturing or fabricating such items and advise the Project Coordinator or Owner's Representative, of any problems or prospective delay in delivery. When such items are to be fabricated and partially or totally paid for by the City prior to the arrival of such items at the Project Site, the Construction Manager shall require the assembler or manufacturer to provide a Uniform Commercial

Code (UCC) Form No. 1, clearly establishing that the City has rights and privileges with regard to the item that has been paid for.

2.6.2. Separate Subcontracts Planning. The Construction Manager shall review the design and phasing plans for this Project with the Architect-Engineer and make recommendations in writing to the Project Team with respect to dividing the Work in such manner as will permit the Construction Manager to take bids and award separate construction subcontracts on the current schedule while the design is being completed. The evaluation shall speak to the benefits of the speed of erection and early completion of the Project overall. The Construction Manager shall take into consideration such factors as natural and practical lines of severability, sequencing effectiveness, access and availability constraints, total time for completion, construction market conditions, availability of labor and materials, community relations and any other factors pertinent to saving time and cost.

2.6.3. Interfacing. In furtherance of the reviews required by Subsection 2.5.2.4, the Construction Manager shall review the Construction Documents for clarity, consistency and coordination of documentation, and call to the Project Team's attention any apparent ambiguities or defects in the design, plans and specifications or other Construction Documents, use of illegal or restrictive requirements, overlap with any separate construction trade contracts, omissions, lack of correlation between Construction Documents and any other deficiencies noted in order that the Project Coordinator and Architect-Engineer may arrange for necessary corrections. The Construction Manager shall take such measures as are appropriate to provide that all construction requirements for the Project will be covered in the separate subcontracts for procurement of long lead items, and that the separate construction subcontracts will be without duplication or overlap, and will be sequenced to maintain completion of all Work on schedule. Particular attention shall be given to provide that each bid scope clearly identifies the Work included in that particular separate subcontract, its schedule for start and completion and its relationship to other separate contractors.

2.6.4. Warranties. The Construction Manager shall review the Contract Documents to ensure that warranty effective dates coincide with Substantial Completion for the Project, or such other dates as provided for by the Contract Documents.

2.6.5. Stimulation of Bidder Interest. The Construction Manager shall monitor conditions in the construction market to identify factors that will or may affect costs and time for completing the Project. As various bid scopes are prepared for bidding, the Construction Manager shall submit to the Project Team a list of potential bidders. The Construction Manager shall be responsible to stimulate bidder interest in the local, regional and national market place, and to identify and encourage bidding competition.

2.6.6. Preparation of GMP Proposal. When the Construction Documents for the Project are approximately 65-75% complete, or at such time or percent completion as designated by the City, the Construction Manager will submit in writing to the City a GMP Proposal for the Project for the City's consideration at its sole discretion. The GMP Proposal shall include the proposed GMP for completing all Work in accordance with the Contract Documents and fixing all fees, overhead, profit and administrative and general expenses payable to Construction Manager, as well as contingencies for the Project. The GMP Proposal shall contain detailed cost estimates on the basis of a quantitative material take-off with current local cost for each bid group by subcontract package. Such cost estimates shall remain confidential and exempt from inspection under Section 119.07(1), Florida Statutes, to the extent permitted by law, until bids or proposals received by Construction Manager are opened. Such GMP Proposal, if accepted by the City Commission at its sole discretion, may only be modified for changes in the Project in accordance with the Contract Documents and as provided in Article 9. The City currently anticipates that the Construction Manager shall submit its GMP Proposal on or about October 1, 2015, based on approximately 65% completed Construction Documents.

a. If any Estimate submitted by the Construction Manager or GMP Proposal exceeds the City's Construction Budget, the Construction Manager shall make appropriate recommendations to the City, including recommendations to modify the Construction Documents to reduce the scope of Work and to reduce construction costs. In addition, the Construction Manager shall immediately advise the City of any adjustments to any Estimate which would cause the Project cost

to exceed the Estimate or the City's Construction Budget, and shall make recommendations for corrective action no later than seven (7) days thereafter.

b. the GMP proposal for the Project shall include four (4) sets of signed and dated Construction Documents and other Contract Documents upon which the GMP is based from the Architect-Engineer, and shall acknowledge on the face of each document of each set that it is the set upon which the Construction Manager based its GMP. The Construction Manager shall send one set of the documents to the Project Coordinator along with its GMP proposal, while keeping one set for itself and returning one set to the Architect-Engineer. The GMP proposal shall include the following sections:

- Section One: Summary of Work
- Section Two: GMP Price Summary
- Section Three: Scope Clarifications and Assumptions
- Section Four: Detailed Estimate
- Section Five: Bid Tabulations, where applicable
- Section Six: Preliminary Construction Schedule
- Section Seven: Contract Documents – Construction Document Plan List and Specification List

2.6.7. Expedited Permitting Services. Construction Manager shall be responsible for subcontracting with a firm to provide expedited permitting services in connection with all permits required for the Project, and for coordinating all Work associated with obtaining all appropriate permits from all agencies having jurisdiction.

2.6.8. Early Bid Procurement. As part of its Pre-construction Phase Services and prior to the City's consideration or acceptance of the GMP Proposal, Construction Manager shall solicit bids for certain bid packages that may be necessary to permit the commencement of construction Work on or about December 12, 2015, in accordance with the subcontractor bid process delineated in Article 4 and other applicable provisions of the Contract Documents. Such bid packages shall be determined in consultation with the Project Team and shall be subject to the Project Coordinator's advance written approval, and may include solicitation of bid packages for foundations, demolition, utilities, steel or other Work. In no event shall any Subcontract or bid package be awarded (1) prior to the City Commission's acceptance of a GMP Amendment, and (2) without the City Manager's advance written approval.

a. The intent of such procurement efforts is to solicit and evaluate bids, negotiate and finalize draft subcontracts that are ready to be awarded simultaneously with execution of a GMP Amendment or shortly thereafter, in the event the City Commission at its sole and absolute discretion accepts a GMP Amendment, to permit commencement of construction activity on or about December 12, 2015.

b. During the Pre-Construction Phase Services period, Construction Manager shall identify all appropriate resources and personnel to perform all such early procurement and related Work in accordance with all applicable provisions of the Contract Documents, in the same manner as set forth in the Contract Documents for such Work during the Construction Phase that may be required for commencement of construction activity on or about December 12, 2015, (including permitting, scheduling, coordination, subcontractor interfacing and the like).

2.7. Construction Phase.

In addition to any other services to be performed during the Construction Phase, as may be specified elsewhere in this Agreement, the Construction Manager shall perform the following Construction Phase services:

2.7.1. Construction Manager's Administration. The Construction Manager shall maintain at the Project Site sufficient off-site support staff and competent full time staff to manage the Project, and who are authorized to act on behalf of the Construction Manager to provide continuous on-site monitoring and coordination, inspection and general direction of the Work on the Project and progress of the

Subcontractors and provide all services required by the Contract Documents. Construction Manager shall not transfer or move either its Project Manager, Construction Superintendent or any of its supervisory staff assigned to the Agreement without the prior written consent of City.

2.7.2. Lines of Authority. The Construction Manager shall establish on-site organization and maintain lines of authority for its personnel, and shall provide this definition to the Project Manager and all other affected parties such as the inspectors, the Subcontractors, the Architect-Engineer and the Project Coordinator, to provide general direction of the Work and progress of the various phases and Subcontractors. Construction Manager's Project Manager shall have authority to represent Construction Manager. Directions given to the Project Manager or Construction Superintendent by the Project Coordinator shall be binding on Construction Manager. The Project Coordinator, City and Architect-Engineer may attend meetings between the Construction Manager and its Subcontractors; however, such attendance shall not diminish either the authority or responsibility of the Construction Manager to administer the subcontracts. At all times during the course of the Work, Construction Manager shall provide at the Project Site the Project Manager who shall be satisfactory to City. Upon City's written request, Construction Manager shall give the Project Manager, in writing, complete authority to act on behalf of and to bind Construction Manager in all matters pertaining to the Work and this Agreement. Construction Manager shall furnish City a copy of such authorization.

2.7.3. Schedule and Project Manual Provisions. The Construction Manager shall provide Subcontractors with applicable portions of the Project Manual emphasizing their respective responsibilities for performance and the relationships of their Work with respect to other Subcontractors and suppliers. The Construction Manager shall also continue to provide current scheduling information, direction and coordination regarding Milestones, and beginning and finishing dates to enable them to perform their respective tasks so that the development of construction progresses in a smooth and efficient manner in conformance with the overall Project Schedule.

2.7.3.1. No less often than once each month, Construction Manager shall update and distribute the Project Schedule and Construction Schedule, both of which must incorporate its activities and those of all Subcontractors, including processing of Shop Drawings and similar required submittals and delivery of products requiring long lead time procurement and showing current conditions and revisions required by actual experience. Construction Manager shall include in the Construction Schedule the submission of the GMP proposal; all phases and components of the Work; long lead procurement, approval of Shop Drawings; times of commencement and completion required of each Subcontractor; ordering and delivery of products and materials, including those that must be ordered well in advance of construction; Contract Modifications in progress; schedules for Contract Modifications; performance testing requirements, and Project occupancy requirements, showing portions of the Project having occupancy priority. Construction Manager shall use reasonable care and all necessary efforts to cause the progress of all Work to be maintained in accordance with the Project Schedule and Construction Schedule.

2.7.3.2. The Construction Manager shall review each Subcontractor's construction schedule and conformance with applicable Contract Documents and ensure that established completion dates will comply with overall Project Schedule requirements. Construction Manager shall obtain input and/or recommendations from key Subcontractors with respect to activity which may facilitate the achievement of the Milestones and Project Schedule. The Construction Manager shall review the progress of construction of each Subcontractor on a weekly basis, evaluate the percentage completion and compare actual progress to schedule, and determine and implement alternative courses of action that may be necessary to achieve timely and complete contract compliance by the Subcontractor. The Construction Manager shall determine the effect on schedules of requested time extensions and require recovery schedules from Subcontractors as needed.

2.7.3.3. Construction Manager shall develop, monitor and update the phasing plan for the Project, which shall provide for the entirety of the Project Site to be available for the Art Basel exhibition events each year and for the MBCC to remain open during the construction period consistent with City Resolution No. 2015-28995. Construction Manager shall provide recommendations on an on-going basis with regard to accelerated or fast-track scheduling, procurement, or phased construction. The

Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities and procurement and construction scheduling issues.

2.7.4. Solicitation of Bids. Without assuming responsibilities of the Architect-Engineer (except for Delegated Design Work, as applicable), the Construction Manager shall prepare invitations for bids, or requests for proposal when applicable, as well as all contract documents for all procurements of long lead items, materials and services, site utilities, and for all Subcontractor contracts. Construction Manager shall solicit bids and award subcontracts in accordance with the requirements of Article 4 of this Agreement.

2.7.5. Quality Control. In accordance with the requirements of Appendix I, the Construction Manager shall be responsible and accountable for the quality control of the Work including quality control testing and inspection. The Construction Manager shall supervise the Work of all Subcontractors, reviewing construction means, methods, techniques, sequences and procedures, providing instructions to each when their Work does not conform to the requirements of the Contract Documents. The Construction Manager shall continue to exert its influence and control over each Subcontractor to ensure that corrections are made in a timely manner so as to not affect the efficient progress of the Work. The Construction Manager shall receive copies of all claims or reports issued by the Architect-Engineers' Field Representative relative to the performance or acceptability of Work. Should disagreement occur between the Construction Manager and either the City or the Architect-Engineer over acceptability of Work and its conformance with the requirements of the Construction Documents of the Project, the Project Coordinator shall be the final judge of performance and acceptability, and noncompliant Work shall be corrected accordingly. The City may employ independent firm(s) for verification testing of the quality control testing. Construction Manager shall be responsible for payment of expenses for additional third-party testing resulting from non-conforming Work, at its sole cost and expense. The Construction Manager will exercise reasonable care and diligence in discovering and promptly reporting to City any defects or deficiencies in the Work and no later than three (3) business days following discovery thereof. The Construction Manager shall establish Project Schedule and Milestones and review the progress schedules submitted by Subcontractors in order to ensure proper completion of Work.

2.7.6. Subcontractor Interfacing. The Construction Manager shall be the single point of interface with all of its Subcontractors and Suppliers, and shall manage the Project and be fully responsible for coordinating all Work of each Subcontractor to ensure all of the Work is performed in a timely, efficient and economical manner and in accordance with the Contract Documents. There is no requirement that City or any of its agents or representatives, including the Architect-Engineer, interface with such Subcontractors and Suppliers. The Construction Manager shall negotiate all contract modifications with all affected Subcontractors. The Construction Manager shall review the costs of those proposals and advise the City and Architect-Engineer of their validity and reasonableness, acting in the City's best interest prior to requesting approval of each contract modification from the City. Before any Work is begun on any contract modification, a written authorization from the City must be issued. However, when health and safety are threatened, the Construction Manager shall act immediately to remove the threat to health and safety. The Construction Manager shall also carefully review all Shop Drawings and then transmit the same to the Architect-Engineer for review and action. Construction Manager shall also be responsible for coordination of Shop Drawings affecting multiple trades prior to submission to the Architect-Engineer. The Architect-Engineer will transmit them back to the Construction Manager who will then issue the Shop Drawings to the affected Subcontractor for fabrication or revision. The Construction Manager shall maintain a suspense control system to promote expeditious handling. The Construction Manager shall request the Architect-Engineer to make interpretations of the Construction Documents requested by the Subcontractors via submission of a Request for Information form (as provided by the Owner's Representative). The Construction Manager shall maintain a document control/correspondence log system to promote expeditious handling of all submittals and Requests for Information. The Construction Manager shall advise Project Coordinator and Architect-Engineer when timely response is not occurring on any of the above.

2.7.7. Means and Methods. Construction Manager shall be solely responsible for construction means, methods, techniques, sequence and procedures used in the construction of the Project and for

the safety of its personnel, property, and its operations for performing in accordance with the Contract Documents.

2.7.8. General Coordination. In addition to its responsibility for coordinating the Work of all Subcontractors, Construction Manager shall coordinate the Work with all authorities having jurisdiction over the Project and utility companies that may be involved in the Project. Construction Manager shall arrange for delivery, storage, protection and security for all materials and equipment until the materials are incorporated as part of the Work and final acceptance is received from the Architect-Engineer. Construction Manager shall file all notices of commencement and all other filings required to be made for the Project.

2.7.9. Coordination with Adjacent Work. The Construction Manager shall coordinate with any other contracts or assigned work City may issue directly for the Project, and for any work adjacent to or interfacing with the Project.

2.7.10. Permits. The Construction Manager shall coordinate with the Architect-Engineer regarding the submittal of all required documents for permits. With respect to permits issued by the City of Miami Beach Building Department, such permitting may involve a phased permitting approach for the Project, subject to such conditions or parameters as the Building Department may establish at its sole discretion. The Construction Manager shall be responsible for securing all necessary building permits, all necessary utility connection permits, Public Works Department right-of-way permits, DERM permits and any other permits for permanent improvements from applicable permitting authorities, except for permits required to be obtained directly by Subcontractors or the City, and provided, however, that Construction Manager cannot guarantee approval of permits from agencies having jurisdiction. Construction Manager shall coordinate the permitting process and verify that the general building permit and all trade permits have been obtained. Construction Manager shall develop a matrix (in a form approved by the Owner's Representative) showing required permits, the party responsible to obtain each permit, the status of each permit, and the target application dates and dates by which permits must be issued. Construction Manager shall assist the City and Architect-Engineer in connection with the City's responsibility for filing documents required for the approvals of government entities having jurisdiction over the Project. Unless otherwise approved by the City at its sole discretion, City's issuance of a Notice to Proceed for the Construction Phase or portions thereof shall be contingent upon Construction Manager's obtaining all appropriate permits and satisfying all requirements of agencies having jurisdiction.

2.7.11. Field Questions. Construction Manager shall develop, in conjunction with the City and Architect-Engineer, procedures acceptable to the City, the Owner's Representative and Architect-Engineer for implementing, documenting, reviewing and processing field questions and responses, field variance authorizations and Field Orders, minor changes and Change Orders due to scope and modifications. Construction Manager shall cooperate with the City, Owner's Representative and Architect-Engineer to develop systems and procedures to be used by the Project Team and the Subcontractors to facilitate quick and accurate communications and to provide for an up to date submittal log accessible to the Project participants. Construction Manager shall recommend necessary or desirable changes to the Project Team, review requests for changes submitted by Subcontractors, negotiate Subcontractor's proposals, submit recommendations to Architect-Engineer, the City and the Owner's Representative, and if they are accepted by the City, then prepare Change Orders for execution by the appropriate parties.

2.7.12. Submittals. Construction Manager shall prepare for review and approval a comprehensive schedule for Submittals (to include Shop Drawings, product data, physical samples and other written or graphic information required by the Contract Documents) indicating all anticipated submittals and anticipated timing of submission. The Construction Manager shall receive from each Subcontractor such Shop Drawings, product data, samples, as-built drawings and other submittals as set forth in a submittal schedule agreed to by the Parties, and shall thoroughly review and approve same for conformance with the Contract Documents, and/or take other appropriate action and then submit to Architect-Engineer. Construction Manager shall stamp or take such other appropriate action with respect to all Shop Drawings, product data, samples and other submittals to verify the review, approval for conformance with the Contract Documents or other action thereon, and in the case of Shop Drawings, shall also review and coordinate the shop drawing to indicate field conditions, proposed Subcontractor

deviations from the Contract Documents, and other requirements that affect design intent. Construction Manager shall transmit to Architect-Engineer all submittals recommended for approval in accordance with the Contract Documents. Construction Manager's stamp shall constitute its verification that, to the best of the Construction Manager's knowledge and belief based on its review, the submitted item conforms with the Contract Documents and is coordinated with other related Work. In collaboration with Architect-Engineer and the Owner's Representative, Construction Manager shall establish and implement procedures for expediting the processing and approval of Shop Drawings, product data, samples and other submittals.

2.7.13. Safety and Security Program. The Construction Manager shall be solely responsible for initiating, maintaining and providing supervision of safety precautions and programs in connection with the Work, and shall also comply with any and all insurance carrier-mandated safety requirements and programs. The Construction Manager shall designate a full-time staff member as the Project safety director who shall oversee job safety and accident prevention for the Construction Manager. This individual shall review the proposed safety program of each Subcontractor and make appropriate recommendations. The Construction Manager shall conduct a review of job safety and accident prevention at its progress meetings with Subcontractors. The performance of such services by the Construction Manager shall not relieve the Subcontractors of their responsibilities for the safety of persons and property, and for compliance with all Applicable Laws relating to the conduct of the Work.

2.7.13.1. Construction Manager shall take any and all precautions that may be reasonably necessary to render all portions of the Work, the Project Site and any adjacent areas affected by the Work secure in every material respect, to decrease the likelihood of accidents from any cause, and to avoid vandalism and other contingencies which may delay the Work or give rise to any Claims or liabilities.

2.7.13.2. Construction Manager shall ensure all necessary facilities are furnished and installed to provide safe means of access to all points where Work is being performed, and shall take all precautions and measures as may be reasonably necessary to secure the Project at all hours, including evenings, holidays and non-work hours. Such precautions may include provision of security guards.

2.7.14. Inspection Coordination. The Construction Manager shall coordinate all technical inspection and testing provided by professionals designated by the City, Project Coordinator, Owner's Representative, permitting authorities, and others. The Construction Manager shall also schedule the services of independent testing laboratories and provide the necessary testing of materials to ensure conformance to the Contract Documents and provide a copy of all inspection and testing reports to Owner's Representative on the day of inspection or test. The Construction Manager shall provide reasonable prior notice to appropriate inspectors before the Work is covered up, but in no event less than 24 hours before the Work is covered up. All costs for uncovering Work not inspected and any reconstruction due to lack of reasonable prior notice shall be borne by Construction Manager at its sole cost and expense. Any time billed by inspectors for inspection where the Work is not ready to be inspected shall be at Construction Manager's sole cost and expense. If any members of the Project Team are to observe said inspections, tests or approvals required by the Contract Documents, they shall be notified in writing by the Construction Manager of the dates and times of the inspections, tests or other approvals. The Construction Manager shall schedule, direct and/or review the services of or the reports and/or findings of surveyors, environmental consultants and testing and inspection agents engaged by the City. All Materials and Equipment furnished by Construction Manager and Work performed by Construction Manager shall at all times be subject to inspection and testing by City or inspectors or representatives appointed by City. Whenever requested, Construction Manager shall give the Owner's Representative, the City, and any inspectors or representatives appointed by the City free access to its Work during normal working hours either at the Jobsite or its shops, factories, or places of business of Construction Manager and its Subcontractors and suppliers for properly inspecting materials, equipment and Work, and shall furnish them with full information as to the progress of the Work in its various parts. If any of the Work should be covered up without approval or consent of City's Project Coordinator, or without necessary test and inspection, Construction Manager shall, if required by City's Project Coordinator or by

public authorities, uncover such Work for examination and testing, and shall re-cover same at Construction Manager's expense.

2.7.15. Art in Public Places ("AIPP") Coordination. Construction Manager shall coordinate the implementation of the City's AIPP commissions and installations for the Project, with all such coordination Work covered within the GMP, provided, however, that the City shall separately fund the commissioning of all AIPP artworks.

2.7.16. Notice to Proceed with Construction Phase Work. City's issuance of a Notice to Proceed for any portion of the Work shall be contingent upon Construction Manager's advance submission of a Project Schedule in compliance with the Contract Documents; a utility coordination schedule (including schedule for utility relocations); preliminary schedule of Show Drawing submission; a preliminary Schedule of Values in sufficient detail to serve as the basis for progress payments during construction of the Work or portion thereof (including an appropriate amount of overhead and profit applicable to the Work); and all permits required by authorities having jurisdiction, unless otherwise provided by the Contract Documents.

2.7.17. Construction Administration. Construction Manager shall provide, as part of its Construction Phase General Conditions Fee set forth in Subsection 7.1.2, comprehensive construction management and administrative functions during construction to assure proper supervision, coordination and documentation, including the following responsibilities:

2.7.17.1. Supervision of Work. Construction Manager shall provide full-time representation at the Project Site to become familiar in detail with the progress and quality of the Work completed, to determine in detail if the Work is proceeding in accordance with all the requirements of the Contract Documents, to ensure compliance with the Construction Documents, coordination with other Work, and to ensure compliance with all Applicable Laws.

2.7.17.2. Daily Logs. Construction Manager shall maintain a log and electronic database of daily activities for the Project including, at a minimum, the following information in a bound log: the day, date, weather conditions and how any weather condition affected the progress of the Work; time of commencement of work for the day; number of workers delineated by Subcontractor and trade; all Work accomplished; problems encountered; material and equipment deliveries made to and received at the Project Site and other similar relevant data as the City may require; visitors to the Project Site including representatives of City, Owner's Representative and Architect-Engineer; any special or unusual conditions or occurrences encountered; and the time of termination of work for the day. The log and database shall be available to the City, the Owner's Representative, the Architect-Engineer, and the inspectors upon request. Construction Manager shall also require all Subcontractors to provide independent daily logs of activity.

2.7.17.3. Project Rosters. Construction Manager shall maintain for the Project a roster of companies on the Project with names and telephone numbers of key personnel, and provide a means of identifying workers on-site in accordance with the approved security plan.

2.7.17.4. Job Meetings. Construction Manager shall hold weekly progress and coordination meetings with the Project Manager to provide for an easy flowing Project and orderly progress of the Work, including implementation of procedures, scheduling, and to assure timely submittals and expeditious processing of approvals and return of Shop Drawings, samples, and address other Project issues or problems in a timely fashion. Construction Manager shall prepare and distribute for discussion at each meeting a 3 Week look-ahead schedule. The Construction Manager shall advise the other Project Team members of their required participation in any meeting or inspection, giving each approximately one week's notice, unless such notice is made impossible by conditions beyond the Construction Manager's control. The Construction Manager shall hold Jobsite meetings at least once every two (2) weeks with the Project Team. Construction Manager shall prepare and distribute minutes of each meeting promptly and no later than three (3) business days after each meeting.

2.7.17.5. Project Team Meetings. The Construction Manager, Project Coordinator, Owner's Representative and Architect-Engineer and any other authorized representatives of the City shall meet regularly as the progress of the Project requires, but in no case less than every two weeks for the Project, to review and agree upon the Work performed to date and to establish the controlling items of Work for the next two weeks.

2.7.17.6. Shop Drawings Submittals/Approvals. Construction Manager shall work with the Project Team to establish and implement procedures for expediting and processing all Shop Drawings, samples, submittals and detail plans/drawings, and other documents, maximizing the use of electronic plan media to the greatest extent possible for submittal and transmittal to the Architect-Engineer of such plans for action, and closely monitor their submittal and approval process. The Construction Manager shall be responsible for the initial review and appropriate circulation of submittals.

2.7.17.7. Material and Equipment Expediting. Construction Manager shall closely monitor material and equipment deliveries, critically important checking and follow-up procedures on supplier commitments of all Subcontractors.

2.7.17.8. Payments to Subcontractors. Construction Manager shall review and process invoices from Subcontractors and Suppliers.

2.7.17.9. Document Interpretation. Construction Manager shall refer all questions for interpretation of the documents prepared by the Architect-Engineer to the Architect-Engineer.

2.7.17.10. Reports and Project Site Documents. Construction Manager shall record the progress of the Project as required by this Agreement, as well as directed by the Project Coordinator. Submit written progress reports to the City and the Architect-Engineer including information on the Subcontractor's Work, and the percentage of completion. Construction Manager shall keep a daily log available to the City, the Architect-Engineer and the permitting authority inspectors.

2.7.17.11. Subcontractors' Punch List. Construction Manager shall prepare periodic punch lists for each Subcontractor's Work, including unsatisfactory or incomplete items and schedules for their completion, and including comments and items provided by Architect-Engineer, Owner's Representative and the City.

2.7.17.12. Signage. Construction Manager shall arrange for all appropriate Project signage necessary for identification, direction, or control for safety and maintenance of traffic. The layout and location of all signage must be approved by the Project Coordinator, and the signage shall be prepared by a professional sign maker.

2.7.17.13. Printing. Construction Manager shall arrange for the printing and distribution of all required bidding documents and Shop Drawings, including the sets required by any permitting authority's inspectors.

2.7.17.14. Cleaning. Construction Manager shall cause the Subcontractors to keep the premises where the Work is underway reasonably free from accumulations of waste material or rubbish. Upon Substantial Completion of portions of the Work, the Construction Manager shall cause the appropriate Subcontractors to remove all rubbish, tools, scaffolding and surplus materials from and about the Project Site and leave such Work area clean and ready for occupancy.

2.7.17.15. Protection of Property. Construction Manager shall take all reasonable precautions for the safety of, and shall monitor the Subcontractors for reasonable protection to prevent damage, injury or loss to all the Work and all materials and equipment to be incorporated therein, whether in storage on or off the Project Site, under the care, custody or control of the Construction Manager or a Subcontractor, and other property at the Project Site or adjacent thereto, including walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction. The Construction Manager shall cause all Subcontractors and other agents of Construction Manager to protect City's property from loss or injury that may arise in connection with the Work.

2.7.17.16. Severe Weather/ Storm and Hurricane Preparedness. Construction Manager shall submit to the City a Hurricane Preparedness Plan (HPP) within thirty (30) days following the GMP Amendment. The HPP shall include the measures to be taken by the Construction Manager in case of a threatened tropical storm or hurricane. During such periods of time as are designated by the United States Weather Bureau as being a tropical storm/hurricane warning or alert, or at such other time deemed necessary by the City's Project Coordinator, the Construction Manager shall implement the HPP to secure the Project Site in response to all threatened storm events, regardless of whether the City or Architect-Engineer has given notice of same. Failure of the City to direct the Construction Manager to implement the HPP shall not relieve the Construction Manager for sole responsibility for implementation of the HPP. Any damage to materials and equipment resulting from Construction Manager's failure to implement the HPP shall be removed and replaced at no cost to the City. The costs for additional Work relating to hurricane warning or alert at the Project Site will be charged to the Construction Manager's Contingency. Construction Manager's sole remedy for any delay or suspension of the Work resulting from severe weather shall be as provided for Force Majeure events in Section 9.4. In no event shall Construction Manager be entitled to damages (other than General Conditions, if any, as set forth in Subsection 9.4.1.4) for any such delay.

2.7.17.17. LEED Initiatives. Construction Manager shall implement the agreed-upon LEED initiatives and certification process, which at a minimum shall include satisfying all of the requirements associated with the then current USGBC Silver LEED certification. Construction Manager shall endeavor to obtain Gold LEED certification, if feasible and within the Project budget.

2.7.17.18. Presentations. Construction Manager shall participate and assist in the preparation of materials for meetings of the City Commission, relevant sub-committees, and any other groups required.

2.7.17.19. MBCC Event Coordination. Construction Manager shall meet with the Convention Center Manager not less than bi-weekly to discuss construction activities and event activity occurring at the operational part of the Convention Center.

2.7.17.20. Defective or Non-Conforming Work. Construction Manager shall correct all defective Work or Work that fails to conform to the Contract Documents, or remove such defective or non-conforming Work and replace it with non-defective and conforming Work no later than thirty (30) days following notice thereof by the Architect-Engineer, Owner's Representative or City's Project Coordinator, each of whom shall have the authority to reject or disapprove Work which Architect-Engineer finds to be defective or as failing to conform to the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed. Construction Manager shall bear all direct and indirect costs of such removal or corrections including cost of testing laboratories and personnel, at its sole cost and expense and without any reimbursement whatsoever from the City and shall not be reimbursable as a Cost of the Project except as set forth in Section 8.2. Labor required for correction of non-conforming work is to be manned separately from that of the Work on the Project Schedule and shall be appropriately reflected in updated Project Schedule resource loading. Nothing in the foregoing shall preclude the Construction Manager from paying such costs and expenses from any insurance proceeds received by the Construction Manager under the insurance maintained under the Contract Documents.

a. The Construction Manager further agrees that after being notified in writing by the City's Project Coordinator or Architect-Engineer of any Work not in accordance with the requirements of the Contract Documents or any defects in the Work, the Construction Manager will commence and prosecute with due diligence all Work necessary to fulfill the terms of the Contract Documents and to complete the Work within a reasonable period of time, as determined by the City's Project Coordinator or Architect-Engineer, and in the event of failure to so comply, the Construction Manager does hereby authorize the City to proceed to have such Work done at the Construction Manager's sole cost and expense and Construction Manager shall pay the cost thereof upon demand. Notwithstanding the foregoing paragraph, in the event of an emergency constituting an immediate hazard to the health or safety of personnel, property, or licensees, the City may undertake, at the

Construction Manager's expense, without prior notice, all actions necessary to correct such hazardous condition when it was caused by Work of the Construction Manager not being in accordance with the requirements of the Contract Documents.

b. In no event shall the failure of the City or the Architect-Engineer to bring to the attention of the Construction Manager such faults act as a waiver or release the Construction Manager from responsibility or liability for such fault, defect or non-conforming Work.

2.7.17.21. Contract Modification Administration. Construction Manager shall administer contract modifications in conjunction with the Project Coordinator regarding revised plans or sketches as prepared by the Architect for items of extra work or changes of scope (as required), review each requested change in the Work or directed extra work to compare with the prices quoted by the Subcontractors. With approval of City, Construction Manager shall conduct negotiations with Subcontractors and develop contract modifications to incorporate the changes or extra work into the subcontracts and process each contract modification through the respective Subcontractor and submit to City for approval. The Construction Manager shall evaluate the scope of Subcontractor's proposal with respect to the proposed contract modifications and substitutions proposed by the Subcontractor and shall make recommendations to City. City shall have the option to reject proposed contract modifications and substitutions. Any Work performed under a proposed contract modification issued without prior City approval shall be subject to removal and replacement at the Construction Manager's sole cost and expense, should City subsequently object thereto. The Construction Manager shall have no authority to authorize changes in Contract Documents of any kind or to modify any deadlines for completion of Work specified in the Contract Documents.

2.7.17.22. Administration of Claims. Construction Manager shall administer claims from Subcontractors and suppliers as to their validity under the terms of the subcontracts. Upon being advised of any proposed contract modification, the Construction Manager shall submit to the Project Team the estimated cost of, or savings attributable to, such contract modification and the estimated impact thereof on the Project Schedule. No contract modification shall be effective until the Construction Manager receives approvals in writing from City. Upon receipt of such approval from City and execution by the applicable Subcontractors, such contract modification shall become a part of the Contract Documents, and the Construction Manager shall promptly cause the performance of the Work so changed to proceed. In the event a contract modification necessitates a change in the Project Schedule, such schedule and associated costs shall be changed by a reasonable amount, subject to the provisions of Article 9. Agreement on any contract modification shall constitute a final settlement on all items covered therein, subject to performance thereof and payment therefore pursuant to the terms of this Agreement.

2.7.17.23. Dispute Resolution. Construction Manager shall resolve, in consultation with the Project Team, all disputes that may arise with or between Subcontractors and/or Suppliers as a result of the construction.

2.7.17.24. Substitution of Material. If a Subcontractor recommends or proposes substitution of material or other changes in the Work from the material or Work specified in the Construction Documents after bids and/or proposals for that Work have been received, evaluated and awarded, the Construction Manager, subject to the Project Coordinator's and Architect-Engineer's review and approval, shall evaluate such proposal and make a recommendation to the Project Team. If approved by the Project Coordinator, the Construction Manager shall process a contract modification.

2.7.17.25. Substantial Completion. Construction Manager shall ascertain when the Work or designated portions thereof are ready for the Architect-Engineer's substantial completion inspection. From the Architect-Engineer's list of incomplete or unsatisfactory items, prepare a schedule for completion of such items, indicating proposed completion dates for the City's review. If the Construction Manager wishes the Architect-Engineer to conduct a pre-substantial completion inspection in conjunction with its own forces, the Architect-Engineer shall coordinate with the Owner's Representative and prepare the pre-substantial completion punch list from which the Construction Manager will develop a completion schedule. The Architect-Engineer will issue a certificate of substantial

completion when the Work on its pre-substantial completion punch list has been accomplished. Within three weeks after Substantial Completion, Construction Manager shall conduct walk-through inspections of the Project and promptly advise City in writing of any known or observable defects or deficiencies in the Project and of any known or observable non-conformance of the Work with the Contract Documents and no later than three (3) days following such walk-through inspections. Construction Manager shall ensure timely correction of any defects or deficiencies in the Work no later than thirty (30) days following such walk-through inspections.

2.7.17.26. Record Plans/Drawings. During the progress of the Work, the Construction Manager shall require the plumbing, air conditioning, heating, ventilating, elevator, and electrical Subcontractors to record on their field sets of plans the exact locations, as installed, of all conduit, pipe and duct lines whether concealed or exposed which were not installed exactly as shown on the contract plans. Construction Manager shall also record all plan revisions that have been authorized by Contract Modification that effect wall or partition locations, door and window locations and other template changes. Accurate dimensional locations for all items shall be recorded. The exact routing of conduit runs and underground utilities shall be shown on these plans. Each plan shall be noted "As Built" and shall bear the date and name of the Subcontractors that performed the Work. Where the Work was installed exactly as shown on the contract plans the sheets shall not be disturbed except as noted above.

2.7.17.27. Off-Site Parking and Transportation of Construction Workers to and from Project Site. Construction Manager acknowledges and agrees that there will be no labor parking available at the Project Site, except for approximately 100 spaces available collectively for Construction Manager's management personnel and other members of the Project Team at the surface parking lot known as the "P-lot" and located on the Project Site. Construction Manager shall make all arrangements for off-site parking and shuttle transportation services to and from the Project Site for all construction workers performing work on the Project, except for any other arrangements authorized with the advance written approval of the Project Coordinator, at her sole discretion.

2.7.17.28. Public Information Officer. Construction Manager shall employ or subcontract a professional Public Information Officer, approved by the Project Coordinator, to coordinate the public information component of the Work. The Public Information Officer shall be responsible for writing public involvement plans for the Project; identifying potential impacts to the public as a result of the prosecution of the Work; preparing and disseminating collateral materials to the public; developing strategic alliances and partnerships with the community; preparing and presenting project information for meetings; coordinating resolution of issues; maintaining a database of stakeholders; preparing information for City website updates; performing media responses in writing, as needed; coordinating formal and informal public meetings; and executing other duties relevant to the position, as deemed necessary by the Project Coordinator. At a minimum, the Construction Manager's public relations, community involvement and customer service work, as it relates to the Project, shall include (1) developing a Public Involvement Plan and Project-related informational material; (2) communicating Project information and addressing concerns; (3) preparing related media communications and informational materials; (4) coordinating emergency communications; (4) developing presentations (including audio/video presentations) and talking points; (5) planning, organizing and attending special events and meetings; (6) writing newsletters and feature stories; and (7) translating collateral material developed for the Project. All releases of public information with respect to the Project shall require approval by the City.

2.7.17.29. Location of Utilities. Construction Manager shall schedule the Work in such a manner so that the Work is not delayed by utility providers relocating or supporting their utilities. Prior to the commencement of construction of any portion of the Work, Construction Manager shall be solely responsible for arranging for positive underground location, relocation or support of any utility that may be in conflict with or endangered by the proposed Work. All charges by utility companies for temporary support of its utilities shall be paid for by the Construction Manager. All costs of permanent utility relocation to avoid conflict shall be the responsibility of the utility company involved. Construction Manager shall coordinate its activities with any and all public and private utility providers occupying the right-of-way. City shall pay for costs associated with relocation and support of any utility previously

unidentified as of the effective date of the GMP Amendment that may be in conflict with or endangered by the proposed Work.

2.8. Post-Construction.

In addition to any other services to be performed during the Construction Phase, as may be specified elsewhere in this Agreement, the Construction Manager shall perform the following Post-Construction Phase services:

2.8.1. Final Completion. Construction Manager shall monitor the Subcontractor's performance on the completion of this Project and provide notice to the City and Architect-Engineer that the Work is ready for final inspection.

2.8.2. Commissioning. Construction Manager shall assist City and Architect-Engineer in preparing an operation and maintenance schedule manual for building systems and equipment which shall include the following: (i) all operation and maintenance manuals provided by the Subcontractors; (ii) a complete listing of all vendors and material suppliers (firm name, address, telephone number and contact person for each such vendor and material supplier) cross referenced to the Subcontractor responsible for procurement of the particular item purchased from each such vendor and material supplier; and (iii) a complete description of all safety precautions to be observed during routine or emergency maintenance. Deliver operating and maintenance manuals for building systems and equipment to Architect-Engineer.

2.8.3. Warranties. Construction Manager shall secure from the entities required to provide such documents and transmit to the City required warranties, guarantees, affidavits, releases, bonds, waivers and other documentation required by the Contract Documents, in duplicate, bound and indexed by Construction Manager.

2.8.4. Start-Up. With the City and Owner's Representative, coordinate, schedule and observe the checkout of utilities, operational systems and equipment for readiness and shall assist in their initial start-up, personnel training and testing. Construction Manager shall collect and deliver to the City all keys, manuals, record drawings and operating and maintenance books.

2.8.5. Record Plans/Drawings. The Construction Manager shall review the completed as-Built plans submitted by Subcontractors and ascertain that all data on all as-built plans submitted to the City are accurate and truly represent the Work as actually installed. When manholes, boxes, underground conduits, plumbing, hot or chilled water lines, inverts, etc. are involved as part of the Work, the Construction Manager shall furnish true elevations and locations, all properly referenced by using the original bench mark used for the institution or for this Project.

2.8.6. City Occupancy. The Construction Manager shall provide consultation and Project management to facilitate City occupancy and provide transitional services to get the Work, as completed by the Construction Manager or Subcontractors, "on line" in such conditions as will satisfy City operational requirements.

2.8.7. Post-Occupancy Inspection. Ten (10) months after the Substantial Completion Date, Construction Manager shall, together with the Architect-Engineer and the City, attend a final post-occupancy inspection of the Work to ensure that the Work comports with all warranties and guarantees and satisfies the requirements of the Contract Documents. Construction Manager shall correct any deficiencies noted during such inspection within thirty (30) days, unless otherwise approved by the City.

2.8.8. Training. The Construction Manager shall catalog operational and maintenance requirements of equipment to be operated by maintenance personnel and convey these to the City in such a manner as to promote their usability. The Construction Manager shall provide operational training in equipment use (with a video record of such training sessions) for building operators and all appropriate personnel employed by the City or the City's agents in the installation, maintenance, calibrations, and routine care of all equipment and systems provided and installed as part of the Work.

2.8.8.1. Separate training sessions shall be conducted for equipment/system operation and maintenance except when combining of these two (2) subjects is specifically allowed by the City. The Construction Manager shall provide qualified, prepared instructors for all training plus all necessary material and equipment (training aids, audio visual equipment, seating, tables, etc.). The Construction Manager shall provide factory-level maintenance training in system problem identification and resolution. This training should be aimed at providing the City with means to perform all corrective, scheduled and preventative maintenance.

2.8.8.2. All training shall be conducted on the Project Site or, if conducted at a remote location, travel and expenses for City's personnel shall be reimbursed to the City by the Construction Manager. Training shall be conducted prior to Final Completion of the Project.

2.8.8.3. For each training session, the Construction Manager shall submit a training plan for review. The plans shall include proposed dates/times/durations of training sessions, suggested class size/attendees, proposed locations, session objectives and an outline of the training topics to be presented. Training plans for all training sessions shall be submitted not later than the date set forth in the Project Schedule. The City shall have the right to modify proposed training dates in conjunction with the Construction Manager to coordinate the schedule with availability of personnel and ongoing operations.

2.8.9. Warranty. The Construction Manager warrants that all materials and equipment included in the Work will be new except where indicated otherwise in Contract Documents, and that such Work will be of good quality, free from improper workmanship and defective materials and in conformance with the Contract Documents and that such Work will provide proper and continuous service under all conditions of service required by, specified in, or which may be reasonably inferred from the Contract Documents. With respect to the same Work, the Construction Manager further agrees to correct all Work found by the City to be defective in material and workmanship or not in conformance with the Contract Documents for a period of one year from the Substantial Completion Date or for such longer periods of time as may be set forth with respect to specific warranties contained in the trade sections of the Specifications or other Construction Documents, as well as any damage to the Work resulting from defective design, materials, equipment, or workmanship which develop during construction or during the Warranty Period. The Construction Manager only has design responsibility for Shop Drawings and other Construction Manager-initiated designs such as subcontracted Delegated Design Work. The Construction Manager shall collect and deliver to the City any specific written warranties given by others as required by the Contract Documents. All such warranties shall commence upon Substantial Completion or such other dates as provided for in the Contract Documents, or unless the warranted Work is not completed or has been rejected, in which case the warranty for the Work shall commence on the completion or acceptance of the Work. Also, the Construction Manager shall conduct, jointly with the City and the Architect-Engineer, a warranty inspection ten (10) months after Substantial Completion.

2.8.9.1. Any repair or replacements done under this Warranty shall comply with the requirements of the Contract Documents and shall be verified by the performance of Construction Manager testing as City may require. All costs incidental to such repair, replacement, and testing, including the removal, replacement, and reinstallation of equipment and materials necessary to gain access, shall be borne by Construction Manager. Construction Manager warrants such repaired or replaced Work against defective design, materials, and workmanship for a period of twelve (12) months from and after substantial completion of the Project or twelve (12) months from the time of such repair or replacement, whichever occurs latest. The Construction Manager only has redesign responsibility for Shop Drawings and other Construction Manager-initiated designs. Should Construction Manager fail to promptly make the necessary redesign, repair, replacement, and tests within thirty (30) days following notice thereof by the City, City may perform or cause to be performed the same at Construction Manager's expense. Construction Manager shall reimburse the expense incurred by City for such remedial Work within thirty (30) days from the date of receipt of City's invoice therefore. Construction Manager shall be liable for the satisfaction and full performance of the warranties as set forth herein.

2.8.9.2. If required by Architect-Engineer, Construction Manager shall furnish satisfactory evidence as to the kind and quality of materials and equipment. This warranty is not limited by any other provisions within the Contract Documents.

2.8.9.3. Written warranties furnished to the City are in addition to implied warranties, and shall not limit the duties, obligations, rights and remedies otherwise available under Applicable Laws or the Contract Documents. The Construction Manager shall also furnish any special guarantee or warranty called for in the Contract Documents. To the extent there is any conflict as to the applicable time period of coverage for any guarantee or warranty to be provided by the Construction Manager under the Contract Documents, the longer period of time for any such guarantee or warranty shall govern.

2.8.9.4. The Construction Manager shall secure, assemble and deliver required guarantees and warranties to the City in a manner that will facilitate their maximum enforcement and assure their meaningful implementation.

2.9. Project Closeout. In addition to any other services to be performed during the Construction Phase or Post-Construction Phase of any Project, as may be specified elsewhere in this Agreement, the Construction Manager shall perform such services relating to closing out the Project as requested by City, or as set forth in the Project Procedures Manual.

ARTICLE 3

RESPONSIBILITIES OF CITY, ARCHITECT-ENGINEER, AND OWNER'S REPRESENTATIVE

3.1. City's Responsibilities.

3.1.1. Project Coordinator. The City shall designate a representative for the Project who shall be fully acquainted with the Project and shall serve as the person designated by the City to provide direct interface with the Construction Manager with respect to the City's responsibilities or matters requiring the City's approval, in its proprietary capacity as Owner, under the Contract Documents. The Project Coordinator shall have full authority to require the Construction Manager to comply with the Contract Documents.

3.1.2. Architect-Engineer. The City has retained the Architect-Engineer to serve as the Architect of Record for the Project, to prepare Construction Documents and provide certain administration services for this Project. The Architect-Engineer's responsibilities are delineated in Section 3.2 below.

3.1.3. Owner's Representative. The City has retained an independent Owner's Representative to assist the City with its oversight of the Project. The Owner's Representative shall serve as the day-to-day contact with the Construction Manager and Project Team for all purposes, and shall monitor Construction Manager's performance in accordance with the Contract Documents. The Owner's Representative shall have the authority to issue directives and notices on behalf of the City. The Owner's Representative responsibilities are delineated in Section 3.3 below.

3.1.4. City's Information. Except for any tests or studies that the City provides to the Construction Manager pursuant to Section 9.2, any information provided by the City to the Construction Manager relating to the Project and/or other conditions affecting the Project Site, is provided only for the convenience of the Construction Manager and does not relieve the Construction Manager of the due diligence necessary to independently verify local conditions and site conditions. The City makes no representation or warranty as to, and assumes no responsibility whatsoever with respect to, the sufficiency, completeness or accuracy of any such test, studies or other information and makes no guarantee, either express or implied, that the conditions indicated in such information or independently found by the Construction Manager as a result of any examination, exploration or testing, are representative of those existing throughout the performance of the Work or the Project Site, and there is no guarantee against unanticipated or undisclosed conditions.

3.1.5. Plans and Specifications. The Construction Manager will be furnished a reproducible set of all Construction Documents for bid documents reasonably necessary and ready for printing.

3.1.6. Cost of Surveys & Reports. The services, information, surveys and reports required by the above paragraphs shall be furnished with reasonable promptness in accordance with the approved schedule at the City's expense.

3.1.7. Funding. Notwithstanding any provision herein to the contrary, the City's obligations under this Agreement with respect to the Construction Phase or any portion thereof shall be subject to and contingent upon the City's obtaining the full amount of all financing and the availability of bond proceeds and earnings or other funding that the City may require for the Project. In the event this contingency is not satisfied and City does not obtain the necessary financing or sufficient funding to proceed with any portion of the Project and/or this Agreement, City shall notify Construction Manager in writing, and this Agreement shall be null and void and City shall have no further obligations under this Agreement, other than to compensate Construction Manager for Work performed satisfactorily under any previously authorized Notice to Proceed. Except as set forth herein, Construction Manager hereby waives any other rights or remedies at law or in equity with regard to any matter arising out of this Section 3.1.7.

a. In the event the City fails to make payments because of the unavailability of such bond proceeds and earnings, the Construction Manager shall have the right to stop its performance of the Work pursuant to Section 13.1 hereof.

3.1.8. Lines of Authority. The City and Project Coordinator shall establish and maintain lines of authority for their personnel and shall provide this definition to the Construction Manager and all other affected parties.

3.1.9. Permitting & Code Inspections. The City may retain a threshold inspector, if required by Chapter 553, Florida Statutes, and any other inspectors as the City deems necessary.

3.1.10. Approvals. Wherever the Contract Documents require or provide for City approval, such approval must be evidenced in writing to be effective.

3.2. Architect-Engineer's Responsibilities.

3.2.1. The Architect-Engineer shall provide administration of this Agreement and its role shall include the following:

a. The Architect-Engineer will assist the City with the enforcement of the faithful performance of this Agreement, including making recommendations to the City, by and through the Owner's Representative, with respect to the immediate condemnation of Work or materials known by it to be in violation of the Contract Documents, provided Architect-Engineer obtains prior written consent of the City; (ii) the issuance or withholding of approvals or certificates as directed and approved by City and as required by, and in accordance with, the Contract Documents; and (iii) requiring compliance with Applicable Laws.

b. The Architect-Engineer and Project Coordinator may review the Project Schedule and/or Construction Schedule and consult with the Construction Manager, the City and the Owner's Representative with respect thereto.

c. The Architect-Engineer, by periodic inspections by its personnel and by personnel employed by the structural engineering firms, electrical engineering firms, and mechanical engineering firms employed by the Architect-Engineer, shall have the right to: (i) enforce the faithful performance of the Contract Documents ; and (ii) assure that the Work has been or is being installed in accordance with the Contract Documents before allowing it to be covered. With respect to Work which requires inspection prior to covering under the Contract Documents, the Architect-Engineer shall not certify any such Work for payment if it has been covered prior to the Architect-Engineer's consent. The

Architect-Engineer may attend Project construction meetings.

d. Architect-Engineer's Decisions. The Architect-Engineer may review and approve (or take other appropriate action upon) submittals by Construction Manager, such as Shop Drawings, product data and samples, but only for conformance with the design concept of the Work and with the information given in the Contract Documents. Such action shall be taken within ten (10) days of the date of each such submittal. The Architect-Engineer's review of a specific item shall not indicate acceptance of an assembly of which the item is a component. The Architect-Engineer may review and comment on Change Orders and Construction Change Directives for the City's approval and execution in accordance with the Contract Documents, and shall have authority to issue, with the written concurrence of the City, minor changes in the Work pursuant to Article 9.

e. Changes. The Architect-Engineer and Project Coordinator may use their powers of enforcement granted under this Agreement in an effort to assure that no changes in the Work, or of any part thereof, be made except as are specifically authorized by the Contract Documents, or as authorized by written Change Order, Construction Change Directive or Field Order.

f. Construction Manager Not Relieved by Architect-Engineer or Project Coordinator Activity. The responsibility of the Construction Manager for faithful performance of the Contract Documents shall not be relieved or affected in any respect by the presence, inspections, approvals, or certificates by the Architect-Engineer or Project Coordinator or by employees or representatives of the Architect-Engineer or Project Coordinator.

g. Architect-Engineer, City and Owner's Representative Not Responsible for Means or Methods. The Architect-Engineer, City, and Owner's Representative will not have control over or charge of construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work. The Architect-Engineer, City and Owner's Representative will not have control over or charge of acts or omissions of the Construction Manager, Subcontractors, or their agents or employees, or of any other persons performing portions of the Work.

h. Architect-Engineer's and Owner's Representative's Review and Architect-Engineer's Certification of Pay Applications. The Architect-Engineer and Owner's Representative, in cooperation with the Project Coordinator, may determine the amounts owing to the Construction Manager, based on their respective observations at the Project Site and on evaluations of the Construction Manager's Applications for Payment and the Contract Documents. The Architect-Engineer, Owner's Representative and Project Coordinator may review and comment on the Construction Manager's Applications for Payment during the progress of the Work and may issue or withhold approval or certifications of Applications for Payment therefore as directed and approved by the City and as required by, and in accordance with, the terms and provisions of the Contract Documents.

i. Architect-Engineer's Authority to Reject Work. The Architect-Engineer will have the authority to reject Work which does not conform to the Contract Documents, provided that the Architect-Engineer obtains the prior written consent of the Project Coordinator. Whenever the Architect-Engineer considers it necessary or advisable for implementation of the intent of the Contract Documents, the Architect-Engineer, after prior consultation with and written approval of the City, will have the authority to require special inspection or testing of the Work in accordance with the provisions of the Contract Documents, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect-Engineer nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect-Engineer to the Construction Manager, any Subcontractors of any tier, their agents or employees or other persons performing portions of the Work. Such rejections and/or directives will be communicated through the Owner's Representative to the Construction Manager.

j. Change Orders, Construction Change Directives, and Minor Changes in the Work. The Architect-Engineer and Owner's Representative may assist the City in the review of all Change Orders, Construction Change Directives, and Field Orders, and the Architect-Engineer may

authorize minor changes in the Work as provided in Article 9. Such changes will be communicated through the Owner's Representative to the Construction Manager.

k. Substantial and Final Completion Determination. The Architect-Engineer, Owner's Representative and Project Coordinator may conduct inspections to determine the date or dates of Substantial Completion and the date or dates of Final Completion for the entire Work, or any component thereof, and may receive and forward to the City, for the City's review, records, written warranties and related documents required of the Construction Manager and may issue a final certificate of payment upon compliance with the requirements of the Contract Documents.

l. Architect-Engineer's Interpretation of Construction Documents. The Architect-Engineer may render written interpretations necessary for the proper execution of the Work and/or relating to interpretations of the requirements of the Construction Documents, on written request of the Owner's Representative or Project Coordinator.

m. Binding Effect of Architect-Engineer's Decisions and Interpretations. The Architect-Engineer's decisions on matters relating to aesthetic effect will be final, if consistent with the intent expressed in the Contract Documents and if approved in writing by the Project Coordinator.

n. City shall cause Architect-Engineer to design the Project to meet City's Construction Budget through the development of the GMP. Following acceptance of the GMP Amendment, City shall cause the Architect-Engineer to complete the Construction Documents consistent in material respects with the Construction Documents that were utilized as the basis for the GMP Amendment.

3.3. Owner's Representative Role. The Owner's Representative may provide oversight and administrative support services to the City during all phases of the Project and shall have the right and authority to issue directives and notices on behalf of the City to require the Construction Manager to comply with the Contract Documents. Such services may include the following:

3.3.1. Observing the progress of all Work to ensure the Work is being performed in accordance with the Contract Documents and all approved Construction Manager plans and processes;

3.3.2. Reviewing Construction Manager Applications for Payment for accuracy and completeness and coordinating the certification process. Further, the Owner's Representative will recommend full, partial or appropriate non-payment to the City;

3.3.3. Recommending to the City that it take actions pursuant to the Contract Documents to ensure the faithful performance by Construction Manager of this Agreement, which recommendations, may include, but shall not be limited to, withholding of certificates or approvals of Applications for Payments, or rejecting of non-conforming or defective Work in consultation and coordination with the Architect-Engineer; requiring efficient superintendence and operation by the Construction Manager, and the like;

3.3.4. Monitoring the Subcontractor bidding processes, reviewing trade bids and supporting documentation, attending opening of Subcontractor bids, and making recommendations to the City with regard thereto;

3.3.5. Facilitating the City's approval of modifications to the Construction Documents, and/or acting on behalf of the City with respect thereto;

3.3.6. Conducting, attending and facilitating meetings among members of the Project Team;

3.3.7. Implementing a communication system plan for the distribution of meeting minutes, written and oral communications, Requests for Information, progress reports, submittals, changes, test reports, Applications for Payment, payments, logs and other information;

3.3.8. Reviewing the Project Schedule, Construction Schedule and other schedule submittals required under this Agreement and making recommendations to the City with regard thereto;

3.3.9. Reviewing the progress reports required to be submitted by Construction Manager under this Agreement, including the Daily Reports, Schedule Reports, the Monthly Updated Schedules and Construction Budget Reports;

3.3.10. Reviewing Change Order proposals, Change Orders, Construction Change Directives, and Field Orders and making recommendations to the City with regard thereto; and

3.3.11. Coordinating the City's responsibilities with respect to a Direct Purchase Program, if one is established for the Project;

3.3.12. Monitoring the Project Site and observing the Work and progress of Construction;

3.3.13. Monitoring, verifying and coordinating the QA/QC process;

3.3.14. Issuing instructions and directives on behalf of the City (provided, however, that only the City shall have the authority to authorize Change Orders);

3.3.15. Coordinating all Project Team members, including City consultants and other third-parties; and

3.3.16. Reviewing and monitoring all Construction Manager processes and procedures for adherence to the Contract Documents and advising City of deviations and discrepancies, and making recommendations with respect to corrective actions and mitigation strategies when necessary.

3.4. Lines of Communication. For purposes of efficient administration of the Contract Documents:

a. Communications with Subcontractors and Suppliers. The City, Owner's Representative and Architect-Engineer shall communicate with the Subcontractors and Suppliers only through the Construction Manager, except as to those communications provided for under Article 4 of this Agreement or the other Contract Documents. Nothing herein shall preclude any Subcontractor or Supplier from communicating directly with the City with respect to any default of the Construction Manager or other matter of public concern.

b. Communications with the City and Architect-Engineer. The Construction Manager shall communicate with the City and Architect-Engineer (and its sub-consultants) only through the Owner's Representative or the Architect-Engineer, as the context may require. If communications are made directly to the Project Coordinator or Architect-Engineer, Construction Manager shall copy the Owner's Representative, to permit tracking and timely responses of all matters requiring the City's and Architect-Engineer's attention. Wherever the Contract Documents expressly require transmittal of any document or notice of any information to the City (including the Project Coordinator) or the Architect-Engineer, the Owner's Representative shall be copied on such transmittal or notice.

c. Communications with Separate Contractors. Communications between the Construction Manager and Separate Contractors shall be through the Owner's Representative.

d. The Parties may supplement the foregoing in the Project Management Plan and the detailed matrix to be utilized for Project communications.

ARTICLE 4 **PERFORMANCE OF WORK AND SUBCONTRACTS**

4.1 Performance of Work by Construction Manager. It is the intent of this Agreement that the construction Work under the Project shall be performed solely by Subcontractors to the Construction Manager. However, the Construction Manager may perform portions of the Work with its own personnel,

with the prior written approval of the City, in extenuating circumstances and pursuant to the requirements of this Article 4, such as if the services of a responsive and responsible Subcontractor cannot be retained.

4.2 Pre-qualification of Bidders. The Construction Manager, in consultation with the Project Team, shall establish objective pre-qualification guidelines to be applied by the Construction Manager for subcontracts and major suppliers, including guidelines relating to financial stability, past performance, bonding capacity, safety record, and personnel. At the discretion of the Construction Manager, on subcontracts where the bid exceeds \$250,000.00, each Subcontractor may be required to submit a completed experience questionnaire and details relating to its financial information. The Subcontractor's financial condition must demonstrate that adequate fixed and liquid assets and equipment are available to properly perform the subcontract. The Construction Manager shall advertise all prospective subcontract Work for purposes of pre-qualification using public means (e.g. newspaper) and shall receive letters of interest and other data deemed necessary by the Construction Manager for proper pre-qualification. Submittals by prospective Subcontractors shall be evaluated by the Construction Manager pursuant to the pre-qualification guidelines. Proposers meeting the Construction Manager's pre-qualification guidelines shall be placed on a list of pre-qualified Subcontractors. Except where a trade is represented by less than three pre-qualified Subcontractors, bids shall only be accepted from the list of pre-qualified Subcontractors or suppliers. Construction Manager shall be solely responsible for any claims, objections or disputes arising out of the pre-qualification of bidders.

4.3 Subcontract and Supplier Bids and Proposals. Construction Manager shall solicit subcontract bids or proposals from the Subcontractors and Suppliers prequalified pursuant to Section 4.2 of this Agreement, and shall implement an "open book" process whereby all bids or proposals and supporting documentation with respect thereto shall be made available to the City, Owner's Representative and Architect-Engineer, and their respective representatives, for the purpose of verifying the responsiveness and responsibility determinations made by Construction Manager and ensuring a transparent and competitive environment for the award of Subcontracts. Any member of the Project Team may attend or observe the opening of bids. Such bidder or proposer records shall be subject to the public records disclosure requirements of Chapter 119 of the Florida Statutes, provided that such records shall remain confidential and exempt from inspection under Section 119.07(1), Florida Statutes, to the extent permitted by law.

4.3.1. A minimum of three bids or proposals shall be solicited, if feasible. Such solicitations shall specifically state that no contractual relationship will be created with City. Unless otherwise approved by the City Manager or Project Coordinator at their sole discretion to account for extenuating circumstances, the Construction Manager shall award subcontracts in accordance with the Contract Documents to the lowest responsive and responsible bidders or proposers after the proposals are reviewed by the Construction Manager, City, Owner's Representative and Architect-Engineer. Instructions to bidders must require each bid to be accompanied by the appropriate bid security.

4.3.2. For each separate subcontract, the Construction Manager shall conduct a pre-bid conference with prospective bidders, the Architect-Engineer, and the Project Coordinator, to familiarize bidders with the Contract Documents, any special requirements of the Contract Documents and equal employment opportunity and prevailing wage requirements and the like.

4.3.3. In the event that questions are raised which require an interpretation of the bid packages or otherwise indicate a need for a clarification or correction of the invitation, the Construction Manager shall coordinate the preparation of an addendum to the bid packages with the Owner's Representative and Architect-Engineer. The Owner's Representative shall transmit to Construction Manager all of the Project Team's responses to questions at pre-bid conferences, and Construction Manager shall review addenda prepared by the Architect-Engineer to incorporate those responses. The addendum shall be the medium for making any clarifications or corrections to the bid packages and will be issued to all of the prospective bidders.

4.3.4. Construction Manager shall evaluate all applicable alternates referenced in the Contract Documents and shall evaluate each bidder in accordance with the bid criteria contained in the bid

package. Construction Manager shall not consider any unauthorized substitutions contained in subcontractor bids.

4.3.5. The Construction Manager shall analyze and evaluate the results of the various bids and their relationships to budgeted and estimated amounts, and shall distribute to the Project Team a bid tabulation analysis and such other supporting documentation as necessary to verify the comparison of the various bids, their responsiveness to the desired scope of Work, and the basis for the Construction Manager's selection, including a summation and analysis of the apparent low subcontract bids and/or of any apparent low subcontract bidders that the Construction Manager does not wish to employ. Such identification and proposal of non-utilization by the Construction Manager shall require specific written reason for same.

4.3.6. Construction Manager, with the assistance of the Owner's Representative and the Architect-Engineer, shall conduct pre award conferences with the recommended bidders and shall gather documentation for contract execution from such bidders. If a bidder fails to provide the required documentation in a timely manner, Construction Manager shall assist the City in considering whether to grant an extension of time for submitting the documentation or terminate negotiations with the recommended bidder. In no case shall the City have any contractual relationship with a Subcontractor or responsibility for Subcontractor performance. Construction Manager shall be solely responsible for any claims, objections or disputes arising out of the award of subcontractor bids, except where the sole cause of the disappointed bidder's claim is a City-directed decision pursuant to Section 4.4 below.

4.4 City's Right to Disapprove. Prior to entering into any Subcontract or awarding any Work, Construction Manager shall provide City with a notice of intent to award Work to any Subcontractor or Supplier. The City retains the right to object to the Construction Manager's notice of intent to award of a subcontract to any specific bidder if the Project Coordinator or Owner's Representative, does not reasonably believe that the proposed bidder is the most responsive or responsible bidder. The City must provide Construction Manager with notice of its objection within ten (10) days following its receipt of Construction Manager's notice of intent to award and all supporting documentation and bid tabulation analysis required by the Contract Documents. If the Project Coordinator or Owner's Representative objects to a duly qualified, responsible Subcontractor or Supplier award by Construction Manager, the Construction Manager shall select an acceptable substitute. If the substituted Subcontractor's bid exceeds the lowest responsive, responsible bid proposed for award by the Construction Manager, or the time allocated in the approved Project Schedule for that Work, the Construction Manager shall be entitled to a Change Order to cover the additional costs and/or time occasioned by such substitution.

4.5 Third Party Relationship. Nothing in this Agreement, the subcontracts, or in purchase orders issued by the Construction Manager shall create any contractual relationship between the City and any Subcontractor or supplier. The subcontracts and purchase orders shall specifically state that no such relationship is created hereby. However, the City is mutually recognized as a third party beneficiary of all such subcontracts.

4.6 Required Subcontract Conditions.

4.6.1 Subcontractual Relations. Construction Manager shall be solely responsible for and have control over the Subcontractors. By an appropriate written agreement, the Construction Manager shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Construction Manager by the terms of the Contract Documents, and to assume toward the Construction Manager all the obligations and responsibilities that the Construction Manager by the Contract Documents assumes toward the City. Said agreements shall preserve and protect the rights of the City and Architect-Engineer and Owner's Representative under the Contract Documents with respect to the Work to be performed by the Subcontractor so that the subcontracting thereof will not prejudice such rights. The agreement shall also require the Subcontractor to assume toward the City all obligations and responsibility that the Subcontractor has to the Construction Manager in the event that this Agreement is terminated for any reason and the City desires to assume the subcontract. The Construction Manager shall require each Subcontractor to enter into similar agreements with its sub-Subcontractor.

The Construction Manager shall make available to each proposed Subcontractor, prior to the execution of the Subcontract, copies of the Contract Documents to which the Subcontractor will be bound by this Section 4.6, and shall identify and eliminate any terms and conditions of the proposed Subcontract which may be at variance with the Contract Documents. Each Subcontractor shall similarly make copies of such Documents available to its Sub-Subcontractors.

4.6.2 Subcontract Requirements.

4.6.2.1. Supervision. The Subcontractor must agree to provide field (on-site) supervision through a named superintendent for each trade (general concrete forming and placement, masonry, mechanical, plumbing, electrical and roofing). In addition, the Subcontractor shall assign and name a qualified employee for scheduling direction for its Work. The supervisory employees of the Subcontractor (including field superintendent, foreman and schedulers at all levels) must have been employed in a supervisory (leadership) capacity of substantially equivalent level on a similar Project for at least two years within the last five years. The Subcontractor shall include a resume of experience for each employee identified by the Subcontractor to supervise and schedule its Work.

4.6.2.2. Subcontract Terms. The form of agreement for Construction Manager's Subcontractors shall be subject to the City's advance written approval. All of the Construction Manager's agreements with the Subcontractors shall contain the following provisions and shall state:

i. that the Subcontractor irrevocably submits itself to the original and exclusive jurisdiction and venue in Miami-Dade County, Florida, with regard to any controversy in any way relating to the award, execution or performance of the Contract Documents and/or such Subcontractor's agreement, and whereby the Subcontractor agrees that service of process on it may be made to the person or entity designated in the Subcontract;

ii. that the City shall not be in privity of contract with the Subcontractor and shall not be liable to any Subcontractor under the Contract Documents or any such subcontract, except for the payments of amounts due to the Subcontractor under its subcontract in the event that the City exercises its rights under any assignment of the subcontract and requests or directs the Subcontractor to perform the portion of the Work covered by its subcontract;

iii. that the City is a third-party beneficiary of the Subcontract, entitled to enforce any rights thereunder for their respective benefits, and that, subject to the terms of the applicable Subcontract, the City shall have the same rights and remedies vis-à-vis such Subcontractors that Construction Manager shall have, including the right to be compensated for any loss, expense or damage of any nature whatsoever incurred by the City resulting from any breach of such Subcontract by Subcontractor, any breach of representations and warranties, if any, implied or expressed, arising out of such agreements and any error, omission or negligence of such Subcontractor in the performance of any of its obligations under such Subcontract;

iv. that the Subcontractor shall indemnify and hold harmless the City, its officers, agents, directors, and employees, and instrumentalities to the fullest extent permitted by Section 725.06 of the Florida Statutes;

v. that such subcontract shall be terminable for default or convenience upon ten (10) days prior written notice by Construction Manager, or, if the Subcontract has been assigned to the City, by the City or its designee;

vi. that Subcontractor shall promptly notify the City (with a copy to Construction Manager) of any default of Construction Manager under the Subcontract, whether as to payment or otherwise;

vii. that Construction Manager and Subcontractor acknowledge that (i) they are each entering into a contract for the construction of a public building as contemplated in Chapter 255, Florida Statutes, and (ii) each have no right to file a construction lien against the Work or the Project, and further agree to include a similar requirement in any purchase order or subcontract entered into by Subcontractor; and (iii) the payment bond provided by Construction Manager pursuant to this Agreement is a substitute for the right to claim a lien on the Project, and that any claims for nonpayment shall be made against the bond in accordance with Section 255.05, Florida Statutes.

viii. that Subcontractor shall comply with all Applicable Laws (including prompt payment) and the City requirements as set forth in the Contract Documents and maintain all files, records, accounts of expenditures for Subcontractor's portion of the Work to the standards set forth in the Contract Documents.

ix. that the City may, at reasonable times, contact Subcontractor, after notice to Construction Manager, to discuss, or obtain a written report of, Subcontractor's services, with Construction Manager entitled to be present during any such discussions; provided that in no event, prior to any assignment of the Subcontract to the City, shall Subcontractor take instructions directly from the City;

x. that Subcontractor promptly disclose to the City and Construction Manager any defect, omission, error or deficiency in the Contract Documents or the Work about which it has knowledge no later than ten (10) days following discovery of such defect, omission, error or deficiency;

xi. that Subcontractor assign all warranties directly to the City,

xii. that the Contract Documents provide a limitation of remedies and NO DAMAGES FOR DELAY as delineated in Section 9.4, and that accordingly, Subcontractor's exclusive remedy for delays in the performance of the subcontract caused by events beyond its control, including delays claimed to be caused by or attributable to the City, Owner's Representative, or Architect-Engineer shall be as provided by the Contract Documents;

xiii. that in the event of a change in the Work the Subcontractor's Claim for adjustments in the subcontract price shall be limited exclusively to its actual costs for such changes, plus no more than the overhead and profit fees/markups and bond costs to be established as part of the GMP Amendment.

xiv. Each subcontract shall require the Subcontractor to expressly agree that the foregoing constitutes the sole and exclusive remedies for delays and changes in the Work and thus eliminate any other remedies for claim for increase in the subcontract price, damages, losses or additional compensation.

xv. Each subcontract shall require that any claims by Subcontractor for delay or additional cost must be submitted to Construction Manager within the time and in the manner in which the Construction Manager must submit Claims to the City, and that failure to comply with the conditions for giving notice and submitting claims shall result in the waiver of such claims in the same manner as provided for in the Contract Documents.

4.6.3 Conditional Assignment. Construction Manager conditionally assigns to the City all the rights, title and interest of Construction Manager in, to and under any and all Subcontracts. The assignment is exercisable by the City, at its election, in the event that the City has exercised its right to terminate this Agreement for any reason in whole or in part or to take control of, or cause control to be taken of, the Work or any portion thereof. The City may reassign the Subcontracts to another contractor or any other person or entity, and such assignee may exercise the City's rights in the Subcontracts. Each Subcontractor shall, upon written notice that the City has exercised its rights

under the Contract Documents (or the portion thereof applicable to the materials or services being furnished by such Subcontractor), continue to perform all of its obligations, covenants and agreements under such Subcontract for the benefit of the City.

4.6.3.1 Each Subcontract entered into by Construction Manager in connection with the Work shall contain the consent of each Subcontractor to the foregoing assignment and the agreement of each such Subcontractor that, upon written notice from the City, it has assumed the Subcontract or portion thereof applicable to the materials or services being furnished by such Subcontractor and exercised its rights under this Agreement.

4.6.3.2 The Construction Manager shall require each Subcontractor to use all reasonable efforts to enter into similar agreements with sub-Subcontractors of all tiers. The Construction Manager shall make available to each proposed Subcontractor, prior to execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and require that each Subcontractor shall similarly make copies of applicable portions of such documents available to their respective proposed sub-Subcontractors.

4.6.4 Performance Bonds and Payment Bonds. If Construction Manager requires a Subcontractor to obtain a performance bond and/or payment bond, then such bonds shall name the Construction Manager and the City as co-obligees, shall cover all warranties and guarantees of the Subcontractor, and shall comply with all bond requirements under the Contract Documents. If the Subcontract does not require a Performance Bond or Payment Bond, the Subcontract shall contain a provision permitting the City to require a Performance Bond and Payment Bond in the event of an assignment of the Subcontract to the City.

4.6.5 Responsibilities for Acts and Omissions. The Construction Manager shall be responsible to the City for the acts and omissions of its employees and agents and its Subcontractors, their agents and employees, and all other persons performing any of the Work or supplying materials under a contract to the Construction Manager. Nothing in the Contract Documents shall create any contractual relationship between any Subcontractor and City or any obligation on the part of City for the payment of any monies due any Subcontractor. City or Architect-Engineer may furnish to any Subcontractor evidence of amounts paid to Construction Manager on account of specific Work performed.

4.6.6 Subcontractor Performance. Construction Manager shall cause each Subcontractor to perform its Work in accordance with the requirements of the Contract Documents, and shall make all necessary efforts to protect the City against defects and deficiencies in the Work. Construction Manager shall promptly report to the Owner's Representative and Architect-Engineer all Work that does not conform to the requirements of the Contract Documents, make recommendations regarding the acceptance or rejection of that Work and advise the City and Architect-Engineer of Construction Manager's actions or proposed actions with respect thereto.

4.6.7 Subcontractor Change Orders. Construction Manager shall negotiate all Change Orders, Construction Change Directive, Field Directives and other related issues, with all affected Subcontractors and shall review the costs all associated costs and advise City, Owner's Representative and Architect-Engineer of their validity and reasonableness, acting in the City's best interest, prior to requesting approval of each Change Order from the City.

4.6.8 Subcontractor Lists and Subcontract Documents. Construction Manager shall continuously update the Subcontractor list, so that it remains current and accurate throughout the entire performance of the Construction Work. As part of the Project document file to be maintained by Construction Manager at the Project Site, Construction Manager shall keep on file a copy of the license for every Subcontractor performing any portion of the Construction Work, as well as maintain a log of all such licenses. The Construction Manager shall provide upon request a copy of each subcontract, including the general supplementary conditions, to the City.

4.6.9 Local Employment. It is the City's goal to maximize the employment of City of Miami Beach and Miami-Dade County residents in the construction of the Project. Construction Manager shall work with

each Subcontractor to create a plan for maximizing local employment, as well as providing periodic reporting to monitor success. Construction Manager shall provide City with monthly progress reports to be submitted to the City Commission documenting success throughout the Project duration. Construction Manager shall provide the services delineated in its RFP Proposal Submission, Tab 2, Approach to Local Workforce Hiring.

4.7. Limitations on Construction Manager Bidding and Performance of Trade Work. If the circumstances are such that Construction Manager is permitted to bid, the bid of the Construction Manager or any related or affiliated entity shall include its complete take off and unit pricing sufficient to allow the City and Owner's Representative to verify that such costs do not exceed those commonly paid in the market. Any bid from the Construction Manager or a Related Party shall be submitted to the City at least one (1) business day in advance of receipt of bids from the unaffiliated Subcontractors. The Construction Manager, or a Related Party, shall be permitted to perform such trade Work for preservation of the GMP or the Schedule, but only if (i) the Project Coordinator consents thereto in writing after full disclosure in writing by the Construction Manager to the City of the affiliation or relationship of the Related Party to the Construction Manager and (ii) the City approves in writing any subcontract, contract, purchase order, agreement between the Construction Manager and such Related Party in form and substance. Any trade Work performed by the Construction Manager's own forces or by a Related Party, if required by the City, shall be covered in a separate agreement between the City and the Construction Manager or the Related Party. Such agreement shall, without limitation, satisfy all requirements for subcontractors as set forth in this Article 4.

Notwithstanding the foregoing, Construction Manager shall be permitted to perform general cleaning, rough carpentry, safety, temporary conditions and protection services with its own labor forces without obtaining competitive bids or approval from the City.

4.8. Reporting of Bid Buyouts. The Construction Manager shall document the actual Cost of the Project at buyout as compared to the GMP Proposal prepared pursuant to Article 6 of this Agreement, and shall report this information to the Owner's Representative monthly and with Construction Manager's recommendation for selection of a bid/proposal for each subcontracting package.

ARTICLE 5

SCHEDULE, TIME OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

5.1. Time is of the Essence. Time is of the essence throughout this Agreement and the Construction Manager will promptly perform its duties under the Contract Documents and will give the Work as much priority as is necessary to cause the Work to be completed on a timely basis in accordance with the Contract Documents. All Work shall be performed strictly (not substantially) within the time limitations necessary to maintain the critical path and all deadlines established in the Contract Documents.

5.1.1. Project Schedule. At the time a GMP is established, as provided for in Article 6, the Project Team shall establish Milestones for completion of various phases of the Work (including the Milestones set forth in Appendix D), a City Occupancy Schedule in accordance with the foregoing Milestones, the Project substantial completion date, and the Project final completion date, in accordance with the Project Schedule. All dates and periods of time set forth in the Contract Documents, including those for the commencement, prosecution, interim milestones, Milestones, and completion of the Work, and for the delivery and installation of materials and equipment, were included because of their importance to the City.

5.1.2. Milestones and Substantial Completion. Construction Manager acknowledges and agrees that (i) the Work must be performed in accordance with the Project Schedule, (ii) City intends to and shall take Beneficial Occupancy of the portions of the Work and Project Site described in Section 2.1. of Appendix D with respect to the Art Basel 2016 Milestone, and described in Section 2.2 of Appendix D with respect to the Art Basel 2017 Milestone on the fixed and critical dates specified in Sections 2.1 and 2.2 of Appendix D; and (iii) Substantial Completion must occur no later than the date specified for Substantial Completion in the GMP Amendment. Construction Manager acknowledges and agrees that the Project Schedule shall be expressly structured to accommodate the fixed dates for the Art Basel 2016 Milestone and Art Basel 2017 Milestone and the City's needs with respect thereto.

5.1.3. Construction Manager's Responsibility for Failure to Achieve Milestones and/or Substantial Completion. The Construction Manager acknowledges that failure to achieve the Milestones or complete the Project within the construction time set forth in the approved Schedule may result in substantial damages to the City, for which damages the Construction Manager shall be liable to the extent provided herein.

5.1.3.1 The failure of the Construction Manager to meet the Milestones or complete the Project by the Substantial Completion Date (as such date may be extended in accordance with the terms of this Agreement) will deprive the City and the residents and visitors of the City and State of the use of a valuable asset. Therefore, the Construction Manager agrees that the Construction Manager shall begin the Project in conformity with the provisions set forth herein and shall prosecute the same with all due diligence and adequate manpower, so as to timely achieve the Milestones and Substantial Completion of the entire Project (as such date may be extended in accordance with the terms of this Agreement). Failure to achieve the Milestones set forth below shall also be cause for the City to deduct from monies otherwise due the Construction Manager the amounts as follows:

a. Art Basel 2016 Milestone. Upon failure of Construction Manager to meet the Art Basel 2016 Milestone, City shall deduct from monies otherwise due the Construction Manager the actual costs and expenses incurred by the City and/or its licensee, Art Basel U.S. Corp., with respect to the cancelation or relocation of the Art Basel event (including the refund of Art Basel U.S. Corp.'s license fees, loss of exhibitor and other revenue to Art Basel U.S. Corp., costs associated with securing alternative accommodations or temporary tent structures that may be acceptable to Art Basel U.S. Corp. and other logistical expenses related thereto), up to the not-to-exceed amount of One Million Dollars (\$1,000,000.00).

b. Art Basel 2017 Milestone. Upon failure of Construction Manager to meet the Art Basel 2017 Milestone, City shall deduct from monies otherwise due the Construction Manager the actual costs and expenses incurred by the City and/or its licensee, Art Basel U.S. Corp., with respect to the cancelation or relocation of the Art Basel event (including the refund of Art Basel U.S. Corp.'s license fees, loss of exhibitor and other revenue to Art Basel U.S. Corp., costs associated with securing alternative accommodations or temporary tent structures that may be acceptable to Art Basel U.S. Corp. and other logistical expenses related thereto), up to the not-to-exceed amount of One Million Five Hundred Thousand Dollars (\$1,500,000.00).

c. Substantial Completion. Upon failure of Construction Manager to achieve Substantial Completion of the Project within the time specified for Substantial Completion, plus approved time extensions, City shall deduct from monies otherwise due the Construction Manager a liquidated amount assessed daily until Substantial Completion of the Project, in the amount of Fifteen Thousand Dollars (\$15,000) per day.

5.1.3.2. Construction Manager acknowledges and agrees that the liquidated damages amounts in Subsection 5.1.3.1(c) ("Liquidated Damages") are not penalties and have been set based on an evaluation by City of damages to City and the public caused by untimely performance. Such damages may include loss of convention-related business and associated revenues to the City resulting therefrom (including revenues derived directly from use of the Convention Center and the parking components, and from resort tax revenues generated by convention/event attendees); injury to the credibility and reputation of City's Convention Center business and with the convention, trade and event shows and members of the general public who plan to attend such shows; and additional costs of administering this Agreement, including Project staff, legal, accounting, consultants and overhead and other administrative costs. Construction Manager acknowledges that the amounts established for Liquidated Damages are fair and commercially reasonable.

5.1.3.3. Construction Manager and City have agreed to the limitations of liability in Subsection 5.1.3.1(a) through 5.1.3.1(c) in order to fix Construction Manager's costs and to avoid later disputes over which items are properly chargeable to Construction Manager as a consequence of Construction Manager's delays.

5.1.3.4. Liquidated Damages and/or other damages provided for in Section 5.1.3.1(a) through 5.1.3.1(c) shall be deducted from monies otherwise due Construction Manager, whether or not the City terminates Construction Manager for cause and whether or not Surety completes the Project after a Default by Construction Manager.

5.1.3.5. Liquidated Damages or other damages provided for in Section 5.1.3.1 shall apply solely to claims arising from delay in meeting the specific Milestone and shall be the City's sole remedy for delay, and are not intended to, and do not, liquidate Construction Manager's liability under any other provision of this Agreement or for other events not specifically referenced in Section 5.1.3.1. Liquidated Damages shall not liquidate Construction Manager's liability under the indemnification provisions of this Agreement.

5.1.3.6. Construction Manager, in addition to reimbursing City for Liquidated Damages or other damages for untimely performance as provided in Subsection 5.1.3.1, shall reimburse City for all costs incurred by City to repair, restore, or complete the Work, as may be provided by the Contract Documents. All such costs shall be deducted from the monies otherwise due Construction Manager for performance of Work under this Agreement by means of unilateral credit Change Orders issued by City.

5.1.3.7. With respect to the Art Basel 2016 Milestone and Art Basel 2017 Milestone, at any point in time when the City reasonably believes that such Milestones will not be achieved following review of Construction Manager's proposed recovery plan to regain lost schedule progress pursuant to Section 5.2 of the Agreement, the City shall be entitled, but not required, to withhold from any amounts otherwise due the Construction Manager the applicable damages amount specified in this Section in an amount not-to-exceed One Million Dollars (\$1,000,000.00) for the Art Basel 2016 Milestone and not-to-exceed One Million Five Hundred Thousand Dollars (\$1,500,000) for the Art Basel 2017 Milestone. City anticipates making its determination as to whether it reasonably believes that the Milestone will be achieved no later than July 15, 2016 and July 15, 2017, respectively, as by those dates City and/or Art Basel U.S. Corp. will incur significant costs and expenses with respect to securing alternative accommodations or temporary tent structures for the Art Basel events and moving forward with the associated logistical, operational and coordination efforts required to implement an alternative solution as a result of delays.

5.1.3.8. In the event a court of competent jurisdiction determines that any Liquidated Damages amount herein is unenforceable notwithstanding Construction Manager's agreement herein that such amounts are fair and reasonable, Construction Manager shall not be relieved of its obligations to the City for the actual damages resulting from the failure to meet the Milestones in accordance with the requirements of the Contract Documents, including the categories of damages specified in Subsection 5.1.3.2; without limiting the foregoing, City and Construction Manager covenant not to bring any action in a court of competent jurisdiction that would ask the court to rule that the Liquidated Damages amounts are not fair and reasonable.

5.1.3.9. In agreeing to bear the risk of delays for completion of the Work except for extensions approved in accordance with the Contract Documents, the Construction Manager agrees that, except and only to the extent provided otherwise in the Contract Documents, the occurrence of events of delay shall not excuse the Construction Manager (and its Subcontractors and Suppliers) from the obligation to achieve the Art Basel 2016 Milestone and Art Basel 2017 Milestone and full completion of the Work within the Contract Time, and shall not entitle the Construction Manager to an adjustment of the GMP, except as specified in the Contract Documents.

5.1.4. No Interference. The Construction Manager recognizes and acknowledges that the Convention Center is an extremely important, very large convention center and, as a result, is a very significant economic element of the convention and tourism business for the City and Miami-Dade County. Hundreds of thousands of visitors from all over the world annually attend events, shows, and conventions at the Convention Center, which are scheduled throughout the year. It is imperative that these visitors, as well as those who sponsor, manage, and conduct these events, shows, and conventions at the Convention Center have a totally satisfactory experience while at the Convention Center and in the nearby area. These people are the guests and customers of the Convention Center. They have selected and elected to come to Miami Beach, Florida and the City wants them to

continue to make that choice. Therefore, all diligent good-faith efforts must be made by the Construction Manager on a continuous basis to effectively make all Work as transparent to Convention Center guests and customers as is reasonably possible. In addition, the City Commission has adopted a Convention Center Construction Period Booking Policy in Resolution No. 2015-28995, to (i) accommodate only those events that have requested the booking of dates during the construction period as of April 13, 2015; (ii) authorize the closure of the Convention Center during the following periods: October 19, 2016 through November 16, 2016; December 10, 2016 through April 30, 2017; and October 17, 2017 through November 22, 2017; and (iii) permit the phasing of the Work so as to facilitate making all four (4) main exhibition halls available each year for Art Basel, in view of the importance to the City of the annual Art Basel exhibition. Construction Manager acknowledges and agrees that this Agreement, the Project Schedule and phasing thereof have been expressly structured to accommodate the annual Art Basel exhibitions at the Convention Center and permit the City's continued hosting thereof as specified in Sections 2.1 and 2.2 of Appendix D, in view of this international event's importance to the City and Miami-Dade County.

The Construction Manager also acknowledges and understands that, during its performance of the Work, areas adjacent to and around the Project Site such as the Fillmore Miami Beach at the Jackie Gleason Theater, Miami Beach City Hall, the Miami Beach Botanical Gardens, and that events will continue to take place at the Convention Center, as specified in City Resolution No 2015-28995, may be occupied by members of the public and employees and other parties.

The Construction Manager covenants and agrees that it shall at all times perform the Work, and cause all Subcontractors and representatives of Construction Manager to perform the Work, so as to exercise a diligent good-faith effort to minimize interference with the business operations of the City, guests and customers of the Convention Center, members of the public and employees and other parties associated with adjacent businesses and operations, including the following types of interference: (i) fumes, odors, dust, debris, noise and safety hazards, (ii) obstructions of access and obstructions of traffic flow to or from any building, roadway, entryway, parking garage or parking lot in the vicinity of the Project Site, and (iii) interruption in the availability and normal operation of water, sewer, electricity, gas, telephone, HVAC systems, computer systems and other utility services and systems relating to properties adjacent to and around the Project Site. The Construction Manager must plan ahead in detail, schedule accurately, anticipate problems, and communicate plans and intentions clearly in writing to the City in a timely manner to avoid creating any of the types of interference described in the preceding sentence. If any such interference does occur, the Construction Manager must act immediately to remedy the same.

If any of the Construction Manager's construction or other activities interfere with or otherwise disrupt the City's operations, any of the Convention Center's exhibitions, any activities of any exhibitor of the City, or any attendee of the Convention Center, the Construction Manager shall, within one (1) hour of notice from the City, remedy or otherwise correct the cause of such interference or disruption.

Notwithstanding the foregoing, in recognition that construction activity may impact operational conditions at the Center, City will make a diligent good-faith effort to cause for the license agreements with Convention Center customers to include an acknowledgement by licensees that (i) there may be times where normal construction activities may create noise, vibration, dust, or other environmental impacts that may be observable to licensees, (ii) there may be modifications to the entry, egress, loading, and circulation spaces that may include the creation of temporary passages within the Center that may occur within or adjacent to areas of active construction, the relocation of entry or exiting doors, the assignment of specific loading docks, and other temporary adjustments to the movement of people and freight through the Center, and (iii) such conditions are an anticipated element of the use of the Center.

5.2. Progress in Accordance with Schedule / Recovery Schedule. The Milestones and Substantial Completion dates shall not be modified except by a Contract Modification. The Construction Manager shall prosecute the Work, and shall cause all Subcontractors to prosecute the Work, so that the

delivery of all Milestones and Substantial Completion shall be in accordance with the approved Project Schedule.

5.2.1. If the Work on any critical path item or activity delineated in the Project Schedule is delayed for a period which exceeds 5% of the days remaining until a completion deadline for a Milestone set forth in Appendix D or otherwise delineated in the Project Schedule (including delays to which Construction Manager may be entitled to a time extension under Article 9), and it reasonably appears that the Construction Manager will be unable to achieve a Milestone, the City may notify the Construction Manager of the same and, in such event, the Construction Manager shall submit a proposed recovery plan to regain lost schedule progress and to achieve the original Milestone(s) in accordance with the Contract Documents ("Recovery Schedule"), after taking into account Excusable Delays (as hereinafter defined) and permitted extensions of the Project Schedule.

5.2.2. City shall notify Construction Manager within ten (10) days after receipt of each Recovery Schedule, whether the Recovery Schedule is deemed accepted or rejected. Within five (5) business days after City's rejection of the Recovery Schedule, Construction Manager will resubmit a revised Recovery Schedule incorporating City's comments. If the City accepts Construction Manager's Recovery Schedule, Construction Manager shall, within five (5) business days after City's acceptance, incorporate and fully include the Recovery Schedule into the Project Schedule and deliver same to City.

5.2.3. If the Construction Manager fails to provide an acceptable Recovery Schedule, as determined by City in its sole discretion, that demonstrates Construction Manager's ability to timely achieve a Milestone, or if Construction Manager otherwise (1) fails, refuses or neglects to supply a sufficient number of workers or to deliver the materials and equipment with such promptness as to prevent the delay in the progress of the Work; (2) fails in any respect to commence and diligently prosecute the Work and proceed to the point to which Construction Manager must proceed in accordance with the Project Schedule in order to achieve a Milestone or Substantial Completion in accordance with the Project Schedule; (3) fails to commence, prosecute, finish, deliver or install the different portions of the Work on time as herein specified in accordance with the Project Schedule; or (4) fails in the performance of any of the material covenants of the Contract Documents, then the City may proceed as follows:

a. The City may, without prejudice to any other rights and remedies available to the City hereunder or otherwise, order the Construction Manager to employ such extraordinary measures, including acceleration of the Work, as may be necessary to bring the Work into conformity with the Project Schedule and achieve the Milestones set forth in Appendix D, including providing additional labor or expediting deliveries of materials, performing overtime, additional shifts or re-sequencing the Work without any adjustment to the GMP. The City shall, after having provided Construction Manager written notice of any of the deficiencies listed in this Subsection 5.2.3 and a reasonable opportunity to cure and regain the lost schedule progress within twenty-one (21) days following said notice, and without waiving any other rights or remedies, have the right to withhold progress payments to the extent reasonably necessary to protect the City's interests and supplement Construction Manager's forces with separate contractors and/or to seek other redress for Construction Manager's default.

b. If and to the extent Construction Manager is entitled to an extension of time for Excusable Delays pursuant to the Contract Documents, but the City nevertheless requires Construction Manager to perform Work without a change in a Milestone or the Project Schedule (including the fixed Art Basel 2016 Milestone and Art Basel 2017 Milestone), then as an alternative to allowing an extension of time, the City shall fund from the City's Contingency the reasonable acceleration costs or reasonable costs of rearranging, re-sequencing or reallocating Construction Manager's Work to accommodate a Recovery Schedule or City-directed acceleration in order to meet a Milestone, solely to the extent such costs result from Excusable Delays, to reimburse Construction Manager for approved actual costs in connection with the Recovery Schedule or City-directed acceleration, including labor, materials, equipment and services necessary for modifications or extra work required to implement a Recovery Schedule or other City-directed acceleration or extraordinary measures, plus Construction Manager's overhead and profit for Change Order Work as set forth in the Contract Documents

c. Except for expenses approved for payment pursuant to Subsection 5.2.3.b. above, all other costs incurred by Construction Manager in preparing, implementing and achieving the Recovery Schedule, including the costs of taking such extraordinary measures as may be ordered pursuant to Subsection 5.2.3.a, shall be borne by Construction Manager and shall not result in a change to the Guaranteed Maximum Price. The Construction Manager shall expressly acknowledge and agree in the GMP Amendment that its pricing of the Work and the determination of the Guaranteed Maximum Price is expressly based upon the Construction Manager's assuming the foregoing cost risks of taking all extraordinary measures that may be necessary, including acceleration of the Work, in order to achieve the critical Milestones set forth in Appendix D. In no event shall Construction Manager be entitled to any other compensation or recovery of any damages in connection with acceleration or constructive acceleration, including consequential damages, lost efficiency, opportunity costs or similar remuneration.

d. In the event that Construction Manager fails to provide an acceptable Recovery Schedule within ten (10) days of Construction Manager's receipt of a notice to furnish same, Construction Manager shall have no right to receive progress payments until such time as Construction Manager has prepared and City has accepted such Recovery Schedule. Any failure or delay in the submittal or acceptance of a Recovery Schedule shall not result in any time extension under the Contract Documents.

5.3. Substantial Completion. As a condition of Substantial Completion, all of the following must occur:

5.3.1. All Work affecting the occupancy, use and operability of the Project or safety has been completed, including all structural, mechanical and electrical Work in accordance with the Contract Documents;

5.3.2. All Pre-Commissioning activities, including alignment, balancing, lubrication and first-fill have been completed;

5.3.3. The Work may be operated within manufacturers' recommended limits, in compliance with Applicable Laws, and without damage to the Work or to the Project;

5.3.4. Operational testing, whether by Subcontractor, or Construction Manager, or both, has been successfully completed;

5.3.5. Construction Manager has delivered to the City a Substantial Completion Punch List of all remaining items of Work to be completed or corrected, prepared by Construction Manager, coordinated by the Owner's Representative and certified for completeness and accuracy by the Architect-Engineer (provided, however, that failure to include any items on such list does not alter the responsibility of the Construction Manager to complete all Work in accordance with the Contract Documents);

5.3.6. Except for the Substantial Completion Punch List, Construction Manager has corrected all defects, deficiencies and/or discrepancies to the entire Work as identified by City and City has accepted such corrections in writing; and

5.3.7. Construction Manager has delivered evidence that all permits have been satisfied and closed, and that a temporary certificate of completion and/or temporary certificate of occupancy (as applicable) has been issued by the authority having jurisdiction, and the Project or designated portion thereof is sufficiently complete in accordance with the Contract Documents and can be used for its intended purpose for uninterrupted operation.

5.4. Notice of Substantial Completion. Any determination by the Architect-Engineer and the Construction Manager of Substantial Completion shall not be binding on the City, and the ultimate determination of Substantial Completion shall rest with the City and shall be evidenced by the City's executing and returning to the Construction Manager its Notice of Substantial Completion (or Notice of Partial Substantial Completion, as applicable).

5.4.1. When the City, on the basis of an inspection, determines that the Work or designated portion thereof is substantially complete, and when the Construction Manager has complied with all other conditions precedent to Substantial Completion provided for in Section 5.3 and the Contract Documents, the City will then prepare a Notice of Substantial Completion which shall establish the Substantial Completion Date, shall state the responsibilities of Construction Manager, if any, for security, maintenance, heat, utilities, damage to the Work, and insurance, and shall fix the time within which the Construction Manager shall complete the items listed in the Substantial Completion Punch List. If the City issues a Notice of Substantial Completion on the basis of partial completion of the Project, or upon the basis of a partial or temporary certificate of occupancy or certificate of completion, as applicable, City may include such additional conditions, as it deems appropriate to protect its interests pending substantial completion of the entire Project or issuance of a permanent certificate of occupancy or certificate of completion, as applicable.

5.4.2. The City shall not unreasonably withhold or condition acceptance and execution of a Notice of Substantial Completion (or a Notice of Partial Substantial Completion); provided, however, the Project shall not be deemed Substantially Complete and the City shall not execute a Notice of Substantial Completion until all of the criteria for achieving Substantial Completion as identified in Section 5.3 have been satisfied, and (2) in the case of a portion of the Project, the conditions set forth in Section 5.5 shall have been satisfied.

5.5. Partial Substantial Completion. Partial Substantial Completion of the Work shall occur when the City determines that a portion of the Work, as defined in the Contract Documents and/or otherwise by logical boundaries, is Substantially Complete in accordance with the Contract Documents. The City may (but shall not be obligated to) agree that a portion or component of the Work, acceptable to the City in its sole discretion, may be certified as Substantially Complete provided that:

5.5.1. The requirements provided under Sections 5.3 and 5.4 above for issuance of a Notice of Substantial Completion are complied with for the portion of the Work for which a Notice of Partial Substantial Completion is being sought;

5.5.2. Such portion and any and all appurtenances, utilities, transportation arteries and any other items required under the Contract Documents and necessary to serve that portion of the Work are sufficiently completed, a temporary certificate of completion or occupancy, as applicable, is issued for the portion of the Work for which a Certificate of Partial Substantial Completion is being sought and/or all conditions or requirements of authorities having jurisdiction are complied with, to permit the City to utilize and occupy that portion for its intended use in accordance with the Contract Documents without material interference from any incomplete or improperly completed items of Work;

5.5.3. The City is fully able to use and occupy the portion of the Work for the purposes intended and the Construction Manager separates the portion of the Work which is Substantially Complete from non-complete areas of the Project in order to prevent noise, dust and other construction disturbances which would materially interfere with the use of such portion for its intended use in accordance with the Contract Documents and to assure the safety of those entering, exiting and occupying the completed portion;

5.5.4. Partial Substantial Completion shall not constitute Final Completion of the Work or Substantial Completion of the Project, nor shall it relieve the Construction Manager of any responsibility for the correction of Work or for the performance of Work not complete at the time of Partial Substantial Completion; and

5.5.5. As time is of the essence, Construction Manager shall sequence its Work so as to achieve the Milestones set forth in Appendix D and further delineated in the Project Schedule.

5.6. Beneficial Occupancy. Beneficial Occupancy shall occur when the City determines that a portion of the Work may be occupied prior to Substantial Completion. City may take Beneficial Occupancy in accordance with the provisions of the Contract Documents.

5.6.1. Construction Manager acknowledges and agrees that the City intends to and shall take Beneficial Occupancy of the portions of the Work and Project Site described in Section 2.1 of Appendix D with respect to the Art Basel 2016 Milestone, and described in Section 2.2 of Appendix D with respect to the Art Basel 2017 Milestone, either concurrently or prior to Substantial Completion of the Phase 1A Work or Phase 2A/2B Work, respectively. Construction Manager acknowledges and agrees that the Project Schedule is expressly structured to accommodate the Art Basel 2016 Milestone and Art Basel 2017 Milestone and the City's needs with respect thereto.

5.6.2. In the event the City determines, pursuant to Section 5.2, that the Phase 1A Milestone or Phase 2A/2B Milestone set forth in Appendix D cannot timely be achieved or is not likely to be achieved, Construction Manager shall nevertheless take all steps that may be necessary, including implementation of a Recovery Schedule, acceleration of the Work, or extraordinary measures, to prosecute the Work and meet the critical Art Basel 2016 Milestone or Art Basel 2017 Milestone and deliver Beneficial Occupancy of the portions of the Work and Project Site as outlined in the Contract Documents.

5.6.3. Except to the limited extent of reasonable acceleration costs funded from the City's Contingency pursuant to Subsection 5.2.3.b., the Construction Manager shall expressly acknowledge and agree in the GMP Amendment that its pricing of the Work and the determination of the Guaranteed Maximum Price is expressly based upon the Construction Manager's assuming the foregoing cost risks of taking all steps that may be necessary, including implementation of a Recovery Schedule, acceleration of the Work, or extraordinary measures, in order to achieve the critical Art Basel 2016 Milestone, Phase 1A Milestone, Art Basel 2017 Milestone and Phase 2A/2B Milestone.

5.6.4. Prior to the anticipated date of Beneficial Occupancy, Construction Manager shall separate the portion of the Work to be occupied from non-complete areas of the Project in order to prevent noise, dust and other construction disturbances which would materially interfere with the use of such portion for its intended use in accordance with the Contract Documents and to assure the safety of those entering, exiting and occupying the completed portion.

5.6.5. Beneficial Occupancy shall not constitute Substantial Completion or Final Completion of the Work, nor shall it relieve the Construction Manager of any responsibility for the correction of Work or for the performance of Work not complete at the time of Beneficial Occupancy. Prior to Beneficial Occupancy, the Construction Manager shall obtain a temporary certificate of occupancy and/or completion, as applicable, and/or otherwise satisfy all conditions or requirements of any agencies having jurisdiction (including fire watch or other conditions that may be imposed under City special event permits, if such permits are required). Prior to the anticipated date of Beneficial Occupancy, the Construction Manager shall instruct City personnel as necessary for the proper operation and maintenance of all equipment and machinery that will serve the portion of the Work being occupied.

5.6.6. After Beneficial Occupancy and as conditions of Substantial Completion, the Construction Manager shall deliver to the City complete as-built drawings, all approved Shop Drawings, maintenance manuals, pamphlets, charts, parts lists and specified spare parts, operating instructions and other necessary documents required for all installed materials, equipment, or machinery, all applicable warranties and guarantees, and the appropriate certificate of occupancy or certificate of completion that are related to the portion of the Work being occupied.

5.6.7. Construction Manager's insurance on the unoccupied or unused portion or portions of the Project Site shall not be canceled or lapsed on account of such Beneficial Occupancy.

5.6.8. Inspections Applicable to Beneficial Occupancy or Partial Substantial Completion.

a. Prior to Beneficial Occupancy or Partial Substantial Completion of the Phase 1A Work or Phase 2A/2B Work, the City, Owner's Representative and Construction Manager shall inspect the portion of the Work being occupied so as to fully document the condition of the Work at the time the City takes Beneficial Occupancy. Construction Manager shall also coordinate any inspections that may be required by the Builder's Risk insurer or others in connection with the portion of the Work being occupied.

b. Once the City no longer requires the use of the portion of the Work to be occupied (i.e. following the conclusion of the December 2016 or December 2017 Art Basel events), City shall notify Construction Manager of the availability of the premises, to permit Construction Manager to coordinate the completion of any remaining Work. Prior to commencement of such Work, a follow-up inspection by the City, Owner's Representative and Construction Manager shall be conducted so as to document the condition of the Work at the conclusion of City's temporary use of the occupied premises. Construction Manager shall have seven (7) days to provide written notice to the City of any damage to any portion of the Work allegedly attributed to City's use of the area being occupied, and any Claims related thereto shall be reviewed and/or resolved pursuant to Article 15. If City and Construction Manager cannot reach agreement with respect to any such Claim, Construction Manager may reserve its rights by stating the precise nature of the dispute, all facts or documentary evidence supporting the Claim, the particular scope of Work associated with the Claim, and the amount and/or time sought in connection with the Claim. Construction Manager shall then proceed to complete the Work and may not refuse to complete Work that is the subject of a dispute or Claim.

5.7. Final Completion. Final Completion of the Project shall be deemed to have occurred if all the following have occurred:

5.7.1. Substantial Completion has occurred;

5.7.2. The Work can be used and operated in accordance with Applicable Laws bearing on the performance of the Work and applicable permits;

5.7.3. All spare parts and special tools purchased by Construction Manager as part of Vendor supplies shall have been delivered to City and clear of all Liens;

5.7.4. All items on the Substantial Completion Punch List shall have been completed by Construction Manager to City's satisfaction and all final inspections have been performed;

5.7.5. Construction Manager has satisfied the additional conditions prescribed by the City in conjunction with a Notice of Substantial Completion issued on the basis of partial completion of the Project, or a partial or temporary certificate of occupancy or completion, as applicable;

5.7.6. Construction Manager has delivered evidence that all permits that are Construction Manager's responsibilities as specified under the Contract Documents have been satisfied and closed, and that a certificate of completion and/or certificate of occupancy (as applicable) has been issued by the authority having jurisdiction, and the Project or designated portion thereof is sufficiently complete in accordance with the Contract Documents and can be used for its intended purpose for uninterrupted operation.

5.7.7. Construction Manager shall have provided to City final releases and complete and unconditional waivers of liens for all Work performed by Construction Manager and each Subcontractor or Suppliers;

5.7.8. Construction Manager shall have delivered to the City a certification identifying all outstanding Claims (exclusive of any Liens or other such encumbrances which must have been discharged) of Construction Manager (and of its Subcontractors, Suppliers and any other party against Construction Manager) with written documentation reasonably sufficient to support such Claims;

5.7.9. Construction Manager shall have delivered to the City a written assignment of all warranties or guaranties which Construction Manager received from Subcontractors or Suppliers to the extent Construction Manager is obligated to do so;

5.7.10. Construction Manager shall have delivered to City a complete set of as-built documents and Project Records prepared in accordance with the Contract Documents;

5.7.11. Construction Manager has delivered to City all other submittals required by the Contract Documents, including all installation, operations and maintenance manuals or instructions for equipment furnished by Construction Manager, catalogs, product data sheets for all materials furnished by Construction Manager and similar information;

5.7.12. All rubbish and debris have been removed from the Project Site; and

5.7.13. All Construction aids, equipment and materials have been removed from the Project Site.

5.7.14. Construction Manager has delivered to the City all executed warranties and guarantees required by the Contract Documents, all of which shall be in the name of the City and run to the benefit of the City;

5.7.15. If applicable, certificates of insurance indicating that any insurance required of the Construction Manager or Subcontractors by the Contract Documents shall remain in full force and effect for the required period of time;

5.7.16. Any other documentation establishing payment or satisfaction of obligations, including receipts, releases and final waivers of lien from the Construction Manager and all Subcontractors, to the extent and in such form as may be reasonably required by the City;

City shall deliver to Construction Manager a Certificate of Final Completion as soon as practicable following declaration by City that Final Completion has occurred.

ARTICLE 6 GUARANTEED MAXIMUM PRICE FOR CONSTRUCTION

6.1. The initial schedule prepared by the Construction Manager for the Project shall reflect and track the design progress through the completion of the presentation of the GMP Proposal for the construction of the Project and completion of Construction Documents. The Construction Manager shall follow the process required by this Agreement for the preparation and submittal of a GMP for the Project. The Construction Manager shall propose for the Project, the amount to be included in the GMP for the Construction Manager's general conditions costs and Construction Manager's Contingency identified in Subsection 6.4.1. The City shall have the option of accepting or rejecting the GMP Proposal as presented by the Construction Manager. Should the City Commission accept the GMP Proposal, a GMP Amendment reflecting that authorization shall be issued. Once accepted by City, any mistakes by Construction Manager in estimating costs or Work in its preparation of a GMP shall not serve as the basis for a Claim by Construction Manager or upward adjustment to the GMP. Notwithstanding the foregoing, prior to submission of the GMP Proposal, the City may issue a Notice to Proceed to Construction Manager with certain initial preparatory and demolition Work, as authorized via a Change Order in accordance with the Contract Documents following the subcontractor bid process delineated in the Contract Documents.

6.2. Upon acceptance of a GMP Proposal and execution of the GMP Amendment, the GMP for the Project will be fixed and firm for the duration of the Work and shall include the maximum compensation payable to Construction Manager for all costs, expenses, taxes, overhead and profit for the full and complete performance of all Work required by or reasonably inferable from the Contract Documents. The GMP is not subject to price escalation or de-escalation and is not subject to increase or decrease, except for changes in the Work or adjustments as approved by Change Order and in accordance with the Contract Documents. The GMP shall be construed at any given point in time to include any fixed firm adjustments thereto made by Change Order in accordance with the Contract Documents. In the event the Construction Manager's total expenditures for the Project exceed the Guaranteed Maximum Price as may be adjusted pursuant to the Contract Documents, the Construction Manager shall pay such excess from its own funds without any reimbursement by the City. City shall not be required to pay any amount that exceeds the Guaranteed Maximum Price as may be adjusted pursuant to the Contract Documents, and the Construction Manager shall have no Claim against the City on account thereof.

6.3. The GMP Proposal shall form the basis of negotiations between the Construction Manager and the City. The City shall have no obligation to accept any GMP Proposal of the Construction Manager regardless of that proposal's relationship to the City's Construction Budget or the most current Estimate or for any other reason. After each negotiation session, unless agreement is reached the City shall determine if further negotiations are warranted. If not, the negotiations shall be declared not to be successful, and the City may proceed as follows:

6.3.1. Reject the GMP and direct the Architect-Engineer for the Project and the Construction Manager to investigate, redesign, develop for City consideration Value Engineering possibilities, and other cost savings and to re-submit a new, lesser, proposed GMP. This may, at the City's option, include reduction in scope; or,

6.3.2. Reject the GMP, take possession of the Construction Documents and other Contract Documents and Project Records, terminate this Agreement and select a new construction manager for the Project, bid the Work to a general contractor or otherwise complete with other forces or take such action, if any, that the City may determine is in its best interest. In this event, the Construction Manager shall not perform any other services for the Project, and Construction Manager's sole compensation shall be limited to (1) Construction Manager's Pre-Construction Phase Fee as specified in Section 7.1.1; (2) a lump-sum demobilization/termination fee in the amount of \$400,000; and (3) any unpaid amounts due for any remaining undisputed Work performed pursuant to any Notice to Proceed prior to the date thereof. In the event any option under this subparagraph is chosen by the City, the Construction Manager shall immediately turn over to the City all Construction Documents and other Project Records, and upon payment of the fees specified in this Section 6.3.2, neither Party shall have or owe any further obligation whatsoever to the other Party.

6.4. Construction Contingency. In addition to the Base GMP, a GMP for the Project will include an agreed upon sum as the Construction Manager's Contingency relating to construction of the Project. The City shall separately establish a City Contingency fund, which shall not be included as part of the GMP, and which will be available to the City to pay for Project costs as outlined in Subsection 6.4.2. Use of the Construction Manager Contingency shall be as provided in Section 6.4.1. Use of the City Contingency shall be requested through the Change Order process in Article 9 and must be approved in writing by the City prior to the prosecution of the related Work.

6.4.1. Construction Manager's Contingency. The Construction Manager's Contingency shall be for the Construction Manager's use against risks assumed by Construction Manager in providing the GMP with uncertainties that are beyond the control of the Construction Manager, including the reasonable and necessary costs incurred by the Construction Manager due to (1) costs of the Project pursuant to Section 8.2 that were not specifically foreseeable or quantifiable as part of the GMP Amendment or unforeseen circumstances relating to construction of the Work not directly or indirectly attributable to Construction Manager's (or its Subcontractors or Suppliers) noncompliance with the Contract Documents, and which result in unavoidable increases in the Cost of the Project; (2) increased costs/escalation resulting from the Subcontractor and Supplier bidding process due to changed market conditions, as measured against a relevant market index selected by the City; (3) increased Costs of the Project solely to the limited extent resulting from questions of conflicts, clarity or coordination of the Construction Documents, provided such coordination questions do not implicate matters covered by Construction Manager's warranty pursuant to Subsection 2.5.2.4; (4) costs for implementing a hurricane preparedness plan pursuant to Subsection 2.7.17.16, and further provided that all such costs and expenses must be a Cost of the Project. If bids are received below the applicable line items in the GMP, the buyout savings or surplus will be added to the Construction Manager's Contingency. If bids are received above the applicable line item in the GMP, the deficiency will be charged to the Construction Manager's Contingency, however such events shall not be cause to increase the Base GMP.

a. All payments hereunder shall be made in accordance with and subject to Article 11 of the Agreement. Upon making a draw against the Construction Manager's Contingency, the Construction Manager shall increase the relevant line items in the Schedule of Values by the amount of the draw, including any associated Construction Overhead and Profit Fee, and shall decrease the respective Construction Manager's Contingency line item accordingly. Construction Manager's draws

made against the Construction Manager's Contingency shall be reported to the Project Coordinator and Owner's Representative on a monthly basis with all associated supporting documentation sufficient to evidence each draw against the Construction Manager's Contingency.

b. The Project Coordinator, Architect-Engineer and/or Owner's Representative shall have the authority to verify all actual costs charged to the Construction Manager's Contingency. The City, through the Project Coordinator or Owner's Representative, may at any time dispute the legitimacy or reasonableness of any draws made or costs charged to the Construction Manager's Contingency, and the City may, pursuant to Section 11.5 of the Agreement, withhold such disputed amounts from any other amounts otherwise due the Construction Manager. Any dispute with regard to the legitimacy or reasonableness of such expenditures (or City's withholding thereof) may be the subject of a Claim.

c. In no event shall the use of the Construction Manager's Contingency cause for the GMP to be exceeded, and the Construction Manager shall be solely responsible for all costs that exceed the GMP (as adjusted by Change Order or Construction Change Directive), without any reimbursement from the City. Construction Manager shall use all diligent, good-faith efforts to maximize cost savings and minimize use of the Construction Manager's Contingency.

6.4.2. City's Contingency. The City's Contingency shall be an amount, determined by the City, which will be available to the City to pay for Project costs which are expressly chargeable to the City or determined to be the City's responsibility under the Contract Documents, including, as it relates to the Construction Manager, the following increased Costs of the Project incurred by Construction Manager:

a. Express written changes in the Work made in the discretion of the City after issuance of a Change Order or Construction Change Directive relating thereto. The decision to make such changes, and to incur the costs that arise there from, shall be in the sole discretion of the City. No costs may be charged to the City's Contingency under this subsection without express approval of City.

b. Changes to the Work if ordered by agencies having jurisdiction, provided such Work directly results from City's issuance of a Notice to Proceed prior to obtaining full permits thereon;

c. In the event of Excusable Delay, reasonable acceleration costs to meet Milestones, if approved pursuant to 5.2.3(b);

d. Differing site conditions pursuant to Section 9.2;

e. Post-hurricane or storm-related Construction Change Directives;

f. Increased Costs of the Project resulting from other actions of the City deemed to be City's responsibility and/or compensable under the Contract Documents.

Unless Construction Manager secures City's written agreement that such costs are City's responsibility, documentation of responsibility for such costs shall be submitted with the Construction Manager's Claim. When Construction Manager has reason to anticipate that such costs may be incurred, it shall be the Construction Manager's responsibility, when feasible, to provide the City with sufficient advance notice in accordance with Article 15 or as otherwise provided in the Contract Documents, so as to provide the City with a reasonable opportunity to avoid such costs. Such costs shall be deemed the City's responsibility if City subsequently agrees in writing to grant the Claim and accept such responsibility, or if the Claim is granted and responsibility assigned to City pursuant to the dispute resolution process under Article 15 and all reviews thereof are exhausted or waived by City. The Construction Manager has no right or entitlement whatsoever to the City's Contingency, and use of such funds are subject to the City's prior written approval and issuance of a Change Order or Construction Change Directive by the City at its sole and absolute discretion. Any unused City Contingency remaining at the completion of the Project shall accrue solely to the City.

6.4.3. Construction Manager will be required to furnish documentation evidencing all expenditures charged to the Construction Contingency, and demonstrating that the costs incurred were necessary for the Work. Construction Manager shall identify the amounts sought to be charged to the Construction Contingency, whether the charge is to be applied to the Construction Manager's Contingency or the City's Contingency, and the reasons why the amount should be charged to either the Construction Manager's Contingency or City's Contingency. Documentation for use of the Construction Contingency shall be determined by the Project Team, included in the Project Manual and displayed monthly in the PMIS. The Architect-Engineer, Owner's Representative and/or Project Coordinator shall have authority to verify the actual costs.

6.4.4. The grant of a Claim shall not result in a charge against the City's Contingency unless the Claim expressly requests a charge against the City's Contingency and the grant of the Claim expressly approves the charge against the City's Contingency.

6.4.5. Construction Contingency accounts shall contain no Construction Overhead and Profit Fee and shall not automatically entitle Construction Manager to any Construction Overhead and Profit Fee or other markup. With respect to the Construction Manager's Contingency, Construction Overhead and Profit Fee shall be paid to the Construction Manager as part of the monthly Applications for Payment and as draws are made for costs charged against the Construction Manager Contingency, with the Schedule of Values to be adjusted accordingly. With respect to the City's Contingency, the Construction Overhead and Profit Fee shall be paid as part of Change Orders or Construction Change Directives.

6.5. Taxes. The Construction Manager shall pay, as a Cost of the Project, all existing and future applicable Federal, State, local and other sales, consumer, use and similar taxes, whether direct or indirect, relating to, or incurred in connection with, the performance of the Work. The Guaranteed Maximum Price shall include all other Federal, State, local and/or other direct or indirect taxes which may apply. In the event the City elects to implement a direct purchase program for the purchase of materials and equipment to achieve Florida sales tax savings, Construction Manager shall comply with the provisions set forth in Appendix F with respect to any such City purchases. Construction Manager is responsible for reviewing the pertinent state statutes involving state taxes and complying with all requirements.

6.5.1. Any sales tax savings shall be either identified in the GMP Amendment or passed to the City in the form of a reduction in the GMP via deductive Change Order, provided, however, such deductive Change Order shall not include a reduction in the proportionate amount of Construction Overhead and Profit Fee applicable to the direct cost of the Work (plus sales tax) that is the subject of the Change Order.

6.6. At the time of submission of the GMP proposal for the Project, the Construction Manager will propose a schedule for substantial completion of the Project. The City and the Construction Manager may negotiate incentives for early completion of the Project and sharing of cost savings. The City and the Construction Manager may also negotiate liquidated damages for failure to meet certain Milestones or substantial completion of the Project.

6.7. The term "GMP," as used in this Agreement is a term of convenience only and is not intended to affect how a GMP or its components are to be determined or adjusted.

ARTICLE 7

CONSTRUCTION MANAGER'S FEE

7.1 In consideration of the performance of the services specified in this Agreement with respect to the Project on which the City has issued a Notice to Proceed, the City agrees to pay the Construction Manager as compensation for its services relating to the Project, fees as set forth in Subsections 7.1.1, 7.1.2 and 7.1.3.

7.1.1 Pre-Construction Phase Fee. For the performance of the Pre-Construction Phase Services for this Project including profit and overhead related to these preconstruction services, a fixed fee set forth herein. The fee for the Pre-Construction Services Phase shall be a fixed lump sum fee of **Two Million Five Hundred Ninety Four Thousand and Seventy-Three Dollars \$2,594,073** ("Pre-Construction Phase Fee"), and shall be paid in five (5) equal installments, with the first payment to be made on July 1, 2015. Pre-construction services for the Project shall include all services specified in Section 2.5 relating to design review through 100% Construction Documents for the Project, and other services specified in Section 2.6 of this Agreement, including all permit expediting services and early bid procurement, and all personnel and items required with respect thereto. Pre-Construction Services for the Project shall run concurrently with Construction Phase services for the Project and Construction Manager shall not be entitled to any additional fee with respect thereto, unless the GMP Proposal period is extended by the City. If the GMP Proposal period is extended by the City beyond October 31, 2015, Construction Manager shall be paid an additional fixed Pre-Construction Phase Fee in the amount of \$22,171 per business day until such time as a GMP is either accepted or rejected in accordance with Article 6.

a. The Construction Manager's personnel to be assigned during this phase and their duties and responsibilities to this Project and the duration of their assignments are shown on Appendix B.

b. The Pre-Construction Phase Fee includes general overhead; salaries and labor for necessary staff and consultants required to complete the Pre-Construction Phase Services specified in this Agreement; cost engineering/estimating, scheduling; information technology set-up; project information technology, including computers, cellphones, information management systems and software (including e-builder licenses), and other technology and support; contract administration; office expenses, including postage; permit expediting fees; printing and copying, including drawing reproductions; consulting fees; legal or accounting fees; cost of money; taxes; insurance premiums and deductibles; purchase or rental of equipment; utilities; travel; per diem; fines, penalties and/or damage awards.

c. If the scope of the Pre-Construction Phase Services is changed materially, the Pre-Construction Fee may be equitably adjusted. There shall be no adjustments in the Pre-Construction Fee following the City's acceptance of the GMP proposal.

7.1.2 Construction Phase General Conditions Fee. Prior to commencement of the Construction Phase for the Project, the City will issue a Notice to Proceed directing the Construction Manager to proceed with the Construction Phase. The Construction Manager's compensation for General Conditions Work or services performed during the Construction Phase shall be a fixed lump sum amount fee negotiated as part of the GMP, based on a detailed schedule of General Conditions costs and services that shall be provided by the Construction Manager ("General Conditions Fee"). The General Conditions Fee shall be invoiced and paid in monthly payments as agreed by the Parties and set forth in the applicable GMP. The first monthly payment shall become due thirty (30) days following the issuance of the first Notice to Proceed by the City (and the submission by the Construction Manager of a complete and approved Application for Payment satisfying all requirements of Article 11) and the final monthly payment shall be paid only when construction of the Project is finally completed and occupancy of the Project accepted by the City. If construction is authorized only for a part of the Project, the fee paid shall be proportionate to the amount of Work authorized by the City.

7.1.2.1 Adjustments in Fee. For changes in the Project as provided in Article 9, the General Conditions Fee for the Project shall be adjusted as follows:

a. The Construction Manager shall be paid an additional fee subject to negotiation with the City if the Construction Manager is placed in charge of reconstruction of an uninsured loss excluding any condition that may have been caused from negligent acts by the Construction Manager, its employees, agents, Subcontractors and others for whom Construction Manager may be responsible.

b. Should the Contract Time set forth in the GMP Amendment be contractually extended for Excusable Delay or for additional Work due no fault of the Construction Manager or its Subcontractors, the Construction Manager's additional General Conditions Fee will be negotiated and set forth in a Change Order, as an adjustment to the GMP on a per working day basis, in accordance with the provisions of Article 9. The Construction Manager's staff during such time extensions shall be established and set forth in the Change Order.

c. Construction Manager's Exclusive Remedy. In the event the date for Substantial Completion or Final Completion is extended for Excusable Delay in accordance with Article 9, the Construction Manager's sole and exclusive remedy is an extension of the Contract Time for completion of the Work and payment of additional General Conditions Fee as provided in Subsection 9.4.1.4.

7.1.2.2 Costs and Expenses Included in General Conditions Fee. The direct and indirect costs and expenses for facilities or performance of Work by the Construction Manager for items which do not lend themselves readily to inclusion in one of the separate trade contracts and within this Subsection below, are included in the General Conditions Fee during the Construction Phase and not otherwise reimbursable:

a. Onsite and Local Office Project Management Staff: Wages, salaries, benefits and costs associated with Construction Manager's supervisory and other technical, administrative and clerical Project personnel engaged in supervision and management of the Work on the Project Site, at the agreed-upon billing rates to be established as part of the GMP Amendment, but only to the extent not already included as Cost of the Project under Article 8, and specifically attributable to the Work performed in connection with the Project, including the Project Manager, Construction Superintendent, structural superintendent, assistant superintendent, shop drawing checker, secretary, layout foreman, consultants, estimators, cost controllers, accountants, office administrative personnel, time keepers, clerks, safety director, safety coordinator, safety labor, overall project schedule preparation, CPM scheduling and scheduler costs, cost of periodic site visits for supervisory, inspection, oversight, or management of the Project by specific "home office" personnel previously approved in writing by the City;

b. Field/Onsite Construction Offices and Supplies including transportation and set-up of onsite construction office trailers, construction of ramps and stairs for onsite construction office, interior build-out of onsite construction office, onsite construction office trailer rental, first aid supplies, reproduction services, monthly office supplies, Project reference manuals, field office postage, field office furniture, onsite construction office computer system and software, installation and equipment of field computer ISDN line, monthly cost for field ISDN/computer line, onsite construction office photocopier rental and supplies, plan printing (other than revisions) or document reproduction used for bidding or information purposes required by the Contract Documents, long-distance telephone calls, telegrams, postage, package delivery and courier service, hardwired telephone service, and reasonable expenses of Construction Manager's Jobsite office if incurred at the Project Site and directly and solely in support of the Work, Project Site photographs, field office express mail/courier charges, miscellaneous onsite construction office supplies, safety material and equipment, small tools, equipment or machinery, miscellaneous hand tool rental equipment (other than that of the subcontractors), hand tool purchase, hand tool repair, hand tool rental, job radios, jobsite cleaning labor and material, trash containers, final exterior and interior cleaning materials and labor other than subcontractors, miscellaneous cutting and patching, traffic control, off duty police officer(s), alarm system and monitoring for trailers;

c. Surveys, measurements and layout work reasonably required to perform the Work;

d. Retention/storage of Project Records;

e. Off-site secure storage space or facilities approved in advance by the City;

f. Miscellaneous expendable items, extended jobsite General Conditions

(unless such extended jobsite General Conditions are compensable pursuant to Section 9.4.1.4, in which case Construction Manager shall be entitled to a Change Order for those costs), interest on monies retained by the City, escalated costs of materials and labor, home office expenses or any cost incurred that may be allocated from offices of the Construction Manager or any of its Subcontractors;

g. Other expenses or charges properly incurred and paid in the prosecution of the Work and services required of Construction Manager pursuant to Sections 2.7 and 2.8 and other provisions of this Agreement, with the prior written approval of the City, for the provision of management and other related services necessary to complete the Project in an expeditious and economical manner consistent with this Agreement and in the best interests of the City, but specifically excluding legal costs, attorney's fees, court costs and any other fees, costs or expenses already included as a Cost of the Project in Article 8; and

h. Other costs as may be specified in the GMP Amendment.

Construction Manager agrees that no payment or reimbursement beyond the General Conditions Fee shall be made for any of the general conditions items set forth in this section 7.1.2, unless such general conditions costs and expenses are actually incurred and arise from Changes in the Work approved by the City. Construction Manager covenants and agrees that it shall not seek, nor is it entitled to, reimbursements or payments as part of the General Conditions Fee, for any items it has already included as a Cost of the Project in Section 8.2. Construction Manager's team will at all times include, at least, the positions listed in its table of organization to be included in the GMP Amendment. In the event Construction Manager fails to provide such personnel or other items included within the General Conditions Fee, then the General Conditions Fee will be adjusted accordingly.

7.1.3 Overhead and Profit for Construction Phase. For all overhead, profit and general expenses of any kind, except as may be expressly included in Article 8 and the GMP Amendment, for services provided during and related to the Construction Phase of the Project, the Construction Manager's fee shall be 3.80% of the Cost of the Project plus the General Conditions Fee ("Construction Overhead and Profit Fee"). For the avoidance of doubt, Construction Manager shall not be paid any fee on its Construction Overhead and Profit Fee. The Construction Overhead and Profit Fee shall be paid proportionally to approved expenditures for Direct Cost Items under Section 8.2, and less retainage in accordance with Article 11. The City's obligation to pay the Construction Overhead and Profit Fee is subject to the Guaranteed Maximum Price. The balance of the Construction Overhead and Profit Fee for the Project, if any, shall be paid upon Substantial Completion.

i. The fixed Construction Overhead and Profit Fee shall not be subject to increase or decrease for any Change in the Work or Change Order (whether additive or deductive), except as provided in Article 9.

ii. In the event that the Certified Cost of the Work shall exceed the Guaranteed Maximum Price, the Construction Manager shall pay such excess at its own cost and expense, and the City shall not be required to pay any part of such excess or the Construction Overhead and Profit Fee and the Construction Manager shall have no Claim against the City on account thereof.

7.2 Shared Savings.

7.2.1 It is intended that the Construction Manager fee will include a share of the cost savings, if any, realized during the bidding and construction of this Project completed by Construction Manager. In the event that the total Certified Cost of the Project, any unused remaining Construction Manager's Contingency and General Conditions Fee is less than the City-approved Cost of the Project, Construction Manager's Contingency and the General Conditions Fee set forth in the GMP Amendment (as the same may be adjusted by Change Order, including deductive Change Orders for direct purchase of materials pursuant to Appendix F), less any amounts assessed for damages or liquidated damages pursuant to Subsection 5.1.3.1(a) through (c), then the difference (hereinafter called "Project Cost Savings") shall be allocated seventy-five percent (75%) to the City and twenty-five percent (25%) of the Project Cost Savings to the Construction Manager as an Additional Fee.

7.2.2 For the avoidance of doubt, City's Contingency and any savings realized for Owner-Purchased Materials (which savings shall inure solely to the City), shall not be used to calculate Project Cost Savings. The Additional Fee, if any, shall be paid to the Construction Manager on or before the date which is thirty (30) days after the later to occur of the following events: (i) the Construction Manager has complied with all requirements in Article 11 (including Sections 11.13 through 11.15, and (ii) the amount of such fee having been finally determined by the City as provided in this Agreement.

7.2.3 Notwithstanding any provision to the contrary herein or in the other Contract Documents, in no event shall Construction Manager be entitled to any Additional Fee whatsoever for any Project Cost Savings if the fixed and critical Art Basel 2016 Milestone or Art Basel 2017 Milestone is not achieved, without regard to the cause or fault thereof, unless such failure is due to Excusable Delays caused by the City.

ARTICLE 8 **COST OF THE PROJECT**

8.1 With respect to this Project, the City agrees to pay the Construction Manager for the Cost of the Project as defined in this Article 8. Such payment shall be in addition to the Construction Manager's fees stipulated in Article 7.

8.2 Direct Cost Items. The Cost of the Project shall include the following items for equipment, materials, labor, taxes and Subcontractors to complete the Work:

8.2.1 Wages paid for labor of construction workers directly employed by the Construction Manager to perform the construction of the Work at the Project Site or, with the Project Coordinator's advance written approval, at off-site workshops;

8.2.2 Wages paid for labor of supervisory or administrative personnel not included in the Construction Manager's fees stipulated in Article 7, but who are in the direct employ of the Construction Manager in the performance of the construction Work at the Project Site, provided Construction Manager has obtained the advance written approval of the Project Coordinator for such personnel;

8.2.3 Wages paid for labor of the Construction Manager's supervisory or administrative personnel engaged at factories, workshops, or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for and actually dedicated to the Work;

8.2.4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions (excluding bonuses), provided such costs are based on wages and salaries included in the Cost of the Project under Subsections 8.2.1 through 8.2.3;

8.2.5 Temporary Project utilities including the portion of temporary electric hookup not typically paid by the electrical subcontractor, temporary electrical distribution and meters, monthly temporary electric charge by Florida Power & Light, HVAC testing electrical charges, temporary water connection not typically provided by the plumbing subcontractor, temporary water meter, temporary water deposit, fire hydrant service, temporary fire protection monthly temporary water service, temporary toilets, temporary construction phone hookup and installation, temporary construction phone monthly charges, construction phone long distance charges, cellular phones, site erosion control and Project entrance(s), fencing and covered walkways, storage containers, storage rental costs, temporary onsite roads, temporary onsite fencing, temporary onsite gates, street barricades, construction temporary signage, pedestrian walkway and street occupation fees for construction activities, temporary trash chute and dumpsters

8.2.6 Cost of all materials, supplies and equipment incorporated in or to be incorporated in the completed construction of the Project, including costs of transportation and storage thereof, and cost of materials in excess of those actually installed (but only to the limited extent to allow for reasonable waste and spoilage);

8.2.7 Payments due to Subcontractors and Suppliers from the Construction Manager or made by the Construction Manager to Subcontractors for their Work performed pursuant to subcontracts or agreements issued in accordance with the Contract Documents;

8.2.8 Costs, including transportation and storage, maintenance, installation, dismantling and removal of materials, supplies, of all temporary facilities, machinery, equipment, and hand tools (except hand tools customarily owned by construction workers) which are provided by the Construction Manager at the Project Site and are fully consumed in the performance of the Work Cost of items previously used by the Construction Manager shall mean fair market value;

8.2.9 Rental charges for temporary facilities, machinery and equipment (except hand tools) used at the Project Site, whether rented from the Construction Manager or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. Such rental charges shall include, but not be limited to, the Construction Manager cost of opening a new office specifically for the Project during the Pre-Construction Services Phase, prior to the establishment of an office at the Project Site, except as set forth in 8.3. Rental charges shall be consistent with those generally prevailing in the location of the Project. The Construction Manager shall obtain bids for all temporary facilities, machinery and equipment to be rented from no less than three (3) responsible suppliers. If the cumulative total of rental charges in connection with any single item is in excess of sixty percent (60%) of its fair market value as of the date that such item is intended to be first put into service in connection with the Work, then such item shall be purchased instead of rented, and sold at the completion of the Work. All proceeds from such sales shall be credited to the City as a deduction from the Cost of the Project;

8.2.10 Rental rates and charges consistent with those prevailing in the area of the Project (Miami-Dade County, or, if such information on prevailing rates and charges is not available, South Florida) on all necessary machinery and equipment, exclusive of hand tools used at the Project Site, whether rented from the Construction Manager or other. Such rental charges include installation, repairs and replacements, dismantling, removal, costs of lubrication, transportation and delivery costs thereof, which are used in the support of a sub-contractor or the Construction Manager's own forces in the performance of the Work. If the Parties fail to agree on the standard rates prevailing in the area of the Project, the standard rates shall be deemed to be the rates shown in the latest edition of the "AED Green Book" prepared by EquipmentWatch, San Jose, CA ("AED"), or, if not shown in AED, the rates shown in the latest edition of "Tool and Equipment Rental Guide" prepared by Mechanical Contractors Association of America ("MCA"); or, if not shown in MCA, the rates shown in the latest edition of "Rental Rate Blue Book for Construction Equipment" published by EquipmentWatch, San Jose, CA ("Blue Book"); or, if not shown in the Blue Book, the latest edition of "Tool and Equipment Rental Schedule" published by National Electrical Contractors Association, Bethesda, MD ("NECA"). In any case, the Cost of the Project will be charged the lowest of the applicable "Hourly", "Daily", "Weekly", or "Monthly" rate specified, based on actual use. Each specified rate is inclusive of all costs and expenses to furnish the equipment (including transportation, delivery, pickup, fuel, energy costs, consumables, connections, maintenance, wear and tear, repair, depreciation, storage, tax, overhead and profit). If an hourly rate is used, equipment shall be charged based upon actual usage within a ½ hour;

8.2.11 Cost of bond premiums, insurance premiums for coverage required by the Contract Documents and in accordance with Appendix E, including costs of City-authorized additional coverage (such authorization not to be unreasonably withheld) and/or self-insured retentions in connection with claims against such coverage, which are directly attributed to this Agreement, subject to the review and approval of the City, which shall not be unreasonably withheld;

8.2.12 Sales, use, or similar taxes imposed by any governmental authority and paid by the Construction Manager or its Subcontractors that are related to the Work and for which the Construction Manager is liable;

8.2.13 Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay;

8.2.14 The cost of corrective Work subject, however, to the GMP and the provisions of Section 6.2, and except for any corrective Work made necessary because of defective workmanship or other causes contributed to by the Construction Manager or its Subcontractors or suppliers. No costs shall be paid by the City or schedule adjustments made to the Construction Manager for any expenses made necessary to correct defective workmanship or to correct any Work not in conformance with the Construction Documents or applicable construction-related codes or to correct any deficiency or damage caused by negligent acts by the Construction Manager or its Subcontractors and suppliers;

8.2.15 Fees of laboratories for tests required by the Contract Documents, except those related to defective or non-conforming Work for which reimbursement is excluded by the provisions of the Contract Documents or the costs of which Construction Manager is able to recover from the Subcontractor(s) responsible for the defective or non-conforming Work;

8.2.16 Costs for trash and debris control and removal from the Project Site;

8.2.17 That portion of the reasonable expenses of Construction Manager's supervisory or administrative personnel incurred while traveling in the discharge of duties connected with the Work, to the extent and reimbursement limits permitted by Fla. Stat. 112.061 and subject to the advance written approval of the Project Coordinator;

8.2.18 Costs incurred due to an emergency affecting the safety of persons and property, not directly or indirectly attributable to the acts or omissions of the Construction Manager or its Subcontractors or Suppliers.

8.2.19 Costs for watchman, security services and temporary fencing for the Project.

8.2.20 Costs for efficient logistical control of the Project Site, including horizontal and vertical transportation of materials and personnel; adequate storage; temporary roads; maintenance of traffic; and off-site parking for and bussing of construction workers and personnel to and from the Project Site, net of any value or remuneration received from Subcontractors with regard to such parking or transportation. The foregoing costs in Subsection 8.2.20 may be included in the GMP Amendment as part of the General Conditions Fees.

8.2.21 Costs of materials and equipment suitably stored off-site at a mutually acceptable location, subject to the City's prior approval.

8.2.22 Costs for any Project Jobsite items not referenced herein, not normally provided by the Subcontractors, which will be provided by the Construction Manager as required to complete the Work.

8.2.23 Cost of providing one set of as-built documents to the City.

8.2.24 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents.

8.2.25 Costs for electronic equipment and software directly related to the Work, with the City's advance written approval;

8.2.26 Costs of third-party data processing or information technology support for the Project.

8.2.27 Costs of Quality Control and materials testing, unless such costs are incurred to inspect or test defective or non-conforming Work.

8.2.28 Costs associated with employee drug screen or other background check related expenses

8.2.29 Costs of overtime premium expense if overtime work is necessary to maintain or improve the Schedule, provided, however, that such costs shall (1) solely be chargeable to the Construction Manager's Contingency; (2) be limited to any remaining amounts available in the Construction Manager Contingency, and (3) in no event cause for the GMP to be exceeded.

8.2.30 Costs of temporary measures that may be required to ensure that, consistent with the Construction Period Booking Policy set forth in City Resolution No. 2015-28995 and the phasing plan for the Project, the portions of the Convention Center where events are scheduled to take place during the Construction Phase are fully operational and available for occupancy and use by the public, vendors and others, provided, however, that such costs shall (1) solely be chargeable to the Construction Manager's Contingency; (2) be limited to any remaining amounts available in the Construction Manager Contingency, and (3) in no event cause for the GMP to be exceeded.

Notwithstanding anything to the contrary contained in the Contract Documents, the City-approved Cost of the Project and the Guaranteed Maximum Price shall only be increased or decreased by reason of the issuance of a Construction Change Directive or Change Orders approved in accordance with Article 9 of this Agreement.

8.3 Costs Not to be Reimbursed. The Cost of the Project shall not include the items listed below, as such items are either expressly not to be reimbursed or are otherwise contemplated as part of Construction Manager's fees stipulated in Article 7:

8.3.1. Salaries and other compensation of the Construction Manager's principals (exclusive of loss prevention oversight and operations manager time spent on the Project) and branch office or departmental heads, non-line staff personnel (including legal, corporate, insurance/risk management and similar personnel) and other personnel stationed at the Construction Manager's principal office or offices other than the site office, except as specifically provided in Section 8.2.

8.3.2. Expenses of the Construction Manager's principal office and offices other than the site office, except as specifically provided in Section 8.2;

8.3.3. Overhead and general expenses, except as may be expressly included in Section 8.2;

8.3.4. The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work;

8.3.5. Costs due to the fault, negligence or failure to fulfill a specific responsibility of the Construction Manager, Subcontractors of all tiers, and Suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, including costs for the correction of damaged, defective or nonconforming Work, disposal and replacement of materials and equipment incorrectly ordered or supplied, and correcting damage to property not forming part of the Work;

8.3.6. The Construction Overhead and Profit Fee.

8.3.7. Costs, other than costs included in Change Orders approved by the City, that would cause the Guaranteed Maximum Price to be exceeded;

8.3.8. Costs for Preconstruction Phase Services;

8.3.9. Losses and expenses sustained by the Construction Manager or any Subcontractors at any tier, not compensated by insurance or otherwise, if such losses and expenses are

due to infidelity on the part of any employee of Construction Manager, any Subcontractor or Supplier, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, or others to whom the property may be entrusted;

8.3.10. Except to the extent specifically permitted under any other provisions of the Contract Documents, costs and expenses due to the willful misconduct or gross negligence of Construction Manager, any Subcontractor, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable;

8.3.11. Losses and expenses not covered by insurance where the Construction Manager, or any Subcontractor, failed to obtain and/or maintain in effect the insurance required to be carried by the Contract Documents, or where Construction Manager, or any Subcontractor or Supplier, failed to obtain and/or maintain such insurance in limits and amounts required by the Contract Documents except to the extent any deductible provided in such required insurance;

8.3.12. Costs and expenses incurred by Construction Manager upon breach of its warranties or guaranties;

8.3.13. Costs associated with the relocation of employees, and any travel costs not expressly permitted in Section 8.2 (including costs for long-distance travel, costs for travel between the Project Site and the Construction Manager's office(s), and hotel, car rental and airfare costs);

8.3.14. Any amounts to be paid by the Construction Manager for federal, state or local income or franchise taxes;

8.3.15. Any costs covered as part of the General Conditions Fee in Section 7.1.2;

8.3.16. Rental costs of machinery and equipment, or licensing charges for software and other items, which are paid or payable to the Construction Manager or a Related Party, except as specifically consented by the City in writing (which consent shall not be unreasonably withheld);

8.3.17. Labor, material, and equipment costs or any other costs incurred which should be back-charged to any Subcontractor, any Sub-Subcontractor, any direct or lower tier supplier, or any other party for whom the Construction Manager is responsible;

8.3.18. Costs or losses resulting from lost, damaged by misuse or stolen tools and equipment;

8.3.19. Costs of bonding or securing liens or defending claims filed by any Subcontractor of any tier, any Supplier, any direct or lower tier supplier or any other party for whom any of such parties or the Construction Manager is responsible arising from nonpayment, unless such nonpayment is the result of the City's unexcused or wrongful failure to pay the Construction Manager undisputed amounts as and when due under the Contract Documents;

8.3.20. Costs of self-insured losses (e.g., losses within the deductible limits maintained by the Construction Manager or any direct or indirect subcontractor), costs covered by any insurance carried by Construction Manager or a direct or lower tier subcontractor, costs which would have been covered by the insurance required to be carried by a Construction Manager or a direct or lower tier subcontractor under the Contract Documents, and costs which would have been covered by insurance but for failure of the Construction Manager or direct or lower tier subcontractor to properly submit, process or give notice to the occurrence or claim;

8.3.21. Costs of employee bonuses and executive bonuses whether or not based in whole or in part on performance related to the Work;

8.3.22. Costs incurred or paid for recruiting employees (whether to third party recruiters or to employees);

8.3.23. Severance or similar payments on account of terminated employees;

8.3.24. Costs incurred after the Construction Manager's application for final payment;

8.3.25. Any outside legal fees incurred without prior written approval from the City Attorney, which approval is at the sole and absolute discretion of the County Attorney.

8.3.26. Any costs not specifically and expressly described in Section 8.2.

8.4. Discounts and Penalties. All discounts for prompt payment shall accrue to the City to the extent the Cost of the Project is paid directly by the City or from a fund made available by the City to the Construction Manager for such payments. To the extent the Cost of the Project is paid with funds of the Construction Manager at its sole expense, all cash discounts shall accrue to the Construction Manager. All trade discounts, rebates and refunds, and all returns from sale of surplus materials and equipment, shall be credited to the Cost of the Project. All penalties incurred due to fault of the Construction Manager or its Subcontractors for late payment of cost of the Project will be paid by the Construction Manager and will not be reimbursable as a Cost of the Project.

8.5 No Duplication. Construction Manager hereby covenants and agrees that there shall be no duplication of payments for any items comprising the Cost of the Project, including any costs related to General Conditions as set forth in Subsection 7.1.2.2, notwithstanding any itemization, breakdown or provision contained in the Contract Documents to the contrary.

8.6 Other Provisions Relating to Costs and Expenses.

a. The billing rates charged by the Construction Manager for wages or salaries and associated labor burden shall be subject to City approval as part of the lump-sum General Conditions Fee and the composition of such rates shall not be subject to City audit after approval. The Construction Manager shall bill the City for the Construction Manager's personnel and jobsite labor at the actual salaries or wages plus labor burden paid by the Construction Manager. If, at any time, it is determined that any amounts paid by the City for labor costs for the Construction Manager's personnel exceed the approved billing rates, the Construction Manager shall promptly reimburse the City for such overpayment (and the City can offset such overpayment against amounts otherwise due the Construction Manager)

b. Where any cost or expense is subject to the City's prior approval under the Contract Documents (including Articles 7 and 8), the Construction Manager shall obtain this approval prior to incurring the cost.

c. The Construction Manager, with the participation of the Project Team as provided in the Contract Documents, shall select Subcontractors and suppliers who shall provide labor, equipment and materials related to completion of the Work. As this "buyout" process is completed, the Schedule of Values shall be revised and the actual costs associated with the line items in the Schedule of Values shall be incorporated into such schedule of values. Any net savings between the estimated costs as reflected in the original Schedule of Values and the actual Subcontractor and supplier award amounts resulting from the buyout process shall be allocated to the Construction Manager's Contingency.

ARTICLE 9
CHANGE IN THE PROJECT

9.1 Contract Modifications. The City, without invalidating this Agreement, may order changes in the Work within the general scope of the Contract Documents consisting of additions, deletions or other revisions, with the GMP and the Contract Time being adjusted accordingly. Adjustments to the Base GMP or charges to the Construction Contingency shall be in accordance with Section 6.4. Contract Modifications may be issued by the City on its own initiative or in response to a proposal by the Construction Manager, and shall be subject to the Claims process under Article 15.

9.1.1. Changes in the Work may be accomplished after execution of this Agreement, and without invalidating this Agreement, by Change Order or Construction Change Directive. A Change Order shall be based upon agreement between the City and the Construction Manager; a Construction Change Directive may be issued by the City alone (or Owner's Representative on behalf of the City) and may or may not be agreed to by the Construction Manager. Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Construction Manager shall proceed promptly, unless otherwise provided in the Change Order or Construction Change Directive. No Change Order shall take effect until Construction Manager delivers a Consent of Surety increasing the Performance Bond and Payment Bond by the amount of the Change Order.

9.1.2. If City requests a change in the Work, City shall submit a change request to Construction Manager, in writing. Within seven (7) business days of Construction Manager's receipt of such request, Construction Manager shall provide City with a rough "pencil copy" estimate of the cost and/or time impacts associated with the request. Within twenty-one (21) days of Construction Manager's receipt of City's initial request, the Construction Manager shall submit a detailed proposal to the City stating (i) the proposed increase or decrease, if any, in the Cost of the Project which would result from such a change, (ii) the effect, if any, upon the Contract Time and/or achievement of any Milestone by reason of such proposed change, and (iii) supporting data and documentation, including any requested by the City in its change request.

9.1.3. If the Construction Manager proposes a change in the Work, such proposal must be accompanied by a detailed cost breakdown in relation to the Project Budget and sufficient substantiating data to permit evaluation by the City. If the Construction Manager does submit a proposal within the preceding seven (7) business day time period, the City shall, within thirty (30) days following its receipt of such proposal, notify the Construction Manager as to whether the City agrees with such proposal and wishes to accept the Construction Manager's proposal. If the City agrees with such proposal and wishes to accept the same, the City and the Construction Manager shall execute a Change Order which at a minimum specifies: i) the detailed scope associated with the change to the Work; ii) the amount of the adjustment in the Cost of the Project and the Guaranteed Maximum Price, if any, and (iii) the extent of the adjustment in the Contract Time, if any, and associated General Conditions costs, if any. In the event the City disagrees with the Construction Manager's proposal, the City may either (i) notify the Construction Manager that the City has decided to withdraw its requested change, or (ii) issue a Construction Change Directive in accordance with Subsection 9.1.5. below.

9.1.4. The increase or decrease in the Cost of the Project resulting from a change in the Project shall be determined in one or more of the following ways, subject to the provisions of Subsection 8.2.8:

- a. by mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation by the Project Coordinator, Architect-Engineer and City;
- b. by unit prices stated in the GMP or subsequently agreed upon;
- c. by times and materials cost and a mutually acceptable fixed or percentage fee for the Subcontractor; or
- d. by the method provided in Subparagraph 9.1.3.

9.1.5. If none of the methods set forth above are agreed upon, the Construction Manager, provided he receives a written Construction Change Directive signed by the City, shall promptly proceed with the Work involved. The cost of such Work shall then be determined on the basis of the reasonable expenditures and savings of those performing the Work attributed to the change, including a reasonable overhead and profit in accordance with this Article 9. With respect to Construction Change Directives, the Owner's Representative with the Architect-Engineer will establish an estimated cost of the Work and the Construction Manager shall not perform any Work whose cost exceeds that estimate without prior written approval by the City. In such case, and also under Subsection 9.1.3 above, the Construction Manager

shall keep and present, in such form as the City may prescribe, an itemized accounting together with appropriate supporting data of the increase in the Cost of the Project as outlined in Article 8. The amount of decrease in the GMP to be allowed by the Construction Manager to the City for any deletion or change which results in a net decrease in cost for the Project will be the amount of the actual net decrease.

9.1.6. If unit prices are included in the Contract or as part of any Change Order, City shall pay to Construction Manager the amounts determined for the total number of each of the units of work completed at the unit price stated in the Schedule of Prices Bid associated with such Work. The number of units contained in the bid is an estimate only, and final payment shall be made for the actual number of units incorporated in or made necessary by the Contract Documents, as may be amended by Change Order. If additional unit price work is ordered, then the Contractor shall perform the work as directed and shall be paid for the actual quantity of such item(s) of work performed at the appropriate original Schedule of Prices Bid associated with such Work. If unit prices are stated in the GMP or subsequently agreed upon, and if the quantities originally contemplated are so changed in a proposed Contract Modification that application of the agreed unit prices to the quantities of Work proposed will cause substantial inequity to the City or the Construction Manager, the applicable unit prices and the GMP shall be equitably adjusted.

9.1.7. Increases in the Cost of the Project due to a change in the Project attributable to the City, either by City's agreement thereto or the grant of a Claim under Article 15, may either be charged to the City's Contingency or result in an increase to the Base GMP, in the sole discretion of the City. Decreases in the Cost of the Project due to a change in the Project shall result in a decrease to the Base GMP. If the event of a decrease in the Base GMP as herein provided, Construction Manager's Contingency will be decreased proportionately.

9.1.8. The Construction Manager's fee for Construction Overhead and Profit for all Change Order or Construction Change Directives shall not exceed **3.80%** of the net change in the Cost of the Project. Subcontractors and Suppliers' overhead and profit markup or fee for Change Order or Construction Change Directives shall be reasonable, but in no event shall the aggregate limitation on the amount of overhead and profit that each Subcontractor and all lower tier subcontractors and Suppliers can charge for Work performed pursuant to Change Orders and Construction Change Directives exceed the overhead and profit fee as provided for the performance of the original scope of Work set forth in each Subcontract and specified as part of the GMP Amendment.

9.1.9. Except as provided in Section 6.5.2 for deductive Change Orders for Owner-Purchased Materials, for all other deductive Change Orders in excess of One Million Dollars (\$1,000,000), including deductive Change Orders in excess of One Million Dollars (\$1,000,000) arising from both additive and deductive items, the deductive amounts shall include a proportionate reduction in the Construction Overhead and Profit Fee in an amount equal to **3.80%** of the net change in the Cost of the Project, plus any other markups or costs hereto applied to the direct costs of the net reduction.

9.1.10. Claims Regarding Scope Changes. A "Scope Change" shall mean Work which either (i) is not reasonably inferable from the Construction Documents and other Contract Documents, (ii) is a material change in the quantity, quality, programmatic requirements or other substantial change in the Contract Documents, or (iii) is an increase or decrease in the Work arising from any changes required to the Construction Documents by agencies having jurisdiction and which were not reasonably inferable from the Construction Documents. Construction Manager acknowledges and agrees that increases or decreases in the Work arising from (i) any matters implicating or covered by Construction Manager's warranty pursuant to Subsection 2.5.2.4, or (ii) gaps between Subcontractors' bids, shall not constitute a Scope Change unless Construction Manager can demonstrate that such Work was not reasonably inferable from the Construction Documents and other Contract Documents.

a. If the Construction Manager believes that any direction, action, comment or approval by the City or Architect-Engineer gives rise to or constitutes a Scope Change for which a Change Order is required, but for which a Change Order has not yet been issued, the Construction Manager must submit notice to the City within ten (10) days of such direction, action, comment or approval.

b. Any such notice shall include the Construction Manager's good faith estimate as to the cost and schedule impact to the Construction Manager resulting from the direction, action, comment or approval. The Construction Manager must submit a final Claim to the City within thirty (30) days of such direction, action, comment or approval, which Claim shall include the actual cost (including a detailed cost breakdown in relation to the Project Budget and sufficient substantiating data to permit evaluation by the City) and schedule impact to the Construction Manager resulting from the direction, action, comment or approval.

c. Such notice and final Claim are conditions precedent to any cost or schedule adjustment on the basis of such Claim and, if the Construction Manager does not submit such a notice within such ten (10) day period and a final Claim within such thirty (30) day period, the Construction Manager shall be deemed to have waived its right to make such Claim in the future. If the Construction Manager follows the preceding notice and Claim procedures and the City agrees with the Claim, the parties shall execute a Change Order implementing the changes requested in the Claim. If the City does not agree with such a Claim, the parties shall resolve their disagreement in accordance with Section 15 of this Agreement.

9.1.11. Waiver of Claims. By executing a Change Order, the Construction Manager thereafter waives the right to assert any further Claim for an increase in the Cost of the Project and the Guaranteed Maximum Price or an extension in the Contract Time based on the subject matter of, or the Claim addressed by, such Change Order; it being acknowledged and agreed by the Construction Manager that any such Change Order shall completely address any schedule or cost impact associated with the subject matter of, or the Claim addressed by, such Change Order.

9.1.12. Approval of Change Orders/Modifications. The City Commission may approve any Change Order or other Contract Modification to the Contract Documents. The City Manager may approve Change Orders or other Modifications to the Contract Documents, up to an amount equal to any remaining City Contingency. Change Orders or Contract Modifications exceeding any available City Contingency shall require the advance approval of the City Commission.

9.2. Differing Site Conditions/Concealed Conditions. City, at its discretion, shall conduct certain tests or studies for purposes of minimizing risks related to site conditions, and shall provide Construction Manager with the reports or other data or information identified as a result of such tests. As part of the GMP Amendment, Construction Manager shall acknowledge and agree that based on the information identified by the foregoing tests and information reasonably inferable therefrom, it has satisfied itself as to what the Construction Manager anticipates will be the character, quality and quantity of soil, surface and subsurface materials or obstacles that may be encountered by the Construction Manager at the Project Site, and the condition of the existing foundations and building structure, including the environmental conditions identified in the Phase I and Phase II environmental reports provided by the City, and that the entire cost risk of such matters, as well as any concealed, latent, known, unknown or other conditions, shall be borne by the Construction Manager as part of the Guaranteed Maximum Price unless such conditions could not have reasonably been identified upon reasonable investigation by the Construction Manager. Without limiting the generality of the foregoing, but rather in confirmation and furtherance thereof, the Construction Manager agrees that it shall have no Claim for any increase in the Cost of the Project or the Guaranteed Maximum Price in the event that soil, surface, subsurface, concealed, unknown, known, latent or other conditions are encountered or discovered at the Project Site in the performance of the Work where such conditions were reasonably identified by or inferable from the foregoing tests. The Construction Manager expressly acknowledges and agrees that its pricing of the Work and the determination of the Guaranteed Maximum Price were expressly based upon the Construction Manager's assuming the foregoing cost risks of Project Site conditions.

9.2.1 If subsurface or latent physical conditions that could not have reasonably been identified upon prior investigation are encountered at the Project Site differing materially from those indicated in the Contract Documents, or if unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the Work provided for in the Contract Documents are encountered at the Project Site, Construction Manager shall promptly notify the

Owner's Representative within three (3) business days of the specific differing conditions before the Construction Manager disturbs the conditions or performs the affected Work.

9.2.2 Upon receipt of written notification of differing site conditions from the Construction Manager, the Owner's Representative will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any Work, an equitable adjustment will be made in accordance with this Article from the City's Contingency. An adjustment for a differing site condition shall not be allowed, and shall be deemed conclusively waived, unless the Construction Manager has provided the required written notice within three (3) business days of discovery of the condition. Should the Owner's Representative determine that the conditions of the Project Site are not so materially different to warrant a change in the terms of the Contract Documents, Construction Manager shall be notified of the reasons in writing, and such determination shall be final and Construction Manager shall proceed to complete the Work and may not refuse to complete Work, even if it is the subject of a Claim.

9.3. No Damages for Delay.

9.3.1 No Damages for Delay. Except as provided in Subsection 9.4.1.4, **NO CLAIM FOR DAMAGES OR ANY CLAIM OTHER THAN FOR AN EXTENSION OF TIME SHALL BE MADE OR ASSERTED AGAINST CITY BY REASON OF ANY DELAYS** including any Claim for an increase in the Guaranteed Maximum Price, or payment or compensation to the Construction Manager (or its Subcontractors) of any kind for direct, indirect, consequential, impact, or other costs, expenses, lost profits, compensation, reimbursement or damages including costs of acceleration or inefficiency arising because of delay, disruption, interference or hindrance from any cause whatsoever, whether such delay, disruption, interference, or hindrance be reasonable or unreasonable, foreseeable or unforeseeable, or avoidable or unavoidable, and irrespective of whether such delay constitutes an Excusable Delay and irrespective of whether such delay results in an extension of the Contract Time; provided, however, Construction Manager's hindrances or delays are not due solely to fraud, bad faith or willful or intentional interference by the City in the performance of the Work, and then only where such acts continue after Construction Manager's written notice to the City of such alleged interference.

9.3.1.1 Construction Manager acknowledges and agrees that Excusable Delay shall not be deemed to constitute willful or intentional interference with the Construction Manager's performance of the Work without clear and convincing proof that they were the result of a deliberate act, without any reasonable and good-faith basis, and were specifically intended to disrupt the Construction Manager's performance of the Work.

9.3.1.2 Except as provided herein, Construction Manager hereby waives all other remedies at law or in equity that it might otherwise have against the City on account of any Excusable Delay and any and all other events that may, from time to time, delay the Construction Manager in the performance of the Work. Construction Manager acknowledges and agrees that, except as specified herein, all delays or events and their potential impacts on the performance by the Construction Manager are specifically contemplated and acknowledged by the Parties in entering into this Agreement and that Construction Manager's pricing of the Work and the determination of the Guaranteed Maximum Price shall be expressly based on the Construction Manager's assumption of the risks thereof, and Construction Manager hereby waives any and all Claims it might have for any of the foregoing losses, costs, damages and expenses.

9.4. Extensions to the Contract Time.

9.4.1 Excusable Delays. Construction Manager's sole remedy for Excusable Delay is an extension of the Contract Time for each day of critical path delay and, to the limited extent applicable, costs as provided in Subsection 9.4.1.4, but only if the pre-requisites and notice requirements of Subsection 9.4.4 below have been timely satisfied. An excusable delay is one that (i) directly impacts critical path activity delineated in the Project Schedule and extends the time for completion of the Work; (ii) could not reasonably have been mitigated by Construction Manager, including by re-sequencing,

reallocating or redeploying its forces to other portions of the Work; and (iii) is caused by Force Majeure (defined in Section 9.8 below) or other circumstances beyond the control and due to no fault of Construction Manager or its Subcontractors, material persons, Suppliers, or Vendors ("Excusable Delay"). If two or more separate events of Excusable Delay are concurrent with each other, Construction Manager shall only be entitled to an extension of time for each day of such concurrent critical path delay, and Construction Manager shall not be entitled to double recovery thereon.

9.4.1.1. Inclement weather may be grounds for an Excusable Delay when rains or other inclement weather conditions result in Construction Manager being unable to work at least fifty percent (50%) of the normal work shift on controlling items of work identified on the accepted updated progress schedule submitted pursuant to Subsection 2.1.3 of this Agreement. Time extensions for weather delays shall not be automatic and must be requested in accordance with the notice and other requirements of Subsection 9.4.4. No time extension for weather-related delays will be considered until the Construction Manager demonstrates that the total number of days by which the Construction Manager has been delayed due to adverse weather conditions exceeds the normal or average number of days of adverse weather for the South Florida region as determined by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce or other reliable report or resource identified in Division 1.

9.4.1.2. If an event of delay satisfying all requirements herein for Excusable Delay directly arises from an act or omission of the City, Owner's Representative or Architect-Engineer relating to their respective obligations under the Contract Documents, no such act or omission shall be deemed an Excusable Delay unless and until the Construction Manager shall have first provided the City with written notice setting forth a description of the specific acts or omissions adversely affecting the progress of the Work and the City, Owner's Representative or Architect-Engineer shall have failed, within ten (10) days after receipt of such notice, to have responded or commenced to address or correct the act or omission described in the Construction Manager's notice; and provided further, if the City, Owner's Representative or Architect-Engineer fails to correct such act or omission, the period of any such Excusable Delay shall be deemed to have commenced on the date the City received the aforesaid written notice from the Construction Manager.

9.4.1.3. Any extension of time for Excusable Delay will depend upon the extent to which the delay affects the Project Schedule and will only extend the scheduled dates for the items of the Work so delayed and shall be net of any available "float" time included in the Project Schedule or Construction Schedule. Scheduled dates for other portions of the Work not so delayed will remain unchanged. Delays which do not affect the Critical Path of the Project Schedule will not entitle Construction Manager to an extension of time.

9.4.1.4. Construction Manager's sole remedy for the occurrence of Excusable Delays caused by City (in its proprietary capacity, as opposed to its governmental/regulatory capacity) and its consultants, including Architect-Engineer or Force Majeure Events shall be an extension of time for the affected activities on the Project Schedule and additional General Conditions for Construction Manager and its Subcontractors solely to the limited extent provided herein and provided such Excusable Delay is not concurrent with any Unexcusable Delay. If and to the extent the Contract Time is extended for Excusable Delays, the General Conditions Fee may be increased by the Construction Manager's reasonable and verified additional General Conditions costs as delineated in Article 7.1.2 to the extent directly and solely attributable to the extension of the Contract Time on account of such Excusable Delay, and only to the extent the Construction Manager demonstrates to the City's reasonable satisfaction that the Construction Manager's actual out-of-pocket costs for such General Conditions items as delineated in Article 7.1.2 has or shall exceed the maximum amount set forth in the Contract Documents for the General Conditions Fee.

9.4.1.5. For all other Excusable Delays not specified in Subsection 9.4.1.4, including weather-related delays, permit delays not caused by the acts or omissions of Construction Manager, and Excusable Delays that may occur jointly or concurrently with Non-Excusable Delays, Construction Manager's sole remedy shall be an extension of time for the affected activities on the Project Schedule.

9.4.2. Unexcusable Delays. "Unexcusable Delay" shall mean any delays not included within the definition of Excusable Delay as set forth above including any delay which extends the completion of the Work or portion of the Work beyond the time specified in the Project Schedule and which is caused by the act, fault, inaction or omission of the Construction Manager or any Subcontractor, Supplier or other party for whom the Construction Manager is responsible; any delay that could have been limited or avoided by Construction Manager's timely notice to the City of such delay; or any delay in obtaining licenses, permits or inspections caused by the actions or omissions of the Construction Manager or its Subcontractors, Suppliers or any other party for whom the Construction Manager is responsible. An Unexcusable Delay shall not be cause for granting an extension of time to complete any Work or any compensation whatsoever, and shall subject the Construction Manager to damages in accordance with the Contract Documents. In no event shall the Construction Manager be excused for interim delays which do not extend the Project Schedule or any Milestones.

9.4.3. No Extension of Time Available for Certain Fixed Milestone Dates. Except in the event of Excusable Delays, in no event shall any extension of time apply to or relieve the Construction Manager of its obligation to timely achieve the Art Basel 2016 Milestone and Art Basel 2017 Milestone, or otherwise operate to extend the critical dates thereof. As provided in Section 5.2.3.b. of this Agreement, the City may direct the Construction Manager to accelerate the Work to meet the Art Basel 2016 Milestone and Art Basel 2017 Milestone, and any and all costs or impacts whatsoever incurred by the Construction Manager in accelerating the Construction Manager's Work or taking other measures to overcome or absorb such delays or events in an effort to complete the Work and meet the Art Basel 2016 Milestone and Art Basel 2017 Milestone dates, regardless of whether the Construction Manager successfully does so or not, shall be the sole responsibility of the City.

9.4.4. Prerequisites and Notice Requirements for Extensions of Time. Except as provided in Section 9.1 with respect to Changes in the Work, an extension of the Contract Time will only be granted by the City under the following circumstances: (a) if a delay occurs as a result of an Excusable Delay, and (b) the Construction Manager has complied with each of the following requirements below to the reasonable satisfaction of the City:

a. Construction Manager shall provide written notice to the City of any event of delay or potential delay within five (5) days of the commencement of the event giving rise to the request. The Construction Manager, within ten (10) days of the date upon which the Construction Manager has knowledge of the delay, shall notify the City, in writing, of the cause of the delay stating the approximate number of days the Construction Manager expects to be delayed, and must make a request for an extension of time, if applicable, to the City, in writing, within ten (10) days after the cessation of the event causing the delay specifying the number of days the Construction Manager believes that its activities were in fact delayed by the cause(s) described in its initial notice.

b. The Construction Manager must show to the reasonable satisfaction of the City that the activity claimed to have been delayed was in fact delayed by the stated cause of delay, that the critical path of the Work was materially affected by the delay, that the delay in such activity was not concurrent with any Unexcusable Delay, the delay was not the result of the performance of unit price Work, and that the delay in such activity will result in a delay of Substantial Completion in the Project Schedule.

c. The initial notice provided by the Construction Manager under Subsection (a) above shall describe the efforts of the Construction Manager that have been or are going to be undertaken to overcome or remove the Excusable Delay and to minimize the potential adverse effect on the cost and time for performance of the Work resulting from such Excusable Delay.

Compliance with this Section is a condition precedent to receipt of an extension of the Contract Time. Failure of the Construction Manager to comply with all requirements as to any particular event of delay, including the requirements of this Section, shall be deemed conclusively to constitute a waiver, abandonment or relinquishment of any entitlement to an extension of time and all Claims resulting from

that particular event of Project delay. Once the Parties have mutually agreed as to the adjustment in the Contract Time due to an Excusable Delay, they shall enter into a Change Order documenting the same.

If the City and Construction Manager cannot resolve a request for time extension under this Section within sixty (60) days following submission, the Construction Manager may re-submit the request as a Claim in accordance with the procedures set forth in Article 15 of this Agreement.

9.4.5. Construction Manager's Duty. Notwithstanding the provisions of this Agreement allowing the Construction Manager to claim delay due to Excusable Delay, whenever an Excusable Delay shall occur, the Construction Manager shall use all reasonable efforts to overcome or remove any such Excusable Delay, and shall provide the City with written notice of the Construction Manager's recommendations on how best to minimize any adverse effect on the time and cost of performing the Work resulting from such Excusable Delay. In furtherance of the foregoing, whenever there shall be any Excusable Delay, the Construction Manager shall use all reasonable efforts to adjust the Project scheduling and the sequencing and timing of the performance of the Work in a manner that will avoid, to the extent reasonably practicable, any Excusable Delay giving rise to an actual extension in the time for performance of the Work.

If there are corresponding costs associated with any of the measures which the Construction Manager deems necessary or desirable to minimize any adverse effects resulting from any Excusable Delay, the Construction Manager shall advise the City of such anticipated associated costs and shall not proceed with such measures absent the City's executing a Change Order in connection therewith. Nothing in this Section 9.4 shall, however, be deemed to entitle the Construction Manager to any adjustment in the Contract Price or the Guaranteed Maximum Price or any other damages, losses or expenses resulting from an Excusable Delay; nor shall it be deemed to obligate the City to agree to undertake any recommendations suggested by the Construction Manager as a means of minimizing the adverse effects of any Excusable Delay.

9.5 Minor Changes In The Project. The Project Coordinator (or Owner's Representative on behalf of the City) and Architect-Engineer will each have authority to order minor changes in the Project not involving an adjustment in the GMP or an extension of the Contract Time and not inconsistent with the intent of the Construction Documents for the Project. Such changes shall be effected by Field Order or other written order, interpretation, or supplemental instruction. Documentation of changes shall be determined by the Project Team, included in the Project Manual and displayed monthly in the PMIS. Changes shall be approved by the Project Coordinator, and the Architect-Engineer.

9.6 Emergencies. In any emergency affecting the safety of persons or property, the Construction Manager shall act at its discretion, to prevent threatened damage, injury or loss. Any increase in the Guaranteed Maximum Price or extension of time claimed by the Construction Manager on account of emergency work shall be determined as provided in Article 9.

9.7 Hazardous Waste Removal. The Construction Manager shall or shall cause the removal, encapsulation, transportation and disposal of any hazardous material as may be required in connection with the Work. Hazardous material brought by the Construction Manager or the Subcontractors shall remain their responsibility for proper disposal. Any hazardous material not specifically shown on the Contract Documents shall be considered a concealed condition and may be the responsibility of the Construction Manager in a Contract Modification.

9.8 Force Majeure

9.8.1. A "Force Majeure" event is an event that (i) in fact causes a delay in the performance of a Party's obligations under the Contract Documents, and (ii) is beyond the reasonable control of the Party incurring the delay, and (iii) is not due to an intentional act, error, omission, or negligence of such Party, and (iv) could not have reasonably been foreseen and prepared for by such Party at any time prior to the occurrence of the event. Subject to the foregoing criteria, Force Majeure may include events such as war, civil insurrection, riot, fires, epidemics, sabotage, explosions, embargo restrictions, quarantine restrictions,

transportation accidents, strikes, floods, strong hurricanes or tornadoes, earthquakes, or other acts of God which prevent performance. Force Majeure shall not include technological impossibility, failure of equipment supplied by Construction Manager, receipt of and incorporation of defective materials into the Work, shortage of funds, failure of suppliers to deliver equipment and materials except where such failure is itself the result of a Force Majeure event, or failure of Construction Manager to secure the required permits for prosecution of the Work.

9.8.2. If Construction Manager's performance of its contractual obligations is prevented or delayed by an event believed by Construction Manager to be Force Majeure, Construction Manager shall immediately upon learning of the occurrence of the event or of the commencement of any such delay, but in no case less than the time period set forth in Subsection 9.4.4 (i) of the occurrence of the delay, (ii) of the nature of the event and the cause thereof, (iii) of the anticipated impact on the Work, (iv) of the anticipated period of the delay, and (v) of what course of action Construction Manager plans to take in order to mitigate the detrimental effects of the event. Construction Manager's timely delivery to City of the Notice of the occurrence of a Force Majeure event is a condition precedent to allowance of an extension of time under this Section; however, receipt of such Notice by City shall not constitute acceptance that the event claimed to be a Force Majeure event is in fact Force Majeure. The burden of proof of the occurrence of a Force Majeure event shall be on Construction Manager. Failure to give such Notice promptly and within such time limit may be deemed sufficient reason for denial by City of any extension of time.

9.8.3. If in the opinion of City the event was a Force Majeure event, Construction Manager shall be entitled to such extension of time for completing the Project as, in the opinion of City, is reasonable and equitable. In determining whether any such extension shall be granted and in determining the length of such extension, City may take into consideration any omissions or alterations in the Work or equipment, materials and apparatus required by the Contract Documents whereby, in its opinion, the time necessary for completion has been reduced.

9.8.4. The suspension of Construction Manager's performance due to a Force Majeure event shall be of no greater scope and no longer duration than is required. Construction Manager shall use its reasonable best efforts to continue to perform its obligations hereunder to the extent such obligations are not affected or are only partially affected by the Force Majeure event, and to correct or cure the event or condition excusing performance and otherwise to remedy its inability to perform to the extent its inability to perform is the direct result of the Force Majeure event.

9.8.5. Construction Manager's obligations that arose before the occurrence of a Force Majeure event causing the suspension of performance shall not be excused as a result of such occurrence unless such occurrence makes such performance not reasonably possible. The obligation to pay money in a timely manner for obligations and liabilities which matured prior to the occurrence of a Force Majeure event shall not be subject to the Force Majeure provisions.

ARTICLE 10
RIGHT TO PERFORM CONSTRUCTION AND
TO AWARD SEPARATE CONTRACTS; MUTUAL RESPONSIBILITY

10.1. Right to Award Separate Contracts. The City reserves the right to perform construction or operations related to the Project with the City's own forces, and to award separate contracts to other contractors, including subcontractors, in connection with other portions of the Project or other construction or operations on the Project Site or adjacent to the Project Site, including, any developer, contractor or subcontractor engaged to develop, design or construct a Convention Center headquarters hotel ("Headquarters Hotel Project") on a site adjacent to the Project Site (collectively, "Separate Contractors"). The City anticipates entering into a long-term lease/development agreement for the Headquarters Hotel Project no earlier than November, 2016, if the City obtains City Commission and voter referendum approval, provided, however, that such long-term lease/development agreement is not a condition of the Parties' obligations hereunder.

10.2. Integration of Work with Separate Contractors. Construction Manager shall afford Separate Contractors reasonable access to the Project Site for the execution of their work. Following the request of the City, the Construction Manager shall prepare a plan in order to integrate the work to be performed by the City or by Separate Contractors with the performance of the Work, and shall submit such plan to the City for approval. The Construction Manager shall arrange the performance of the Work so that the Work and the work of the City and the Separate Contractors are, to the extent applicable, properly integrated, joined in an acceptable manner and performed in the proper sequence, so that any disruption or damage to the Work or to any work of the City or of Separate Contractors is avoided.

10.3. Coordination. Construction Manager shall conduct its work so as not to interfere with or hinder the progress of completion of the construction performed by Separate Contractors, and Construction Manager and such other contractors shall cooperate with each other as directed by the Project Coordinator.

10.3.1. The Construction Manager shall provide for coordination of the activities of the Construction Manager's (and its Subcontractors') own forces with the activities of each Separate Contractor and the City. The Construction Manager shall participate with all Separate Contractors and the City in reviewing and coordinating the schedules of the City and the Separate Contractors with the Project Schedule when directed to do so by the City. The Construction Manager shall make any revisions to the Project Schedule (but without extending the Substantial Completion Date) deemed necessary after a joint review with the City and mutual agreement.

10.3.2. Coordination with Separate Contractors shall not be grounds for an extension of time or any adjustment in the Guaranteed Maximum Price. Construction Manager agrees that its pricing of the Work and the determination of the Guaranteed Maximum Price were expressly based upon the Construction Manager's assumption of the foregoing cost risks.

10.4. Use of Project Site. The Construction Manager shall afford the City and all Separate Contractors reasonable opportunity for storage of their materials and equipment, and performance of their work. The Construction Manager shall also connect and coordinate its construction and operations with the City and all Separate Contractors' construction and operations as required by the Contract Documents.

10.5. Deficiency in Work of Separate Contractors. If part of the Construction Manager's Work depends for proper execution or results upon construction or operations by the City or a Separate Contractor, the Construction Manager shall, prior to proceeding with that portion of the Work, promptly report to the City apparent discrepancies or defects in such other construction that renders it unsuitable for proper execution and results by the Construction Manager, and no later than five (5) business days following discovery of any such apparent discrepancies or defects in such other construction. The Parties shall resolve in good faith any such discrepancies or defects or any disagreements relating thereto. Failure of the Construction Manager so to report shall constitute a representation by the Construction Manager to the City that the City's or Separate Contractor's completed or partially completed construction is fit and proper to receive the Construction Manager's Work. However, such representation shall not constitute a waiver of any rights of the Construction Manager against such Separate Contractor as a result of such discrepancies or defects.

10.6. Claims Involving Separate Contractors. Except as provided below, the Construction Manager shall assume all liability, financial and otherwise, in connection with the Work. To the fullest extent permitted by law, the Construction Manager shall defend and save harmless the City against any and all damages or Claims that may arise because and to the extent of inconvenience, delay or loss caused by the Construction Manager.

10.6.1. In the event that the Construction Manager unnecessarily and unreasonably delays the work of Separate Contractors by not cooperating with them, or by not affording them reasonable opportunity or facility to perform their work as specified, the Construction Manager shall, in such event, pay all reasonable costs and expenses incurred by such Separate Contractor(s) due to any such delays. The Construction Manager hereby authorizes the City to deduct the amount of such reasonable costs and

expenses from any monies due or to become due, including Retainage, to the Construction Manager under this Agreement.

10.6.2. If, through the acts or omissions of the Construction Manager or any Subcontractor, any Separate Contractor shall suffer loss or damage to its work, the Construction Manager agrees to compensate such Separate Contractor for any such loss or damage. If such Separate Contractor shall assert any claim or bring any action against the City on account of any damage alleged to have been sustained, the City shall notify the Construction Manager, who, at its sole cost and expense, shall defend, indemnify and save harmless the City and pay and satisfy any judgment or award entered against the City in any such action and shall pay all costs and expenses, legal and otherwise, incurred by the City therein or thereby, including reasonable attorneys' fees.

10.6.3. Subject to the last sentence of this paragraph, the Construction Manager agrees that, despite the fact that such Separate Contractor is not in privity of contract with the Construction Manager, such Separate Contractor shall have the right to bring a direct cause of action against the Construction Manager for its (and its Subcontractors') acts and omissions under this Agreement which result in damages or losses to such Separate Contractor. The foregoing agreement of the Construction Manager shall, however, only be enforceable by separate contractors who grant such a direct cause of action to the Construction Manager under their respective separate contracts with the City and who have also agreed to assume the liabilities and obligations assumed by the Construction Manager under this Section 10.6.

10.7. The Construction Manager shall promptly remedy damage caused by the Construction Manager or its Subcontractors to completed or partially completed construction or to property of the City or Separate Contractors, no later than thirty (30) days following notice by City or any other party of such damage.

ARTICLE 11

PAYMENTS TO THE CONSTRUCTION MANAGER

11.1. **Applications for Payment.** Along with the cost reports required under Section 2.1, the Construction Manager shall deliver to the Owner's Representative every month, and shall review with the Owner's Representative in person in order to obtain the City's approval, itemized monthly Applications for Payments showing in detail all monies paid out, all releases of liens and waivers for Subcontractors and suppliers who have been paid, and the amount of the Construction Manager's fees due as provided in Article 7 (each, an "Application for Payment"). Each Application for Payment shall be submitted to the City each month immediately after the end of the expiration of the period (i.e., the month) (herein each called a "Payment Period") covered by such Application for Payment.

11.1.1 The Schedule of Values allocated to the various portions of the Work shall be prepared on the basis of the City's Construction Budget (and may be updated based on any subsequent modifications thereto), and will be used as a basis for reviewing and approving the Construction Manager's Applications for Payment. Payment during the Construction Phase will be based upon percentage of Work completed for each item in the approved Schedule of Values.

11.1.2 The Construction Manager's Pre-Construction Phase Fee, General Conditions Fee, and Construction Overhead & Profit Fee shall be shown as separate line items on the Schedule of Values. Payment of the Construction Manager's Overhead and Profit shall be calculated based on approved invoiced amounts for Direct Cost Items under Section 8.2. The billable Construction Phase fees set forth in Subsections 7.1.2 and 7.1.3 will be paid in equal monthly installments, subject to Subsection 7.1.2.1. Payments by the City to the Construction Manager shall be made upon satisfaction of applicable provisions governing testing, inspection and acceptance.

11.2. **Form of Application: Projected Payment Schedule.** The Construction Manager shall make each Application for Payment on AIA Form G702 or other form approved by the City, which incorporates the Fixed Construction Budget and the Schedule of Values. For each line item, the Construction Manager shall state the approved cost, the cost to date, and the projected total cost, and retainage held (if any),

shall state that the projected total cost shall not exceed the approved cost, as adjusted by Change Order. Each Application for Payment shall also state the actual costs incurred by the Construction Manager for the Payment Period covered by such Application for Payment.

In order to assist the City in its management of the cash needs for the Project, within thirty (30) days after the Contract Date, the Construction Manager shall submit to the Owner's Representative a schedule of anticipated payment requests (the "Projected Payment Schedule"), setting forth the Construction Manager's best estimate of the amounts for which it will be requesting payment with each Application for Payment to be submitted by it during the balance of the City's then current fiscal year. Thereafter, no later than ninety (90) days prior to the commencement of each ensuing fiscal year for the City, the Construction Manager will present the Owner's Representative with a new Projected Payment Schedule applicable to the upcoming fiscal year. The Parties acknowledge and agree, however, that although the Projected Payment Schedules are to serve as a cash management aid to the City, the amounts shown in any such schedules shall not be determinative of the actual amounts to be paid to the Construction Manager during the fiscal year covered thereby.

11.2.1 Supporting Documentation. Together with each Application for Payment and as a condition of payment thereof, the Construction Manager shall submit the monthly progress report required by Section 2.4 hereof to the Owner's Representative. Payment will be made on the basis of approved Applications for Payment certified by the Architect-Engineer and recommended for payment by the Owner's Representative and such supporting documentation as the City may reasonably require, including any Construction Manager and Subcontractor lien waivers/releases of claims and consents of surety releasing the City from any and all present or future liability for payment which accrued or may accrue against the City on account of the Work covered by the current Application for Payment (conditioned only on payment); provided, however, such lien waivers/releases of claims from Subcontractors need only cover the immediately preceding Application for Payment. Such supporting documentation will include, but shall not necessarily be limited to, the following:

a. Name, classification, date, daily hours, total hours, and rate for each employee, supervisor, manager, laborer and foreman of the Construction Manager.

b. Designation, dates, daily hours, and rental rate for each unit of machinery and equipment.

c. Quantities of materials and prices.

d. Transportation of materials.

e. Cost of insurance and taxes, with each item listed separately.

f. Receipted invoices for all services provided, materials used and transportation charges. If materials for the Work are not specifically purchased for this Work but are taken from stock, then in lieu of invoices, the Construction Manager shall furnish, or cause to be furnished, an affidavit certifying that such materials were from its or its Subcontractor's stock, that the quantity claimed was actually used, that the supplier(s) of such "in stock" materials have been paid, and that the price and transportation claimed represent the actual cost to the Construction Manager. The price quoted for such material shall be reasonable and acceptable to the City as per the normal industry practice.

g. For any cost reimbursable labor performed outside of the General Conditions Fee, the Construction Manager's payroll records or certified copies thereof, pertinent to the Work for which payment is requested. The Construction Manager's payroll records shall contain the name, address and social security number of each employee, his or her correct classification, rate of pay, daily and weekly number of hours worked, itemized deductions made and actual wages paid, with hourly base rate, hourly fringe rate and hourly benefit rate clearly indicated.

- h. An updated progress schedule and updated Schedule of Values acceptable to City as required by the Contract Documents;
- i. A list of Subcontractors that worked during the Application for Payment period;
- j. A release of claims from Construction Manager in favor of the City, and from each Subcontractor in favor of the Construction Manager, relative to the Work which was the subject of previous paid applications;
- k. A Consent of Surety form relative to Work which is the subject of the pending pay application if requested by Owner;
- l. A Monthly Utilization Report Form;
- m. Updated as-built information for Work performed during the payment period;
- n. A LEED certification status report, including documentation of compliance with specifications for Work items that have been designated as intended to support the City's application for LEED certification; and
- o. Any other reasonable documentation requested by the Owner's Representative or Project Coordinator to assist in the City's review of applications for payment

The Project Coordinator may elect to waive submission of any particular supporting document on a case-by-case basis if Construction Manager demonstrates extraordinary extenuating circumstances for being unable to provide the required documentation, provided, however, that any such waiver in any specific instance shall not be a waiver of the requirement to provide all supporting documentation in every other instance.

11.2.2 Review Process. Pencil copy draft applications for payment shall be submitted to Construction Manager by subcontractors and sub-consultants on the 20th of each month. Construction Manager will review and have a draft pencil copy ready for Owner's Representative review and field walk with Architect-Engineer no later than the 25th day of the month. Owner's Representative and Architect-Engineer shall submit all final comments to Construction Manager five (5) days after the field walk/pencil copy review. Construction Manager will then submit completed, certified and corrected final edits with all backup to the Owner's Representative on the first day of the following month. City acceptance of Applications for Payment will occur and will only be considered effective after all of the following have been completed: 1) the Application for Payment is certified by the Architect-Engineer; 2) all lien releases properly notarized and submitted; 3) all required supporting documentation in accordance with Subsection 11.2.1 of this Agreement is submitted and amounts therein match the amounts set forth in the Application for Payment; and 4) Owner's Representative and Architect-Engineer's comments from draft review are satisfactorily addressed. Applications for Payment shall be subject to approval by the City. Failure to furnish supporting evidence for amounts invoiced shall be result in a reduction of the amount otherwise due to Construction Manager. Incomplete pay applications will not be processed. For the avoidance of doubt, no Application for Payment shall be deemed submitted or complete unless and until the review process established in this Subsection 11.2.2 herein has been completed and all the items listed in this Subsection and all supporting documentation or items required by the Contract Documents (including Subsection 11.2.1 above) have been delivered to and received by the Owner's Representative and the Architect-Engineer.

11.3. Final Payment. Final payment constituting the unpaid balance of the Cost of the Project, retainage and the Construction Manager's fee for the Project shall be due and payable upon Final Completion as described in the Contract Documents. However, if there should remain Work to be completed, the Construction Manager, the Project Coordinator and the Architect-Engineer shall list those

items prior to receiving final payment for the Project and the City may retain a sum equal to 200% of the estimated cost of completing any unfinished Work, provided that said unfinished items are listed separately and the estimated cost of completing any unfinished items are likewise listed separately. Thereafter, City shall pay to Construction Manager monthly the amount retained for each incomplete item after each of said items is completed. Final Payment shall not relieve Construction Manager of any obligation under Contract warranty, guaranty and indemnification provisions and such other provisions that survive the termination of the Contract.

11.4. Payments for Materials and Equipment. Construction Manager may invoice City and City will pay for expenditures for materials and equipment received on the Project Site or another location prior to being consumed during construction or incorporated into the Work if the equipment and materials are in conformance with the Contract Documents, are received, inventoried and stored properly, City approves and accepts the same, and City acquires title upon payment therefore. Construction Manager nevertheless retains full responsibility for care, custody and control of such materials and equipment.

11.5. Budget Balancing Requirement; Right to Withhold Payments. Any provision hereof to the contrary notwithstanding, the City may withhold payments in the following circumstances:

11.5.1 If the City, in its good faith judgment, reasonably determines that the portion of the approved cost for any budget category line item then remaining unpaid (or which will be remaining unpaid if all payments theretofore and then being requested by the Construction Manager are made) will not be sufficient to complete the Work attributable to the applicable line item (a "Shortfall Line Item") in accordance with the Contract Documents, no additional payments will be due the Construction Manager hereunder for Work attributable to such line item unless and until the Construction Manager performs a sufficient portion of the Work attributable to the applicable line item in accordance with the Contract Documents (and provides evidence reasonably satisfactory to the City of the performance thereof and payment therefor) so that such portion of the approved cost then remaining unpaid is reasonably determined by the City to be sufficient to complete such Work.

11.5.2 In addition to the Performance Bond and Payment Bond and any other security or retainage then being held by the City, the City may withhold from any payment due or to become due the Construction Manager amounts sufficient to reimburse the City for its expenditures for the account of the Construction Manager or to secure (1) correction or re-execution of Work which is defective or has not been performed in accordance with the Contract Documents and which the Construction Manager has failed to correct in accordance with the terms of this Agreement; (2) past due payments to Subcontractors which are not being disputed by the Construction Manager or a Subcontractor in good faith, and for reasons disclosed to the City, until an appropriate release of lien/claim is provided; (3) the City's remedies in consequence of any failure to perform the Contract Documents' requirements or uncured default of this Agreement by the Construction Manager, including City's performance of Work; (4) damage to another contractor or third-party not remedied or damage to City property not remedied; (5) liquidated damages and other costs incurred by City for extended construction administration; (6) failure of Construction Manager to provide any and all documents required by the Contract Documents, including failure to maintain as-built drawings in a current and acceptable state; (7) pending or imminent claims of the City or others, including, Claims which are subject to Construction Manager's indemnity obligation under Section 12.2 hereof for which the Construction Manager has not posted bonds, obtained required insurance policies, or other additional security reasonably satisfactory to the City; and (8) any amounts charged to the Construction Manager's Contingency without the Project Coordinator's consent, for which the City, through the Project Coordinator or Owner's Representative, disputes the legitimacy or reasonableness of the costs charged (either as not being reasonable or necessary expenses, or otherwise as not being legitimate costs of the Project pursuant to Section 8.2 of the Agreement).

Except as otherwise specifically provided in this Agreement, in no event shall any interest be due and payable by the City to the Construction Manager or any other party on any of the sums retained by the City pursuant to any of the terms or provisions of any of the Contract Documents.

11.6. Applications for Materials and Equipment. Applications for Payment may include a request for payment for materials and equipment incorporated into the Work. That portion of any payment which is requested on account of materials or equipment delivered and suitably stored at the Project Site, or at other locations approved by the City, which approval shall not be unreasonably withheld, but not incorporated into the Work shall be permitted only if approved in advance by the City, which approval shall not be unreasonably withheld. If required by the City, such payment shall be conditioned upon submission to the City of bills of sale or upon such other procedures as will establish the City's title to such materials and equipment and otherwise adequately protect the City's interest therein, including applicable insurance, suitable provisions for storage (including procedures for segregating such materials or equipment from other property of the Construction Manager and/or applicable Subcontractor, supplier or fabricator, and designating same as having been acquired for the Project), suitable arrangements for transporting such materials and equipment to the Project Site and UCC filings. The provisions of this Section permitting payments in respect of materials and equipment stored off-site, as hereinbefore provided, shall apply notwithstanding the fact that such materials or equipment may have to be fabricated prior to their incorporation into the Project. All such requests for stored materials will be subject to the City's or their Representative's physical inspection.

11.7. Effect of Application. In presenting an Application for Payment to the City, the Construction Manager warrants that:

11.7.1 Title to the Work, including all materials and equipment, covered by such Application for Payment will pass to the City, free and clear of liens, claims, security interests or other encumbrances (for purposes of this Article 11, hereinafter referred to as "Liens"), either by incorporation in construction or upon receipt of payment by the Construction Manager, whichever occurs first, and such Work shall not give rise to any valid claims against the Performance Bond and Payment Bond furnished by the Construction Manager. The Construction Manager shall provide evidence demonstrating the above facts to the reasonable satisfaction of the City upon the City's request; and

11.7.2 No work, or any materials or equipment constituting a portion of the Work, covered by such Application for Payment will have been acquired by the Construction Manager, or any other person performing work at the Project Site or furnishing materials or equipment for the Project, subject to an agreement under which a Lien is retained by the seller or otherwise imposed by the Construction Manager or such other person; and

11.7.3 The design and construction have progressed to the point indicated in the Application for Payment; the quality of the Work and any goods and materials covered by such Application for Payment are in accordance with the Contract Documents and applicable laws, codes, ordinances, rules and regulations of governmental authorities having jurisdiction over the Project; and the Construction Manager is entitled to payment in the amount requested; and

11.7.4 The Construction Manager and its subcontractors of any tier are not in breach of applicable conflict of interest provisions of state law with respect to this Agreement and have not been debarred from bidding on work by the State or the City.

11.8. Accounting. Except for the Construction Manager's Fee and any Additional Fee, all sums paid to the Construction Manager pursuant to this Agreement shall constitute a trust fund for the purpose of performance of the Work and the construction, furnishing, and equipping of the Project in accordance with the Contract Documents. At least ten (10) days prior to the submission of each monthly Application for Payment, beginning with the second Application for Payment submitted hereunder, the Construction Manager shall furnish to the City a certified statement accounting for the disbursement of funds received from the City. Such statement shall itemize all disbursements to Subcontractors and vendors and shall be accompanied by copies of subcontract payment vouchers substantiating actual expenditures. Vouchers covering final payments to Subcontractors and other parties furnishing labor and materials in connection with performance of the Work shall be accompanied by a release from each such party in the form

approved by the City. However, no provision hereof shall be construed to require the City to see to the proper disposition or application of the monies so paid to the Construction Manager.

11.9. Payments to Subcontractors. No Application for Payment shall include any request for payment of amounts that the Construction Manager or the Architect-Engineer does not intend to pay to a Subcontractor because of a dispute or for any other reason. The Construction Manager shall pay each Subcontractor, except for payments already made directly by the Construction Manager, promptly out of the amount paid to the Construction Manager on account of such Subcontractor's work, goods or materials, the amount to which said Subcontractor is entitled in accordance with the terms of the Construction Manager's contract with such Subcontractor. The Construction Manager shall, in its agreement with each Subcontractor, require each Subcontractor to make payments to its sub-subcontractors in similar manner. The City shall have the right to withhold from payments to the Construction Manager amounts that the City reasonably believes are owing to a Subcontractor (from City's past payments) unless the Construction Manager explains the circumstances of such nonpayment to the satisfaction of the City. Notwithstanding the foregoing, the City shall have no obligation to pay or to be responsible in any way for payment to any Subcontractor.

11.10. Retainage. The City shall withhold from each progress payment made to the Construction Manager, except for amounts due for the General Conditions Fee, Construction Manager's bonds and insurance, and Construction Manager's purchase Orders for materials and equipment purchased directly by Construction Manager for the performance of its Work (i.e. purchases other than for the Work of Subcontractors or self-performed trade Work), retainage in the amount of ten percent (10%) of each such payment until fifty percent (50%) of the Work has been completed. The Work shall be considered 50% complete on the later of (i) the point at which the City has expended 50% of the approved Cost of the Project together with all costs associated with existing change orders or other additions or modifications to the construction services provided for in this Agreement, or (ii) substantial completion of the Phase 1A and Phase 1B Work.

Thereafter, the City shall reduce to five percent (5%) the amount of retainage withheld from each subsequent progress payment made to the Construction Manager, until Substantial Completion as provided in Sections 5.4 and 5.5. Any reduction in retainage below five percent (5%) shall be at the sole discretion of the City after written request by Construction Manager.

All requests for release of retainage shall be made in accordance with, and shall be subject to, the requirements of Section 255.078 of the Florida Statutes, as may be amended. Except as provided by law, the City shall have no obligation to release or disburse retainage until Substantial Completion of the Project. Upon receipt by the Construction Manager of a Notice of Substantial Completion pursuant to Section 5.4, fully executed by the City establishing the Substantial Completion Date, and after completion of all items on the punch list and/or other incomplete work, the Construction Manager may submit a payment request for all remaining retainage. It shall be the City's sole determination as to whether any of the items have been completed. For items deemed not to have been completed, the City may withhold retainage up to two (2) times the total cost to complete such items. Any interest earned on retainage shall accrue to the benefit of City. City shall disburse the amounts withheld upon the City's acceptance of the completion of the items for which they were withheld. City may require a consent of surety to the release of retainage. In the event that all or any of the Punch List items have not been completed on or before the Final Completion Date, then City, in its sole discretion, may elect to complete some or all of such Punch List items and apply the retainage held with respect thereto towards the costs of completion thereof; provided, however, in the event that such retainage amounts are not sufficient to complete the remaining Punch List items, Construction Manager shall promptly pay to or reimburse the City for the amount of any deficiency.

11.11. No Acceptance. No progress payment made by the City shall constitute acceptance of the Work or any goods or materials provided under this Agreement or any portion thereof. No partial or entire use or occupancy of the Project by the City shall constitute an acceptance of any portion of the Work or the complete Project which is not in accordance with the Contract Documents.

11.12. Payment by the City.

11.12.1. Approval of Applications for Payment. The City shall use good faith reasonable efforts to approve or reject (specifying, in the event of rejection, the reasons therefor) each Construction Manager's Application for Payment within fourteen (14) days after receipt thereof or within such time as otherwise permitted by Fla. Stat. 218.735, following the review process set forth in Subsection 11.2.2. If reasons for rejection apply only to a portion of such Application for Payment, only such portion shall be rejected. An Application for Payment or portion thereof that has been approved by the City is herein referred to as an "Approved Application for Payment."

11.12.2. Frequency of Payments. In accordance with Section 218.735 of the Florida Statutes, the City shall, subject to the terms and conditions of this Agreement, make progress payments in respect of Approved Applications for Payment, less Retainage as herein provided for and/or withholding of any other amounts pursuant to the Contract Documents (including withholding of payment pursuant to Subsection 11.5.2 of this Agreement), and shall use good faith reasonable efforts to make such payments within the twenty-five (25) days after the applicable Application for Payment is marked as received, in accordance with Section 218.74(1) of the Florida Statutes.

11.12.3. No Diversion. The Construction Manager agrees that monies received for the performance of this Agreement shall be used first for payment due for labor, material, and services for the Project and taxes thereon, and said monies shall not be diverted to satisfy obligations of the Construction Manager on other contracts or accounts.

11.13. Release of Subcontractor Retainage. If a Subcontractor has completed its portion of the Work (including all punch list items) pursuant to any given subcontract, the Construction Manager may request the City to disburse the Retainage being held by the City in respect of such Subcontractor, after delivering to the City any necessary consent to such disbursement from any bond sureties in form reasonably satisfactory to the City. If the City is reasonably satisfied the Subcontractor's Work has been completed in accordance with the Contract Documents and the City has received satisfactory final releases of lien with respect to the Subcontractor's Work, the City may at its sole discretion disburse said Retainage, provided that all other requirements of the Contract Documents are satisfied.

11.14. Final Progress Payment/Final Completion. At such time as (i) all Work, including all punch list items, is complete in accordance with the Contract Documents, all Final Completion requirements in Section 5.7 have been satisfied and City has issued a Certificate of Final Completion, and (ii) the Construction Manager has commenced the training program in Subsection 2.8.8 in respect of such Work and has identified to the City the representatives of the Construction Manager to be available during such period as provided for in Subsection 2.8.8 hereof, the Construction Manager may apply for the final progress payment, and the City will pay the remaining amount of money due the Construction Manager under this Agreement, provided that the Construction Manager has submitted a consent of surety to such final payment in a form reasonably satisfactory to the City and all documents called for in Section 5.7, and provided further, with respect to the final payment and the payment of any Additional Fee to be made upon completion of the entire Project, that the Certified Cost of the Project shall have been finally determined and completed in accordance with Section 11.15 hereof.

11.15. Certified Cost of the Project. As a part of its final Application for Payment hereunder, the Construction Manager shall deliver to the City an audit of the Cost of the Project and a certification as to the total Cost of the Project actually and properly incurred by the Construction Manager in the performance of the Work (herein such amount is called the "Certified Cost of the Project"), which audit and certification shall be prepared by an accounting firm, independent of both parties, selected by the Construction Manager and subject to the written approval of the City, which approval shall not be unreasonably withheld. The Certified Cost of the Project so determined shall be binding upon the Construction Manager and upon the City unless, within thirty (30) days after receipt of such audit and certification, the City shall deliver to the Construction Manager written notice of its objections thereto. In the event that the City shall so object to all or any portion of the audit and certification delivered to it by the Construction Manager, the City shall have the right to conduct or cause to be conducted its

own audit of the books and records of the Construction Manager relating to the Work and the Cost of the Project. If the audit and certification of the Cost of the Project performed on behalf of the City differs by more than one percent (1%) from the certification of the Cost of the Project performed by the initial auditor, then the City's audit and cost certification shall be binding on the Construction Manager and such certification shall be deemed the Certified Cost of the Project, unless the Construction Manager objects to the City's audit and cost certification within thirty (30) days after receipt thereof. In the event the Construction Manager timely objects to the audit and certification prepared on behalf of the City as aforesaid, then the differences between such audits and certifications shall be resolved by the parties in good faith, and the certification of the Cost of the Project as so determined shall, for purposes of this Agreement, be deemed the Certified Cost of the Project.

11.16. Maximum Reimbursement. Notwithstanding anything to the contrary set forth in the Contract Documents, in no event shall the Construction Manager be entitled to reimbursement in respect of the Cost of the Work in an amount in excess of the lesser of the City-approved Cost of the Project as set forth in the GMP Amendment (and as adjusted from time to time by Change Order) and the amount finally determined as aforesaid to be the Certified Cost of the Project. If and to the extent the Construction Manager has received payment in respect of the Cost of the Project in an amount in excess of the Certified Cost of the Project, the Construction Manager shall reimburse such excess to the City within ten (10) days after the Certified Cost of the Project has been finally determined. Any portion of the Construction Overhead and Profit Fee or any Additional Fee undisbursed by the City, and any Retainage still held by the City at such time may be applied to and offset against any such excess amounts to be repaid by the Construction Manager to the City. In the event that the Certified Cost of the Project is equal to or less than (i) the City-approved Cost of the Project (as adjusted from time to time by Change Order), plus (ii) any amounts applied by Construction Manager from the Contingency, then if and to the extent the Construction Manager has not been reimbursed for the entire Certified Cost of the Project such deficiency shall be paid by the City to the Construction Manager within ten (10) days after the Certified Cost of the Project has been finally determined.

11.17. Waiver of Claims. The acceptance of the payment and release of the final payment shall operate as and shall be a release to the City from all present and future Claims or liabilities, of whatever kind or nature, arising under, relating to or in connection with, this Agreement for anything done or furnished or relating to the Work or the Project, or from any act or omission of the City relating to or connected with the Contract Documents, the Work or the Project, except those Claims or liabilities, if any, for which the Construction Manager has provided the City with written notice pursuant to a detailed reservation of rights that identifies the precise nature of the dispute, all facts or supporting Construction Manager's Claim, the particular scope of Work giving rise to the Claim, and the amount and/or time sought in connection with the Claim.

ARTICLE 12

BONDS, INSURANCE, INDEMNITY AND WAIVER OF SUBROGATION

12.1. Bonds. In accordance with the provisions of Section 255.05, Florida Statutes, the Construction Manager shall provide to the City, on forms furnished by the City, a 100% Performance Bond and a 100% Labor and Material Payment Bond for this Project, each in an amount not less than the total construction cost for the Project as defined in Article 8, and inclusive of the Construction Manager's fees pursuant to Article 7 for the Project. The bonds shall be delivered to City within ten (10) days after execution of the GMP and shall not expire until expiration of the Warranty Period for the Project. The Construction Manager shall not commence any construction Work in connection with the Project until the bonds have been approved by City.

To be acceptable as Surety for Performance Bonds and Labor and Material Payment Bonds, a Surety Company shall comply with the following provisions:

12.1.1. The Surety Company shall have a currently valid Certificate of Authority, issued by the State of Florida, Department of Insurance, authorizing it to write surety bonds in the State of Florida.

12.1.2. The Surety Company shall have a currently valid Certificate of Authority issued by the United States Department of Treasury under Sections 9304 to 9308 of Title 31 of the United States Code.

12.1.3. The Surety Company shall be in full compliance with the provisions of the Florida Insurance Code.

12.1.4. The Surety Company shall have at least twice the minimum surplus and capital required by the Florida Insurance Code at the time the invitation to bid is issued.

12.1.5. The Surety Company shall have at least an A- policyholder's rating and a Class VII financial rating in the latest issue of Best's Key Rating Guide.

12.1.6. The Surety Company must agree not to expose itself to any loss on any one risk in an amount exceeding ten (10) percent of its surplus to policyholders, provided:

a. Any risk or portion of any risk being reinsured shall be deducted in determining the limitation of the risk as prescribed in this section. These minimum requirements shall apply to the reinsuring carrier providing authorization or approval by the State of Florida, Department of Insurance to do business in this state have been met.

b. In the case of the surety insurance company, in addition to the deduction for reinsurance, the amount assumed by any co-surety, the value of any security deposited, pledged or held subject to the consent of the surety and for the protection of the surety shall be deducted.

12.2. Indemnity. In consideration of the sum of Twenty-Five Dollars (\$25.00) and other good and valuable consideration, the sufficiency of which the Construction Manager hereby acknowledges, to the fullest extent permitted by law, Construction Manager shall defend, indemnify and save harmless City and Architect-Engineer, and their respective officers and employees, from and against any and all third-party claims, liabilities, damages, losses, demands, liens, expenses and costs including reasonable attorney's fees, to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of Construction Manager and persons employed or utilized by Construction Manager in the performance of this Agreement and the other Contract Documents, including Subcontractors or Suppliers, at any tier and anyone directly or indirectly employed by them. It is expressly understood that the monetary limitation on such indemnification, if established in a GMP Amendment, shall be the Guaranteed Maximum Price, as may be increased by duly executed Change Orders.

With respect to Construction Manager's duty to defend claims against the City as set forth in this Article, Construction Manager shall be entitled to select counsel of Construction Manager's choice to defend the claim asserted against the City; provided, however, that such counsel shall first be approved by the City Attorney, which approval shall not be unreasonably conditioned, withheld, or delayed; and, provided further, that the City shall be permitted, at its cost and expense, to retain independent counsel to monitor the claim proceeding. The duty to defend set forth in this paragraph shall be severable and independent from the indemnity obligations otherwise set forth in this Section 12.2, to the extent that if any other provisions of this Section 12.2 are deemed invalid and/or unenforceable, this duty to defend provision shall remain in full force and effect.

Sums otherwise due to Construction Manager under this Agreement may be retained by City until all of City's Claims for indemnification under this Agreement have been settled or otherwise resolved. Any amount withheld pursuant to this Section 12.2 shall not be subject to payment of interest by City.

The execution of this Agreement by Construction Manager shall operate as an express acknowledgment that the indemnification obligation is part of the bid documents and/or Project Specifications for the Project and the monetary limitation on indemnification in this Section 12.2 bears a reasonable commercial relationship to this Agreement.

Nothing in this Section 12.2 is intended, or should be construed, to negate, abridge or otherwise reduce the other rights and obligations of indemnity that may otherwise exist in favor of the City. Nothing in this Section 12.2 is intended to create in the public or any member thereof, a third party beneficiary hereunder, or to authorize anyone not a party to this Agreement, to maintain a suit for personal injuries or property damage pursuant to the terms or provisions of this Agreement.

The defense and indemnification obligations set forth in this Section 12.2 shall survive the termination and/or expiration of this Agreement. This indemnity will be interpreted under the laws of the State of Florida, including Chapter 725, Florida Statutes. To the extent this indemnification provision does not comply with Chapter 725, Florida Statutes, as may be amended, this provision shall hereby be interpreted as the Parties' intention for the indemnification clauses to comply with Chapter 725, Florida Statutes.

Construction Manager shall require all Subcontractor agreements to include a provision that they will indemnify and hold harmless the City, its officers, agents, directors, and employees, and instrumentalities as herein provided.

12.3. Insurance. The Construction Manager and Subcontractors shall comply with the insurance requirements set forth in Appendix E. City makes no representation or warranty that the coverage, limits of liability, or other terms specified for the insurance policies to be carried pursuant to Appendix E are adequate to protect Construction Manager against its undertakings under the Contract Documents or its liability to any third party, or preclude City from taking any actions as are available to it under the Contract or otherwise at law. City shall not be limited to the amount of the insurance premium not paid in the proof of any damages it may claim against Construction Manager arising out of or by reason of failure of Construction Manager to provide and keep in force the insurance policies required by and on the terms of Appendix E, and City shall instead be entitled to recover the full amount of damages available.

ARTICLE 13
SUSPENSION OF WORK; TERMINATION OF THE AGREEMENT;
CITY'S RIGHT TO PERFORM CONSTRUCTION MANAGER'S OBLIGATION

13.1. Suspension of Work By Construction Manager. If the City should fail to pay the Construction Manager within forty-five (45) days after City's approval of a payment request from the Construction Manager, then the Construction Manager may, upon seven (7) additional days written notice to the City, Owner's Representative and the Architect-Engineer, stop the applicable Project until payment of the amount owing has been received.

13.2. Suspension of Work By City.

13.2.1. **For Cause.** Upon the failure of Construction Manager or its Subcontractors or Suppliers to comply with any of the requirements of the Contract Documents, including Construction Manager's failure to maintain proper safety precautions, City shall have the authority to stop any of the Work affected by such failure until such failure is remedied. In the event of the issuance of a Stop Work Order by City, City shall not be liable for any costs or expenses claimed by Construction Manager arising out of such issuance and the Project Schedule shall not be delayed or extended as a result of such issuance.

13.2.1.1. Upon receipt of any such Notice, Construction Manager shall, unless the Notice requires otherwise:

a. Immediately discontinue work on the date and to the extent specified in the Notice;

b. Place no further orders or subcontracts for material, services, or facilities with respect to the suspended Work other than to the extent required in the Notice;

c. Promptly make every reasonable effort to obtain suspension upon terms satisfactory to City of all orders, subcontracts, and rental agreements to the extent they relate to performance of the Work suspended; and,

d. Continue to protect and maintain the Work, including those portions on which work has been suspended.

13.2.1.2. Upon receipt of Notice to resume suspended Work, Construction Manager shall immediately resume performance of the suspended Work to the extent required in the Notice.

13.2.2. Without Cause. By Notice in writing to Construction Manager, City may suspend at any time, at its sole option and for any reason including convenience, the performance of all or any portion of the Work to be performed under the GMP Amendment. Upon such Notice of Suspension of the Work, City will designate the amount and type of plant, labor, and equipment to be committed to the Jobsite during the period of suspension. Construction Manager shall use its best efforts to utilize its plant, labor, and equipment in such a manner as to minimize costs associated with such suspension.

13.2.2.1. The Construction Manager shall comply with Subsections 13.2.1.1 through 13.2.1.2.

13.2.2.2. As full compensation for such suspension, Construction Manager will be reimbursed for the following costs, without duplication of any item, to the extent that such costs were reasonably incurred and directly result from such suspension of the Work:

a. A standby charge to be paid to Construction Manager during the period of suspension of the Work, which standby charge shall be sufficient to compensate Construction Manager for keeping, to the extent required in the Notice, its organization and equipment committed to the Work in a standby status;

b. All reasonable costs, as determined to be equitable by City, associated with demobilization and subsequent remobilization of Construction Manager's plant, forces, and equipment; and

c. An equitable amount to reimburse Construction Manager for the cost of maintaining and protecting that portion of the Work upon which work has been suspended.

d. Any Claim on the part of Construction Manager for such compensation shall be made within ten (10) business days after receipt by Construction Manager of a Notice to suspend the Work.

13.2.2.3. If, as a result of any such suspension of the Work, the cost to Construction Manager of subsequently performing the Work is increased or decreased, an equitable adjustment will be made in the cost of performing the suspended Work in accordance with Section 9.1. Any Claim on the part of Construction Manager for additional time or compensation shall be made within ten (10) business days after receipt of Notice to resume the Work, and Construction Manager shall submit a revised Project Schedule for review and approval by City.

13.2.3. In the event such suspension continues for more than ninety (90) days, City may release to Construction Manager, for the Work satisfactorily completed by Construction Manager, approved and accepted by City, any amounts retained by City under the terms of the GMP Amendment. Such retention shall only be released to Construction Manager after Construction Manager's complete compliance with the suspension notice and the requirements of the Contract Documents.

13.2.4. No compensation or extension of time will be granted if suspension results from Construction Manager's noncompliance with any requirements of the Contract Documents.

13.3. Termination by City for Convenience.

13.3.1. In addition to other rights the City may have at law and pursuant to the Contract Documents with respect to cancellation and termination of this Agreement, the City may, in its sole discretion, terminate for the City's convenience the performance of Work under this Agreement, in whole or in part, at any time upon written notice to the Construction Manager. The City shall effectuate such Termination for Convenience by delivering to the Construction Manager a Notice of Termination for Convenience, specifying the applicable scope and effective date of termination, which termination shall be deemed operative as of the effective date specified therein without any further written notices from the City required. Such Termination for Convenience shall not be deemed a breach of this Agreement, and may be issued by the City with or without cause.

If the City terminates this Agreement other than pursuant to Section 13.3 with respect to this Project as a whole, the City shall reimburse the Construction Manager for any unpaid Cost of the Project due it plus that part of the unpaid balance of the Construction Phase Overhead & Profit Fee in an amount as will increase the payment on account of its fee to a sum which bears the same ratio to the Construction Phase Overhead & Profit Fee as the Cost of the Project at the time of termination bears to the GMPs, if established, otherwise to the City's Construction Budget. The City shall also pay to the Construction Manager fair compensation, either by purchase or rental at the election of the City, for any equipment retained, as well as move-out and demobilization costs. In case of such termination of Agreement, at the sole discretion of the Project Coordinator, the City may require the Construction Manager to assign to the City any unsettled contractual Claim for which performance of the Work and nonpayment by the City can be, in the sole discretion of the Project Coordinator, properly documented. The Construction Manager may, as a condition of receiving the payments referred to in this Article 13, execute and deliver all such papers and take all such steps including the legal assignment of its contractual rights as requested by the City, or as the City may require for the purpose of fully vesting the rights and benefits of the Construction Manager under such obligations or commitments.

13.3.2. After the establishment of the GMP and/or at the completion of the Pre-Construction Phase for the Project, if the final cost estimates or lack of funding make the Project no longer feasible, such determination being at the sole discretion of the City, the City may terminate this Agreement and pay the Construction Manager its proportionate fees earned to date in accordance with Section 7.1 (to be calculated on a pro rata basis by reference to the monthly amounts identified in the Schedule of Values), plus any Work performed and compensable pursuant to Article 8. Construction Manager shall have no entitlement to any fees for activities not yet undertaken or authorized by the City.

13.3.3. The payments to Construction Manager pursuant to the foregoing Sections shall be the sole right and remedy of Construction Manager upon any such termination and Construction Manager shall have no Claims for damages, including loss of anticipated profits on account of termination.

13.3.4. Upon receipt of a notice of termination, Construction Manager and its Subcontractors shall, unless the Notice requires otherwise, and regardless of any delay in determining or adjusting any amounts due under this Section 13.3:

13.3.4.1. Immediately discontinue the Work or portions thereof that can be discontinued without creating a hazardous condition, on the date and to the extent specified in the Notice.

13.3.4.2. Cancel all outstanding commitments for labor, materials, equipment, and apparatus on the terminated portion of the Work that may be canceled without undue cost and take such other actions as are necessary to minimize demobilization and termination costs for such cancellations. Construction Manager shall notify City of any commitment that cannot be canceled without undue cost and City shall have the right to accept delivery or to reject delivery and pay the agreed upon costs;

13.3.4.3. Immediately deliver to the City all Submittals, Project-related documents, any and all unfinished documents, and any and all warranties and guaranties for Work, equipment or materials already installed or purchased.

13.3.4.4. If specifically directed by the City in writing, assign to the City all right, title and interest of Construction Manager under any contract, subcontract and/or purchase order, in which case the City shall have the right and obligation to settle or to pay any outstanding claims arising from said contracts, subcontracts or purchase orders;

13.3.4.5. Place no further subcontracts or purchase orders for materials, services, or facilities, except as necessary to complete the portion of the Work not terminated (if any) under the Notice of Termination for Convenience;

13.3.4.6. As directed by the City, transfer title and deliver to the City (1) the fabricated and non-fabricated parts, Work in progress, completed Work, supplies and other material produced or required for the Work terminated; and (2) the completed or partially completed Project records that, if this Agreement had been completed, would be required to be furnished to the City;

13.3.4.7. Settle all outstanding liabilities and termination settlement proposals from the termination of any subcontracts or purchase orders, with the prior approval or ratification to the extent required by the City (if any);

13.3.4.8. Take any action that may be necessary, or that the City may direct, for the protection and preservation of the property related to this Agreement that is in the Construction Manager's possession and in which the City has or may acquire an interest; and

13.3.4.9. Complete performance of the Work not terminated (if any).

13.3.5. Upon issuance of such Notice of Termination for Convenience, the Construction Manager shall only be entitled to payment for the Work satisfactorily performed up until the date of its receipt of such Notice of Termination for Convenience, but no later than the effective date specified therein. Payment for the Work satisfactorily performed shall be determined by the City in good faith, in accordance with the Cost of the Work, the reasonable costs of demobilization and reasonable costs, if any, for canceling contracts and purchase orders with Subcontractors to the extent such costs are not reasonably avoidable by the Construction Manager.

13.3.6. Construction Manager shall submit, for the City's review and consideration, a final termination payment proposal with substantiating documentation, including an updated Schedule of Values, within thirty (30) days of the effective date of termination, unless extended in writing by the City upon request. Such termination amount shall be mutually agreed upon by the City and the Construction Manager and absent such agreement, the City shall, no less than fifteen (15) days prior to making final payment, provide the Construction Manager with written notice of the amount the City intends to pay to the Construction Manager. Such final payment so made to the Construction Manager shall be in full and final settlement for Work performed under this Agreement, except to the extent the Construction Manager disputes such amount in a written notice delivered to and received by the City prior to the City's tendering such final payment.

13.4. Event of Default. The following shall each be considered a Default. If, after delivery of written notice from the City to Construction Manager specifying such Default, the Construction Manager fails to promptly commence and thereafter complete the curing of such Default within a reasonable period of time, not to exceed fifteen (15) days after the delivery of such notice of Default or, if with respect to any Non-Monetary Default (as defined below), such default is not capable of being cured within such fifteen (15) day period, Construction Manager fails to undertake within such period to effect a cure and diligently and in good faith prosecute the same to conclusion no later than ninety (90) days following delivery of the notice of Default, it shall be deemed an Event of Default, which constitutes sufficient grounds for the City to terminate Construction Manager for cause:

13.4.1. Failing to make payments to Subcontractors or Suppliers for materials or labor in accordance with the respective Subcontracts and Purchase Orders (a "Monetary Default");

13.4.2. Failing to perform any portion of the Work in a manner consistent with the requirements of the Contract Documents or within the time required therein; or failing to use the Subcontractors, and Key Personnel as identified, and to the degree specified, in the Contract Documents, subject to substitutions approved by the City in accordance with this Agreement and the other Contract Documents;

13.4.3. Failing, for reasons other than an Excusable Delay, to begin the Work required for either Pre-Construction Services or Construction Phase Services following the issuance of a Notice to Proceed, respectively;

13.4.4. Failing to perform the Work with sufficient manpower, workmen and equipment or with sufficient materials, with the effect of delaying the prosecution of the Work in accordance with the Project Schedule and/or delaying completion of any Milestone or the Project within the specified time;

13.4.5. Failing, for reasons other than an Excusable Delay, to timely complete any Milestone or the Project within the specified time;

13.4.6. Failing and/or refusing to remove, repair and/or replace any portion of the Work as may be rejected as defective or nonconforming with the terms and conditions of the Contract Documents;

13.4.7. Discontinuing the prosecution of the Work, except in the event of: 1) the issuance of a stop-work order by the City; or 2) the inability of the Construction Manager to prosecute the Work because of an event giving rise to an Excusable Delay as set forth in this Agreement for which Construction Manager has provided written notice of same in accordance with Subsection 9.4.4 of this Agreement;

13.4.8. A custodian, trustee or receiver is appointed for the Construction Manager, or the Construction Manager becomes insolvent or bankrupt, is generally not paying its debts as they become due or makes an assignment for the benefit of creditors, or the Construction Manager causes or suffers an order for relief to be entered with respect to it under applicable Federal bankruptcy law or applies for or consents to the appointment of a custodian, trustee or receiver for the Construction Manager, or bankruptcy, reorganization, arrangement or insolvency proceedings, or other proceedings for relief under any bankruptcy or similar law or laws for the relief of debtors, are instituted by or against the Construction Manager;

13.4.9. Failing to provide sufficient evidence upon request that, in the City's sole opinion, demonstrates the Construction Manager's financial ability to complete the Project;

13.4.10. An indictment is issued against the Construction Manager;

13.4.11. Persistently disregarding laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction;

13.4.12. Fraud, misrepresentation or material misstatement by Construction Manager in the course of obtaining this Agreement;

13.4.13. Failing to comply in any material respect with any of the terms of this Agreement or the other Contract Documents.

The Defaults listed in Subsections 13.4.2 through Subsection 13.4.13 shall each be considered "Non-Monetary Defaults".

In no event shall the time period for curing a default constitute an extension of the Contract Time or any Milestone or a waiver of any of the City's rights or remedies hereunder for a Default which is not cured as aforesaid.

13.5. Termination of Agreement for Cause.

13.5.1. The City may terminate the Construction Manager for cause upon the occurrence of an Event of Default and expiration of the cure period specified in the written notice of Default or as provided in Section 13.4, or for any other breach of this Agreement or other Contract Documents by the Construction Manager that the City, in its sole opinion, deems substantial and material, following written notice to the Construction Manager and the failure to timely and properly cure to the satisfaction of the City in the time period set forth in Section 13.4, or as otherwise specified in the Notice of Default.

13.5.2. Upon the occurrence of an Event of Default, and without any prejudice to any other rights or remedies of the City, whether provided by this Agreement, the other Contract Documents or as otherwise provided at law or in equity, the City may issue a Notice of Termination for Cause to Construction Manager, copied to the Surety, rendering termination effective immediately, and may, subject to any prior rights of the Surety:

- a. Take possession of the Project Site and of all materials, equipment, tools, construction equipment and machinery thereon owned by Construction Manager;
- b. Accept assignments of subcontracts;
- c. Direct Construction Manager to transfer title and deliver to the City (1) the fabricated and non-fabricated parts, Work in progress, completed Work, supplies and other material produced or required for the Work terminated; and (2) the completed or partially completed Project records that, if this Agreement had been completed, would be required to be furnished to the City;
- d. Finish the Work by whatever reasonable method the City may deem expedient' and
- e. Upon the issuance of a Notice of Termination for Cause, the Construction Manager shall:
 - i. Immediately deliver to the City all Submittals and Project-related records in their original/native electronic format (i.e. CAD, Word, Excel, etc.), any and all other unfinished documents, and any and all warranties and guaranties for Work, equipment or materials already installed or purchased;
 - ii. If specifically directed by the City in writing, assign to the City all right, title and interest of Construction Manager under any contract, subcontract and/or purchase order, in which case the City shall have the right and obligation to settle or to pay any outstanding claims arising from said contracts, subcontracts or purchase orders;
 - iii. As directed by the City, transfer title and deliver to the City (1) the fabricated and non-fabricated parts, Work in progress, completed Work, supplies and other material produced or required for the Work terminated; and (2) the completed or partially completed Project records that, if this Agreement had been completed, would be required to be furnished to the City; and
 - iv. Take any action that may be necessary, or that the City may direct, for the protection and preservation of the property related to this Agreement that is in the Construction Manager's possession and in which the City has or may acquire an interest.
- f. The rights and remedies of the City under Article 13 shall apply to all Defaults that fail to be cured within the applicable cure period or are cured but in an untimely manner, and the City shall not be obligated to accept such late cure.

13.6. Recourse to Performance Bond. Upon the occurrence of an Event of Default and the expiration of the cure period provided in the written notice of Default, in addition to any other remedies provided by law, the City may terminate this Agreement and make demand upon the Surety to perform its obligations under the Performance Bond, including completion of the Work, without requiring any further agreement (including not requiring any takeover agreement) The City may also charge against the Performance Bond all fees and expenses for services incidental to ascertaining and collecting losses under the Performance Bond including accounting, engineering, and legal fees, together with any and all costs incurred in connection with renegotiation of this Agreement.

13.7. Costs and Expenses.

13.7.1. All damages, costs and expenses, including reasonable attorney's fees, incurred by the City as a result of an uncured Default or a Default cured beyond the time limits stated herein (except to the extent the City has expressly consented, in writing, to the Construction Manager's late cure of such Default), together with the costs of completing the Work, shall be deducted from any monies due or to become due to the Construction Manager under this Agreement, Irrespective of whether the City ultimately terminates Construction Manager.

13.7.2. Upon issuing a Notice of Termination for Cause, the City shall have no obligation to pay Construction Manager, and the Construction Manager shall not be entitled to receive, any money until such time as the Project has been completed and the costs to make repairs and/or complete the Project have been ascertained by the City. In case such cost and expense is greater than the sum which would have been due and payable to the Construction Manager under this Agreement for any portion of the Work satisfactorily performed, the Construction Manager and the Surety shall be jointly and severally liable and shall pay the difference to the City upon demand.

13.8. Termination If No Default or Erroneous Default. If, after a Notice of Termination for Cause is issued by the City, it is thereafter determined that the Construction Manager was not in default under the provisions of this Agreement, or that any delay hereunder was an Excusable Delay, the termination shall be converted to a Termination for Convenience and the rights and obligations of the Parties shall be the same as if the notice of termination had been issued pursuant to the termination for convenience clause contained in Section 13.3. The Construction Manager shall have no further recourse of any nature for wrongful termination.

13.9. Remedies Not Exclusive. Except as otherwise provided in the Contract Documents, no remedy under the terms of this Agreement is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative and shall be in addition to any other remedies, existing now or hereafter, at law, in equity or by statute. No delay or omission to exercise any right or power accruing upon any Event of Default shall impair any such right or power nor shall it be construed to be a waiver of any Event of Default or acquiescence therein, and every such right and power may be exercised from time to time as often as may be deemed expedient.

13.10. Failure to Pay. If the City should fail to pay the Construction Manager any material amount owing pursuant to an Approved Application for Payment in accordance with the Contract Documents and after receipt of all supporting documentation required pursuant to Subsection 11.2.1 hereof, and if the City fails to make such payment within forty-five (45) days after receipt of written notice from the Construction Manager identifying the Approved Application for Payment for which payment is outstanding, then, unless the City is withholding such payment pursuant to Section 11.5 hereof or any other provision of this Agreement which entitles the City to so withhold such payment, the Construction Manager shall have the right upon the expiration of the aforesaid ninety (90) day period to stop its performance of the Work, provided that Construction Manager has sent a Notice to Cure to the City via certified mail, allowing for a seven (7) day cure period. In such event, the Construction Manager shall not be obligated to recommence the Work until such time as the City shall have made payment to the Construction Manager in respect of such Approved Application for Payment, plus any actual and reasonable related demobilization and start-up costs evidenced by documentation reasonably satisfactory to the City. Except as set forth in this Section 13.10, no act,

event, circumstance or omission shall excuse or relieve the Construction Manager from the full and faithful performance of its obligations hereunder and the completion of the Work as herein provided for.

13.11. Materiality and Non-Waiver of Breach. Each requirement, duty, and obligation in the Contract Documents is material. The 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 shall not be effective unless it is in writing and approved by the City. A waiver of any breach of a provision of this Agreement shall not be deemed a waiver of any subsequent breach and the failure of the City to exercise its rights and remedies under this Article 13 at any time shall not constitute a waiver of such rights and remedies.

13.12. Termination by the Construction Manager. If the Project in its entirety is stopped for a period of one hundred twenty (120) days under an order of any court or other public authority having jurisdiction or as a result of an official act of government, such as a declaration of a national emergency making materials unavailable, through no act or fault of the Construction Manager, its agents employees, Subcontractors or suppliers, and City and Construction Manager are unable to reach agreement concerning compensation to Construction Manager during the suspension and other material matters concerning the status of the Project during the period of suspension, then with respect to any impacted Project the Construction Manager may, upon thirty (30) days written notice to the City, terminate the Project and request payment for all Work performed and compensable pursuant to Article 8, the Construction Manager's fees earned to date, and for any proven loss sustained upon any materials, equipment, tools, construction equipment, and machinery, including reasonable profit, damages and terminal expenses incurred by the Construction Manager.

13.13. City's Right to Carry Out the Work. If Construction Manager fails to perform any of its obligations under this Agreement, including any obligation under or by which it assumes to perform with its own forces, and fails within seven (7) days after receipt of written notice from the City to commence and continue correction of such default or neglect with diligence and promptness, the City may, without prejudice to any other rights or remedies of the City under the Contract Documents or under law, make good such deficiencies. In such event, the GMP shall be reduced via a deductive Change Order in the amount of the costs to the City of making good such deficiencies, including expenses related to any additional services of the Architect-Engineer or Owner's Representative made necessary by such default, neglect or failure. The Construction Overhead and Profit Fee shall be reduced according to the proportionate amount of Work so done or procured to be done by the City. If the payments then or thereafter due the Construction Manager are not sufficient to cover such amount, the Construction Manager shall pay the difference to the City. Disputes relating to this Section may be the subject a Claim that may be submitted to the Dispute Avoidance Panel, if one is established pursuant to Article 15.

ARTICLE 14 **ASSIGNMENT AND GOVERNING LAW**

14.1. Neither the City nor the Construction Manager shall assign its interest in this Agreement without the written consent of the other, except as to the assignment of proceeds. Notwithstanding the foregoing, City may assign its interest in this Agreement or any portion thereof to any local or state governmental body, special taxing district, or any person authorized by law to construct or own the Project. Such assignee shall be bound to comply with the terms of this Agreement.

14.2. This Agreement shall be governed as to performance, interpretation and jurisdiction by the laws of the State of Florida, without regard to conflicts of law rules.

14.3. This Agreement shall be enforceable in Miami-Dade County, Florida, and if legal action is necessary by either Party with respect to the enforcement of any or all of the terms or conditions herein, exclusive venue for the enforcement of same shall be in the state courts of Miami-Dade County, Florida. **BY ENTERING INTO THIS AGREEMENT, THE CONSTRUCTION MANAGER AND CITY EXPRESSLY WAIVE ANY RIGHTS EITHER PARTY MAY HAVE TO A TRIAL BY JURY OF ANY CIVIL LITIGATION**

RELATED TO, OR ARISING OUT OF THE PROJECT. CONSTRUCTION MANAGER SHALL SPECIFICALLY BIND ALL SUBCONTRACTORS TO THE PROVISIONS OF THIS AGREEMENT AND THE CONTRACT DOCUMENTS.

14.4. Each Party shall bear its own attorney's fees, except in actions arising out of Construction Manager's duties to indemnify the City under this Agreement, where Construction Manager shall pay the City's reasonable attorney's fees.

**ARTICLE 15
CLAIMS; WAIVER OF REMEDIES;
DISPUTE AVOIDANCE AND RESOLUTION**

15.1. The City's liability to Construction Manager for any Claims shall be governed by the following provisions:

15.1.1. **Claims.** Claims must be initiated by written notice and, unless otherwise specified in any other provision of this Agreement, submitted to the other Party within ten (10) days of the event giving rise to such Claim or within ten (10) days after the claimant reasonably should have recognized the event or condition giving rise to the Claim, whichever is later. Such Claim shall include sufficient information to advise the other Party of the circumstances giving rise to the Claim, the specific contractual adjustment or relief requested including the amounts and number of days of delay sought, and the basis of such request. The Claim must include all job records and other documentation supporting entitlement, the amounts and time sought. In the event additional time is sought, the Construction Manager shall include a time impact analysis to support such Claim. The City and/or Owner's Representative shall be entitled to request additional job records or documentation to evaluate the Claim. The Claim shall also include the Construction Manager's written notarized certification of the Claim in accordance with the False Claims Ordinance, Sections 70-300 et seq., of the City Code. Claims may be submitted in response to a Contract Modification issued by the City on its own initiative or in response to a proposal by the Construction Manager, but not in response to a Contract Modification issued pursuant to Section 15.2.

a. Claims not timely made or otherwise not submitted in strict accordance with the requirements of this Article 15 or other Contract Documents shall be deemed conclusively waived, the satisfaction of which shall be conditions precedent to entitlement.

b. **CONSTRUCTION MANAGER ASSUMES ALL RISKS FOR THE FOLLOWING ITEMS, NONE OF WHICH SHALL BE THE SUBJECT OF ANY CLAIM AND NONE OF WHICH SHALL BE COMPENSATED FOR EXCEPT AS THEY MAY HAVE BEEN INCLUDED IN THE CONSTRUCTION MANAGER'S OVERHEAD AND PROFIT AS PROVIDED IN THE CONTRACT DOCUMENTS: LOSS OF ANY ANTICIPATED PROFITS, LOSS OF BONDING CAPACITY OR CAPABILITY LOSSES, LOSS OF BUSINESS OPPORTUNITIES, LOSS OF PRODUCTIVITY ON THIS OR ANY OTHER PROJECT, LOSS OF INTEREST INCOME ON FUNDS NOT PAID, INEFFICIENCIES, COSTS TO PREPARE A BID, COST TO PREPARE A QUOTE FOR A CHANGE IN THE WORK, COSTS TO PREPARE, NEGOTIATE OR PROSECUTE CLAIMS, AND LOSS OF PROJECTS NOT BID UPON. NO COMPENSATION SHALL BE MADE FOR LOSS OF ANTICIPATED PROFITS FROM ANY DELETED WORK.**

15.2. Dispute Avoidance and Resolution. The Parties are committed to working together throughout the Project and agree to communicate regularly with each other at all times so as to avoid and/or minimize disputes and disagreements. If disputes do arise between the Parties or involving any Subcontractor as to the interpretation of this Agreement or relating to the Work or the Project, Construction Manager and City each commit to resolving such disputes in good faith, in an amicable, professional and expeditious manner so as to avoid any unnecessary losses, delays and disruptions to the Work.

15.2.1. The City may establish a Dispute Avoidance Panel in accordance with Appendix G. If the Project has a Dispute Avoidance Panel, the Construction Manager must discuss the disputed issue at a Dispute Avoidance Panel meeting before submitting a Claim. Failure to discuss the disputed matter at a

Dispute Avoidance Panel meeting shall constitute a waiver of any Claim arising from that matter, if and to the extent the failure to raise the issue is prejudicial to the other Party. If established, only Claims which seek amounts in excess of \$50,000, seek time which would delay achieving any of the Milestones established by this Agreement and/or are otherwise stipulated by mutual agreement of the Parties in writing, shall be subject to determination by the Dispute Avoidance Panel. If submitted to the Dispute Avoidance Panel, the Parties shall adhere to the procedures set forth in Appendix G unless otherwise specified.

15.2.2. In the event that the City does not elect to establish a Dispute Avoidance Panel, or the Claim does not meet the requirements for submission to the Dispute Avoidance Panel as set forth in herein, then all such Claims shall first be submitted to the Owner's Representative for initial recommendation for determination by the City at the time and in the manner specified in Section 15.1 herein unless otherwise specified in this Agreement or other Contract Documents. The Owner's Representative shall render an initial recommendation for determination of such Claim, in writing, as soon as practicable, but not later than forty-five (45) days of receipt of such Claim, unless the Parties mutually stipulate otherwise in writing or other circumstances warrant a time modification as determined by the Owner's Representative or City. Failure to render a written decision within the forty-five (45) days, or a later date if stipulated by the Parties, shall be considered a denial of the Claim submitted by the claimant.

15.2.3. In order to preserve for review an initial recommendation for determination of the Owner's Representative at mediation and/or by a court of competent jurisdiction (as applicable), then the Party seeking review shall notify the other Party in writing within fifteen (15) days of such recommendation by the Owner's Representative or, if no recommendation, within fifteen (15) days of when the Claim is denied as a result of inaction by the Owner's Representative. Failure to timely preserve review of the Owner's Representative's written recommendation or denial by inaction shall constitute a waiver of such Claim or entitlement to such objection and the recommendation of the Owner's Representative (whether by affirmative written recommendation or denial by inaction) shall be deemed final and binding, but subject to mediation and litigation (as applicable).

15.2.4. If the City agrees to pay a portion of the Claim, the Construction Manager may reserve the remaining portion of the Claim by executing a conditional release in a Change Order, which states the remaining amount and time sought and identifies the particular scope of Work to which the reservation applies. Unspecified amounts or time claimed will not preserve a Claim or right to a Claim. Each Change Order shall contain a release and waiver of all Claims as of the date the Construction Manager executes the Change Order, except as specifically included in a reservation of Claims within the Change Order. The reservation of Claims shall, as to each reserved individual Claim, state the amount and time sought in the Claim and identify the scope of Work giving rise to the Claim. Any Claim not included in the reservation of Claims or that fails to specify the amount and/or time sought are deemed waived and abandoned.

15.2.5. In the event any Claims which have been timely preserved remain unresolved at Substantial Completion, then the Parties agree to participate in mediation within sixty (60) days, unless the City terminates this Agreement, which shall render such mediation moot. The Parties shall mutually agree to the selection of a mediator, and mediation, which shall be confidential in the same manner as Court-ordered mediation, shall take place within the 60-day post-Substantial Completion time period, unless both Parties mutually agree otherwise. The Parties shall split the mediator's fees equally. Participation in mediation shall be a condition precedent to filing suit in a court of competent jurisdiction unless otherwise excused by the terms of this Subsection or stipulated by both Parties in writing.

In the event of a dispute arising after Substantial Completion, Final Payment or Final Completion, mediation is encouraged but is not a condition precedent to litigation.

15.3. Duty to Continue Performance. Pending resolution of any dispute, the Construction Manager shall proceed and shall cause its Subcontractors to proceed diligently with the performance of its duties and obligations under the Contract Documents and the City shall continue to make payments of undisputed amounts in accordance with the Contract Documents. The failure of the Construction

Manager to continue prosecution of the Work in the event of a pending dispute shall be deemed a Default pursuant to Section 13.4 of this Agreement.

15.4. Final Dispute Resolution. In the event of a dispute arising after Final Payment or Final Completion, or a dispute which arose prior to Substantial Completion, has been preserved with respect to a decision of the Dispute Avoidance Panel and/or Owner's Representative (as applicable) and which was not successfully resolved at mediation, a court of competent jurisdiction in Miami-Dade County shall hear such disputes. The Parties hereby waive a trial by jury, which requirement shall be included in each and every Subcontract, sub-consulting agreement and purchase order that Construction Manager executes, in connection with its Work on the Project.

ARTICLE 16 MISCELLANEOUS

16.1. Publicity. Construction Manager shall not engage in any advertising, publicity, or other promotional activities that in any way directly or indirectly mentions or refers to this Agreement, the relationship between the Parties created thereby or the services and material furnished there under, without obtaining the prior written consent of City. Construction Manager shall not display any signs, posters, or other advertising matter in or on any part of the Work without specific written approval of City.

16.2. Right to Apply Monies Due. In addition to other available remedies, the City shall have the right to deduct from any funds and monies due or thereafter to become due to the Construction Manager, including funds retained by the City under the retainage provisions of this Agreement, any amounts due to the City from the Construction Manager as a result of any losses, expenses, damages, obligations or liabilities for which the Construction Manager is responsible pursuant to the provisions of this Agreement, including liquidated damages, and apply said funds deducted toward the satisfaction of such losses, expenses, damages, obligations or liabilities.

It is expressly provided, however, that the deduction and application of such funds shall not apply if the Construction Manager undertakes and makes payment of the amounts so due and payable and shall not in any event relieve the Construction Manager of its responsibility or liability for any amounts owed in addition to those amounts deducted by the City.

16.3. Invoices. Invoices shall be submitted in detail sufficient for a proper pre-audit and post-audit thereof. Invoices for any travel expenses authorized by City shall be submitted in accordance with procedures specified in Section 112.061, Florida Statutes, governing payments by the State for travel expenses.

16.4. Risk of Loss. Except as provided pursuant to Appendix F for Owner-Purchased Materials, the risk of loss to any of the Work and to any goods, materials and equipment provided or to be provided under this Agreement, shall remain with the Construction Manager until Substantial Completion. Should any of the Work, or any such goods, materials and equipment, be destroyed, mutilated, defaced or otherwise damaged prior to the time the risk of loss has shifted to the City, the Construction Manager shall repair or replace the same at its sole cost. The Performance Bond and Payment Bond or other security or insurance protection required by the Contract Documents or otherwise provided by the City or the Construction Manager shall in no way limit the responsibility of the Construction Manager under this Section.

16.5. Damage to Property at Project Site. The Construction Manager shall be liable for any and all damage or loss to property belonging to the City or others at the Project Site to the extent caused by the Construction Manager, any Subcontractor or anyone directly or indirectly employed by any of them, or anyone for whose acts they may otherwise be liable. The costs and expenses incurred by the Construction Manager under this Section shall not be reimbursable as a Cost of the Project, except to the extent provided in Section 8.2. Nothing in the foregoing shall preclude the Construction Manager from paying such costs and expenses out of any insurance proceeds received by the Construction Manager under the policies of insurance maintained under this Agreement.

16.6. Damage to Others' Property. The Construction Manager shall avoid damage, as a result of the Construction Manager's and its Subcontractors' operations, to existing sidewalks, curbs, streets, alleys, pavements, utilities, adjoining property, the work of separate contractors, and the property of the City and others, and the Construction Manager shall repair any damage thereto caused by the Construction Manager's or its Subcontractors' operations. The costs and expenses incurred by the Construction Manager under this Section shall not be reimbursable as a Cost of the Project, except to the extent provided in Section 8.2. Nothing in the foregoing shall preclude the Construction Manager from paying such costs and expenses out of any insurance proceeds received by the Construction Manager under the policies of insurance maintained under this Agreement. In connection therewith, the City hereby waives all Claims against the Construction Manager for loss or damage to any of the City's properties which currently adjoin the Project Site, but only to the extent of the City's actual recovery of property insurance proceeds from its property insurers. If the Construction Manager fails to repair such damage, then after ten (10) days prior notice from the City to the Construction Manager, the City shall be entitled to repair such damages occurring to its property with its own forces or other contractors and to deduct from payments due or to become due to the Construction Manager amounts paid or incurred by the City, including overhead, in repairing such damages if, within the ten (10) day period after the City's delivery of such written notice to the Construction Manager, the Construction Manager has not commenced and diligently proceeded with any such repairs.

16.7. Construction Manager's Project Records. The Construction Manager's Project-related Records shall be made available to the City or its authorized representatives, including the Owner's Representative and Architect-Engineer, at mutually convenient times. Construction Manager shall maintain a copy of all contracts (including this agreement and all Subcontracts), Construction Documents, Change Orders and other Contract Modifications, in good order and marked to record all changes made during construction; Shop Drawings; product data; samples; as-builts; the most recent Master Project Schedule and Construction Schedule; applicable handbooks; maintenance and operating manuals and instructions; and other related documents that arise out of the Work or relate to the Project, including files, correspondence, documents, receipts, vouchers, invoices, memoranda, and similar data relating to all Work performed under the Contract Documents (hereinafter collectively called the "Records") in a proper business-like fashion, conforming to accepted accounting principles, and in such detail as will properly and accurately reflect the Work performed under this Agreement and all GMP Amendments, as well as the costs thereof.

16.7.1. City and/or its authorized representatives shall have the right, after reasonable Notice and at all reasonable times, to examine and make copies of all records.

16.7.2. Construction Manager shall preserve and make available to City and/or its authorized representative all Records for a period of five (5) years from the date of Final Payment, termination settlement, or until the conclusion of any Claim, litigation or appeal, whichever is longer; or for such longer period, if any, required by Applicable Law or regulation.

16.7.3. At City's expense, City or an independent certified public accountant designated by City shall have the right to audit, copy and inspect said records and accounts at all reasonable times during the course of such Work and for the above five (5) year period. At the end of the five (5) year period, if Construction Manager proposes to destroy the Project Records, Construction Manager shall notify City in writing and offer to deliver the Project Records to City at City's expense.

16.8. RFP Proposal Submission. The Construction Manager acknowledges that it was selected for this Agreement in part by the proposed approaches and plans submitted as part of its RFP Proposal Submission. The Construction Manager agrees to provide its services under this Agreement at a level not inferior to that referenced in its RFP Proposal Submission.

16.9. Tax Credits, RECs, Financial Incentives. The Project includes various requirements to achieve energy efficiencies and meet certain environmental or energy-related standards, including American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) and LEED standards, which may result in the availability of federal and/or state tax credits, including deductions under Section 179D

of the Internal Revenue Code, renewable energy credits, and other financial incentives (collectively hereinafter "Incentives"). The City is and shall be the sole recipient and beneficiary of any and all such Incentives, which shall be distributed, disbursed and/or assigned in City's sole discretion. The Construction Manager, Architect-Engineer, and Subcontractors shall have no right to any Incentives, except as otherwise agreed to in writing by City. City and Construction Manager shall explore all available opportunities for assignment or allocation of any available Incentives to the Construction Manager, Architect-Engineer or Subcontractors, as applicable, subject to valuation of the Incentives and negotiation of terms and conditions that are equitable with respect to any assignment or allocation of Incentives.

16.10. Compliance With Applicable Laws. The Construction Manager shall comply, and shall cause all Subcontractors to comply, with all Applicable Laws of any governmental agencies and authorities having jurisdiction over the Work, the Project and/or the Project Site, now existing or hereinafter in effect. Each and every Applicable Law provision required by law to be inserted in the Contract Documents shall be deemed to be inserted herein and the Contract Documents shall be read and enforced as though it were included herein, and if, through mistake or otherwise, any such provision is not so inserted or is not correctly inserted, or is inserted but is subsequently amended, then upon the application of either Party, the Contract Documents shall forthwith be amended to make such insertion or to incorporate such amendment. In no event, however, shall the failure to so insert such provision into the Contract Documents prevent the enforcement of same or relieve the Construction Manager of its obligation to fully comply with the same.

16.11. Public Entity Crime Information Statement. "A person or affiliate 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 a public entity, may not submit a bid on a contract with a public entity for the construction or repair of a public building or public work, may not submit bids on leases of real property to a public entity, may not be awarded or perform work as a Construction Manager, supplier, Subcontractor, or consultant under a contract with any public entity, and may not transact business with any public entity in excess of the threshold amount provided in Section 287.017, for CATEGORY TWO for a period of 36 months from the date of being placed on the convicted vendor list."

16.12. No Personal Liability of Public Officials. In carrying out any of the provisions of the Contract Documents or in exercising any power or City granted to them hereby, there shall be no liability upon any City official, their authorized representatives, or any employee of the City, either personally or as employees or officials of the City, it being understood that in such matters they act as agents and representatives of the City.

16.13. [NOT USED]

16.14. Audit Rights. Construction Manager's records which shall include but not be limited to accounting records, payroll time sheets, cancelled payroll checks, W-2's, 1099's, written policies and procedures, computer records, disks and software, videos, photographs, subcontract files (including proposals of successful and unsuccessful bidders), originals estimates, estimating worksheets, correspondence, change order files (including documentation covering negotiated settlements), and any other supporting evidence necessary to substantiate charges related to the Contract Documents (all the foregoing hereinafter referred to as "records") shall be open to inspection and subject to audit and/or reproduction at any time during or after the Project, during normal working hours, by City's agents or its authorized representatives to the extent necessary to adequately permit evaluation and verification of any invoices, payments or Claims submitted by the Construction Manager or any of its payees pursuant to the execution of this Agreement. Such records subject to examination shall also include, but not be limited to, those records necessary to evaluate and verify direct and indirect costs (including overhead allocations) as they may apply to costs associated with the Contract Documents.

16.14.1. Records subject to the provisions of the Florida Public Records Act, Chapter 119, Florida Statutes, shall be kept in accordance with such statute. Otherwise, for the purpose of such audits, inspections, examinations and evaluations, the City's agent or authorized representative shall have

access to said records from the effective date of this Agreement, for the duration of the Work, and until 5 years after the date of final payment by the City to Construction Manager pursuant to this Agreement.

16.14.2. The City's agent or its authorized representative shall have access to the Construction Manager's facilities, shall have access to all necessary records, and shall be provided adequate and appropriate work space, in order to conduct audits in connection with any aspect of the Project or the application of Project funds. The City or its authorized representative shall give reasonable advance notice of intended audits. City's designated auditors shall, at a minimum, have the same audit rights provided to the Miami-Dade County Inspector General's Office and/or any Independent Private Sector Inspector General as set forth in Section 16.15 below.

16.14.3. If an audit inspection or examination in accordance with this Article discloses contract billing or charges to which Construction Manager is not contractually entitled, Construction Manager shall pay over to the City said sum within twenty (20) days of receipt of a written demand unless otherwise agreed to by both Parties in writing, and Construction Manager shall pay for the audit at its sole cost and expense.

16.15. Miami-Dade County's Audit Rights. Pursuant to various agreements with Miami-Dade County ("County") related to funding for the Project, Miami-Dade County shall have the following audit rights:

16.15.1. Independent Private Inspector General Reviews. The County has the right to retain the services of an Independent Private Sector Inspector General ("IPSIG"), whenever the County deems it appropriate to do so. Upon written notice from the County to the City and/or Construction Manager, Construction Manager shall make available to the IPSIG all requested records and documentation pertaining to the Project for inspection and reproduction. The County shall be responsible for the payment of these IPSIG services, and under no circumstance shall the City or Construction Manager incur any charges relating to these IPSIG services. Nothing contained in this provision shall impair any independent right of the County to conduct an audit or investigate the operations, activities and performance of the City in connection with its agreements with Miami-Dade County.

16.15.2. Miami-Dade County Inspector General Review. Construction Manager acknowledges and agrees that the Miami-Dade County's Office of the Inspector General may, on a random basis, perform audits relating to the Project and is authorized and empowered to review past, present and proposed County and City contracts, transactions, accounts, records, agreements and programs relating to the Project. In addition, the Inspector General has the power to subpoena witnesses, administer oaths, require the production of records and monitor existing projects and programs. Monitoring of an existing project or program may include a report concerning whether the project is on time, within budget and in conformance with plans, specifications and applicable law. The Inspector General is empowered to analyze the necessity of and reasonableness of proposed change orders to a contract. The Inspector General is empowered to retain the services of independent private sector inspectors general (IPSIG) to audit, investigate, monitor, oversee, inspect and review operations, activities, performance and procurement process, including project design, specifications, proposal submittals, activities of the City, its officers, agents and employees, lobbyists, County staff and elected officials to ensure compliance with contract specifications and to detect fraud and corruption.

a. Upon written notice to the City from the Inspector General or IPSIG retained by the Inspector General, the City shall make all requested records and documents available to the Inspector General or IPSIG for inspection and copying. The Inspector General and IPSIG shall have the right to inspect and copy all documents and records in the Construction Manager's possession, custody or control which, in the Inspector General's or IPSIG's sole judgment, pertain to performance of the contract, including original estimate files, change order estimate files, worksheets, proposals and agreements form and which successful and unsuccessful Subcontractors and suppliers, all project-related correspondence, memoranda, instructions, financial documents, construction documents, proposal and contract documents, back-charge documents, all documents and records which involve cash, trade or volume discounts, insurance proceeds, rebates, or dividends received, payroll and personnel records, and supporting documentation for the aforesaid documents and records.

b. At all pertinent times, Construction Manager shall comply with the requirements of Section 2-1076 of the Miami-Dade County Code, and shall maintain all files, records, accounts of expenditures with respect to the Work, and such records shall be maintained within Miami-Dade County and made available to the City and County representatives.

16.16. Patents, Trademarks, and Copyrights.

16.16.1. Construction Manager shall grant to City an assignable, irrevocable, nonexclusive, royalty-free license, for use in connection with operation, maintenance, repair or alteration of the Work or any portion thereof, with respect to any invention based wholly or in part on or derived from proprietary information received from City and conceived or first reduced to practice by Construction Manager, its employees or agents during the course of the Work.

16.16.2. Construction Manager further agrees to grant and hereby grants to City an assignable, irrevocable, nonexclusive, royalty-free license, under all patents, trademarks, copyrights, trade secrets and similar rights now or hereafter owned or controlled by Construction Manager, to the extent necessary for the operation, maintenance, repair or alteration of the Work or any unit or component thereof designed, specified or constructed by Construction Manager under this Agreement.

16.16.3. Construction Manager further agrees to secure from all Subcontractors, suppliers and others, and convey to City, all licenses and other rights to use all patents, trademarks, copyrights, trade secrets and similar rights associated with the Work, to the extent necessary for the operation, maintenance, repair or alteration of the Work or any unit or component thereof designed, specified or constructed by Construction Manager under this Agreement.

16.16.4. Plans, prints, technical documents and data prepared or developed by Construction Manager, Subcontractors or Suppliers and furnished to City in the performance of the Work shall be the property of City and may be used by City without restriction. City shall have the right to reproduce any and all plans, prints, technical documents or other data received from Construction Manager that are considered necessary for engineering, construction, start-up, commissioning, maintenance, or other purposes related to the Project, despite any notice to the contrary appearing on the document.

16.16.5. Construction Manager shall, at Construction Manager's own expense, defend all suits or proceedings instituted against City through counsel selected by Construction Manager and reasonably satisfactory to City, and shall fully indemnify and hold City harmless and otherwise pay any award of damages and all costs (including court costs and attorney's fees) assessed against the City, in such suits or proceedings, insofar as the same are based on (i) any Claim that the material, equipment, apparatus or other item furnished under this Agreement or the GMP Amendment or any part thereof constitutes an infringement of any United States patent, trademark or copyright, or (ii) any Claim that the performance of the Work by Construction Manager, including the use of tools, implements or construction constitutes an infringement of any United States patent, trademark or copyright; provided that City shall give to Construction Manager prompt notice in writing of the institution of any such suit or proceeding and shall furnish Construction Manager (at Construction Manager's expense) all needed information, authority, and assistance to enable Construction Manager to defend the same.

If such material, equipment, apparatus, or other item is in any such suit or proceeding held to constitute infringement and its use is enjoined, Construction Manager, within a reasonable time, shall either secure for City at Construction Manager's own expense, the right to continue using said material, equipment, apparatus or other item by suspension of the injunction or by procuring for City a license to use the infringing material, equipment, apparatus, or other item. In lieu of the foregoing, Construction Manager at its own expense and as the City may elect shall replace such material, equipment, apparatus or other item with non-infringing material, equipment, apparatus or item or shall modify it so that it becomes non-infringing.

The ultimate remedy shall be without damage or injury to any other property of City and shall be at Construction Manager's sole expense.

16.17. Employment Conditions.

16.17.1. No Discrimination; Affirmative Action. The Construction Manager shall not discriminate against any workers, employees, or applicants, or any member of the public, because of race, creed, color, religion, age, sex, sexual orientation or national origin, nor otherwise commit an unfair employment practice. The Construction Manager shall take affirmative action to ensure that applicants are granted or denied employment, and that employees are treated during employment, without regard to their race, creed, color, religion, age, sex, sexual orientation or national origin. Such affirmative action shall relate to, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Construction Manager shall post (or cause to be posted) in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this non-discrimination clause. The Construction Manager further agrees that this clause will be incorporated in all contracts entered into with Subcontractors and all labor organizations furnishing skilled, unskilled and craft labor or performing any such labor in connection with the Work.

16.17.2. Civil Rights Act. The Construction Manager shall comply with, and shall require all Subcontractors to comply with, all Federal, State, and local laws, rules, regulations and ordinances relating to employment and the design and construction of the Project, including the Civil Rights Act of 1964, Pub. L. 88-352, July 2, 1964, 78 Stat. §701 et seq., as amended; the Americans With Disabilities Act of 1990, Pub. L. 101-336, July 26, 1990; and the City's Human Rights Ordinance, as same may be amended.

16.17.3. Prevailing Wages. The Construction Manager shall comply with, and shall require all Subcontractors to comply with, Sections 31-27 through 31-30 of the City Code, as same may be amended from time to time, with regard to minimum hourly wage rates for all employees who provide services pursuant to this Agreement, as follows:

a. The rate of wages and fringe benefit payments for all laborers, mechanics, and apprentices shall not be less than those payments for similar skills in classifications of work in a like construction industry as determined by the Secretary of Labor and as published in the Federal Register (latest revision, General Decision No. FL150027, dated 01/09/2015). All mechanics, laborers, and apprentices, employed or working directly upon the Project Site shall be paid in accordance with the above referenced wage rates. Construction Manager shall post notice of these provisions at the Jobsite in a prominent place where it can be easily seen by the workers.

b. If the Parties cannot agree on the proper classification of a particular class of laborers or mechanics or apprentices to be used, the Parties shall submit the question, together with its recommendation, to the City Manager for final determination.

c. In the event it is found by the City that any laborer or mechanic or apprentice employed by Construction Manager, or any Subcontractor directly on the Project Site has been or is being paid at a rate of wages less than the rate of wages required by the ordinance, the City may (1) by written notice to Construction Manager terminate its right to proceed with the Work or such part of Work for which there has been a failure to pay said required wages; and (2) prosecute the Work or portion thereof to completion by contract or otherwise. Whereupon, City and its sureties shall be liable to City for any excess costs occasioned to City thereby.

d. Construction Manager shall maintain payrolls and basic records relating thereto during the course of the Work and shall preserve such for a period of three (3) years thereafter for all laborers, mechanics, and apprentices working at the Project Site. Such records shall contain the name and address of each such employee; its current classification; rate of pay (including rates of contributions for, or costs assumed to provide, fringe benefits); daily and weekly number of hours worked; deductions made; and actual wages paid.

e. Construction Manager shall be required to submit, with each requisition for payment, any signed and sworn statement of compliance with the prevailing wage rate ordinance, as may be required by the City. Construction Manager shall submit certified payrolls for each requisition period. Certified payrolls should include employee name, address and social security number, labor classification, hours worked, hourly base rate, hourly fringe rate and hourly benefit rate

f. The City may withhold or cause to be withheld from Construction Manager so much of the payments requisitioned as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and guards employed by Construction Manager or any Subcontractor on the work, the full amount of wages required by the Contract Documents or terms of the applicable subcontract.

g. If Construction Manager or any Subcontractor fails to pay any laborer, mechanic, or apprentice employed or working on the Project Site all or part of the wages required by the Contract documents or terms of the applicable subcontract, the City may, after written notice to Construction Manager, take such action as may be necessary to cause suspension of any further payments or advances until such violations have ceased.

h. Construction Manager shall provide monthly reports on prevailing wage requirements for the Project.

16.17.4. Equal Benefits. Construction Manager certifies and represents that it shall comply with all applicable provisions of Section 2-373 of the City Code, as same may be amended from time, with regard to equal benefits for domestic partners of employees. The failure to comply with this Section shall constitute a material event of default of this Agreement.

16.18. Survival of Provisions. In order that the Parties to this Agreement may fully exercise their rights and perform their obligations hereunder arising from the performance of the Work, any provisions of this Agreement that are required to ensure exercise of such rights or performance shall survive termination of this Agreement regardless of the cause for such termination and regardless of whether or not such termination applies to all or only part of the Agreement.

16.19. Severability. The invalidity or unenforceability of any portion or provision of this Agreement shall in no way affect the validity or enforceability of any other portion or provision hereof. Any invalid or unenforceable portion or provision shall be deemed severed from this Agreement and the balance of the Agreement shall be construed and enforced as if the Agreement did not contain such invalid or unenforceable portion or provision. In the event any such provision of this Agreement is declared invalid, the Parties shall promptly negotiate in good faith new provisions to eliminate such invalidity and to restore this Agreement as near as possible to its original intent and effect.

16.20. No Waiver. No waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of this Agreement by either Party at any time shall in any way affect, limit, modify or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision hereof, any course of dealing or custom of the trade notwithstanding.

16.21. No Contingent Fee. Construction Manager warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for Construction Manager to solicit or secure this Agreement and that it has not paid or agreed to pay any person, company, corporation, individual or firm, other than a bona fide employee working solely for Construction Manager, 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 liability at its discretion, to deduct from the Contract Price, or otherwise recover, the full amount of such fee, commission, percentage, gift or consideration.

16.22. Claims for Damages
Except as to damages and/or liquidated damages pursuant to Subsection 5.1.3.1(a) through Subsection 5.1.3.1(c), the Construction Manager and City waive Claims against each other for consequential

damages arising out of or relating to this Contract in excess of Five Million Dollars (\$5,000,000) (the "Claim Limit"); provided, however, that no Party shall be entitled to recover such damages until the total aggregate amount of such damages suffered or incurred by such Party exceeds Two Hundred Thousand Dollars (\$200,000) (the "Threshold Amount"). To the extent the amount of such damages exceeds the Threshold Amount, the Construction Manager or City, as the case may be, shall be entitled to recover the Threshold Amount as well as the amount of its damages in excess of the Threshold Amount. The claiming Party agrees first to look to any available insurance with respect to any Claim; and the Threshold Amount and Claim Limit will be applicable to damages in excess of such available insurance.

The consequential damages to which the foregoing limited waiver applies shall be limited to the following:

16.22.1 damages incurred by the City for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons, except for damages and/or liquidated damages pursuant to Subsection 5.1.3.1(a) through Subsection 5.1.3.1(c), which shall not be subject to the Claim Limit or the Threshold Amount; and

16.22.2 damages incurred by the Construction Manager for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit and other damages specified in Section 15.1.1(b) hereof.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 13. Nothing contained in this Section 16.22 shall be deemed to limit or preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents. Further, nothing set forth in this Section 16.22 shall be deemed to be a waiver or limitation on any Party's right to direct damages for any breach of the other Party's obligations under the Contract Documents.

16.23. Entire Agreement. The Contract Documents shall constitute the entire agreement between the Parties with respect to its subject matter and supersedes all prior agreements, representations and understandings of the Parties, written or oral. No inducements, considerations, promises, or other references shall be implied in the Contract Documents that are not expressly addressed herein.

[signature page to follow]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year first written above.

CITY OF MIAMI BEACH, FLORIDA

ATTEST:

By: _____
City Clerk

By: _____
Philip Levine, Mayor

APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION

Paul C. F. 5/14/15
City Attorney RAP Date

ATTEST:

CLARK CONSTRUCTION GROUP, LLC

Print Name:

By: _____
Sidney J. Jordan
Division CEO/President
Northern & Southern Region

Print Name:

APPENDIX A
PROJECT TEAM ASSIGNED REPRESENTATIVES

City of Miami Beach:

Maria Hernandez, Project Director, Convention Center District (Project Coordinator)
Email: MariaHernandez@miamibeachfl.gov

Thais Vieira, Senior Project Manager
Email: ThaisVieira@miamibeachfl.gov

Architect-Engineer:

John Kudrycki, Fentress Architects
Email: Kudrycki@fentressarchitects.com

Owner's Representative:

Deborah Palmer, Hill International
Email: DeborahPalmer@hillintl.com

Eladio Castrodad
Email: EladioCastrodad@hillintl.com

Construction Manager:

Mark Eames, Project Manager
Email: mark.eames@clarkchicago.com

Bill Dooling, Construction Superintendent

For other Construction Manager personnel, see Appendix B.

APPENDIX B
Construction Manager

Pre-construction & Construction Phase Personnel

Office Staff

William Dean – Executive Vice President

James Faddis – Senior Estimator

Mark Eames – Senior Project Manager

David Gillam – Project Manager

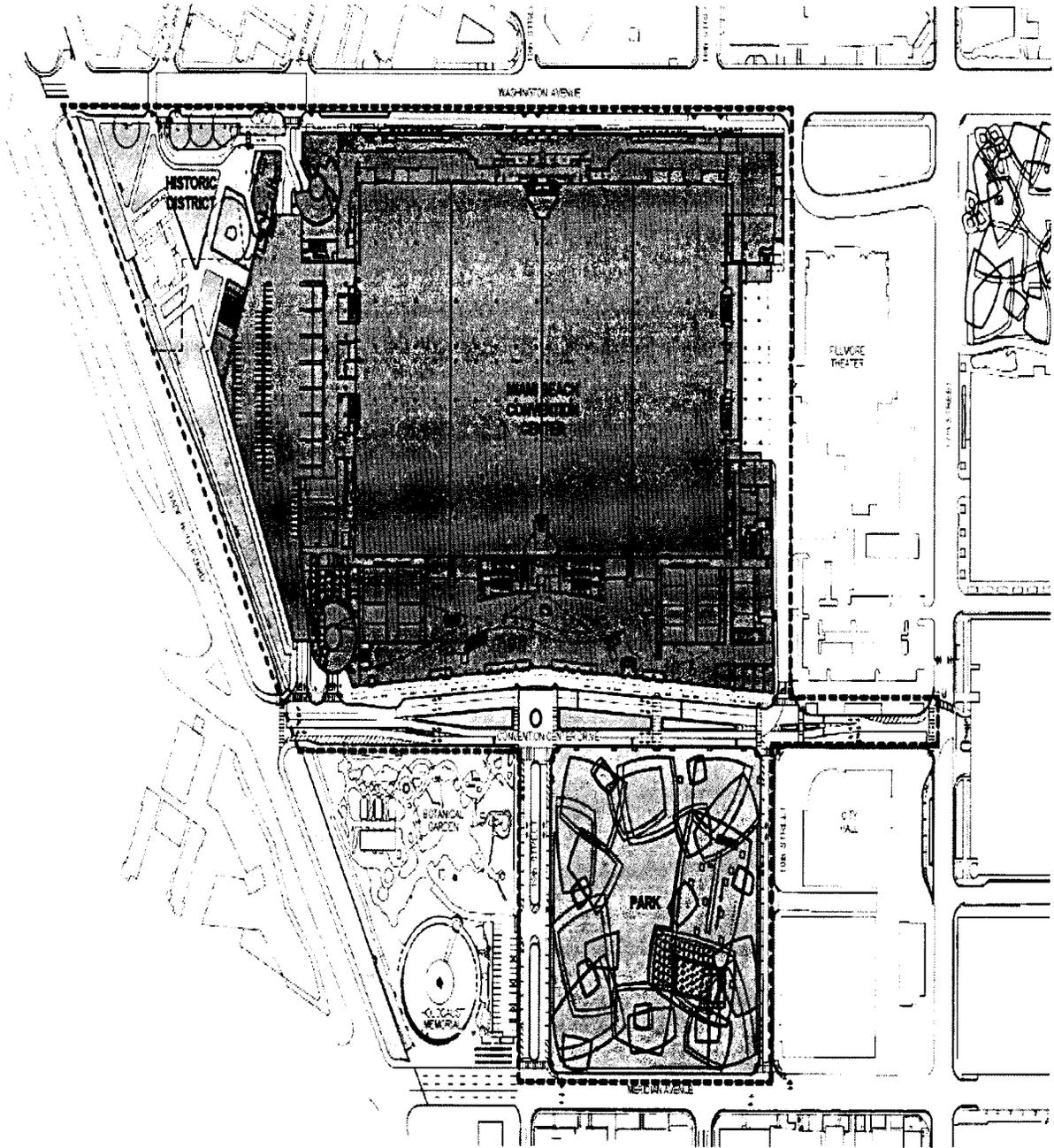
On-Site Staff

Sarah Earle – Assistant Project Manager

William Dooling – Project Superintendent

John Hockensmith– Assistant Project Superintendent

APPENDIX C
Project Site



APPENDIX D
PROJECT PHASES OF THE WORK AND MILESTONES

1. Phases of the Work

1.1. **Phasing Plan TBD with input from the Construction Manager.**

2. The Project Schedule shall include the following Milestones:

2.1. "Art Basel 2016 Milestone" shall mean the November 16, 2016 date by which, without regard to whether Substantial Completion of the Phase 1A Work is timely achieved, Construction Manager shall deliver the Project Site for load-in for the December 3, 2016 Art Basel exhibition, and by which the Construction Manager must obtain a temporary certificate of occupancy and/or completion, as applicable, and/or otherwise satisfy all conditions or requirements of any agencies having jurisdiction (including fire watch or other conditions that may be imposed under City special event permits, if such permits are required) so as to permit the following portions of the Project Site to be fully operational and available for occupancy and use by the public, vendors and others, including:

i. the main floor exhibition spaces (Halls A through D), with removal of the north/south temporary divider walls or partitions so as to provide open and uninterrupted access within and throughout Halls A through D;

ii. the new first floor north junior ballroom;

iii. north loading dock areas and full and open access to loading docks;

iv. first-floor interior West Concourse and East Concourse areas so as to permit safe public access to the Exhibition Halls A through D and other areas of the Convention Center from Washington Avenue and Convention Center Drive;

v. the existing Convention Center spaces not under construction as part of the Phase 1A Work, including the existing Convention Center kitchen, south meeting rooms and existing south second-level spaces, second level east and west corridor meeting rooms;

vi. operational restrooms (or an appropriate number of portable or temporary restrooms), sufficient to permit use of the Convention Center by up to 20,000 daily guests;

vii. support spaces or "back-of-house" areas for the areas identified in subsections (i) through (v);

viii. exterior enclosure of the Convention Center building, sufficient to permit the use of the foregoing interior areas identified in subsections (i) through (vii), even if certain aspects of the exterior façade, including the exterior fins, are not otherwise completed;

ix. interiors sufficient for occupancy or for temporary use, i.e. with temporary partitions to protect uncompleted areas, temporary flooring if necessary, and other similar temporary measures if required to protect or enclose areas that remain uncompleted by the November, 2016 milestone date

x. temporary or permanent HVAC, security systems, sprinkler systems, mechanical, electrical, plumbing, lighting, accessibility, and life safety systems sufficient to meet all conditions or requirements of authorities having jurisdiction for occupancy/use by the public;

xi. a clean and open Convention Center Drive, 18th Street, and 19th Street within the Project Site;

xii. fencing of the P-lot with appropriate fence screens to limit public view of construction staging area and enhance aesthetics of the Project Site;

xiii. use of 50% of P-lot for parking or event tent space(s);

xiv. removal of equipment, machinery, tools, materials, and debris, as well as general clean-up, so as to make the Project Site suitable for use by Art Basel and its event patrons.

2.2. "Art Basel 2017 Milestone" shall mean the November 22, 2017 date by which, without regard to whether Substantial Completion of the Phase 2A/2B Work is timely achieved, Construction Manager shall deliver the Project Site for load-in for the December 3, 2017 Art Basel exhibition, and by which the Construction Manager must obtain a temporary certificate of occupancy and/or completion, as applicable, and/or otherwise satisfy all conditions or requirements of any agencies having jurisdiction (including fire watch or other conditions that may be imposed under City special event permits, if such permits are required) so as to permit the following portions of the Project Site to be fully operational and available for occupancy and use by the public, vendors and others, including:

i. the main floor exhibition spaces (Halls A through D), with removal of the north/south temporary divider walls or partitions so as to provide open and uninterrupted access within and throughout Halls A through D;

ii. the new first floor north junior ballroom and first floor south junior ballroom;

iii. north and south loading dock areas and full and open access to loading docks;

iv. first-floor interior West Concourse and East Concourse areas so as to permit safe public access to the Exhibition Halls A through D and other areas of the Convention Center from Washington Avenue and Convention Center Drive;

v. the new north kitchen or, if the new kitchen is not completed, the existing east Convention Center kitchen;

vi. second level spaces delineated as part of the Phase 2A/2B Work;

vii. operational restrooms (or an appropriate number of portable or temporary restrooms), sufficient to permit use of the Convention Center by up to 20,000 daily guests;

viii. support spaces or "back-of-house" areas for the areas identified in subsections (i) through (vii);

ix. exterior enclosure of the Convention Center building, sufficient to permit the use of the foregoing interior areas identified in subsections (i) through (viii), even if certain aspects of the exterior façade, including the exterior fins, are not otherwise completed

x. interiors sufficient for occupancy or for temporary use, i.e. with temporary partitions to protect uncompleted areas, temporary flooring if necessary, and other similar temporary measures if required to protect or enclose areas that remain uncompleted by the November, 2017 milestone date

xi. temporary or permanent HVAC, security systems, sprinkler systems, mechanical, electrical, plumbing, lighting, accessibility, and life safety systems sufficient to meet all conditions or requirements of authorities having jurisdiction for occupancy/use by the public;

xii. a clean and open Convention Center Drive, 18th Street, and 19th Street within the Project Site;

xiii. fencing of the P-lot with appropriate fence screens to limit public view of construction staging area and enhance aesthetics of the Project Site;

xiv. use of 50% of P-lot for parking or event tent space(s);

xv. removal of equipment, machinery, tools, materials, and debris, as well as general clean-up, so as to make the Project Site suitable for use by Art Basel and its event patrons.

APPENDIX E
INSURANCE AND BONDING REQUIREMENTS

1. Construction Manager shall submit all supporting documentation and detailed invoices with respect to insurance and bond premiums. City's reimbursement of insurance and bond premiums shall be for the portion of insurance and bond premiums directly attributable to this Agreement (i.e. for those contracts actually enrolled or verifiably enrolled in the insurance program). Premiums shall be net of trade discounts, volume discounts, dividends and other adjustments.

2. The Performance Bond, the Payment Bond, and any Bid Bond in excess of \$500,000 must each be executed by a surety company in good standing with the Florida Office of Insurance Regulation and adequate rating from A.M. Best indicated in these Contract Documents, authorized to do business in the State of Florida as surety, having a resident agent in the State of Florida and having been in business with a record of successful continuous operation for at least five (5) years.

3. The surety company that is bound by the performance bond and payment bond, respectively, shall be responsible for Construction Manager's acceptable performance of the Work under the Contract and/or for the payment of all debts pertaining thereto in accordance with Section 255.05, Florida Statutes.

4. The surety company shall hold a current certificate of authority as acceptable surety on federal bonds in accordance with United States Department of Treasury Circular 570, Current Revisions. If the amount of the Bond exceeds the underwriting limitation set forth in the circular, in order to qualify, the net retention of the surety company shall not exceed the underwriting limitation in the circular, and the excess risks must be protected by coinsurance, reinsurance, or other methods in accordance with Treasury Circular 297, revised September 1, 1978 (31 CFR Section 223.10, Section 223.11.) Further, the surety company shall provide City with evidence satisfactory to City, that such excess risk has been protected in an acceptable manner.

5. The City will accept a surety bond from a company in accordance with the requirements set forth below; provided however, that if any surety company appears on the watch list that is published quarterly by Intercom of the Office of the Florida Insurance Commissioner, the City shall review and either accept or reject the surety company based on the financial information available to the City. The following sets forth, in general, the acceptable parameters for bonds:

Policy- Financial holder's Size

| Amount of Bond | Ratings | Category |
|------------------------------|---------|-----------|
| \$500,001 to \$1,000,000 | A- | Class I |
| \$1,000,001 to \$2,000,000 | A- | Class II |
| \$2,000,001 to \$5,000,000 | A | Class III |
| \$5,000,000 to \$10,000,000 | A | Class IV |
| \$10,000,001 to \$25,000,000 | A | Class V |
| \$25,000,001 to \$50,000,000 | A | Class VI |
| \$50,000,001 or more | A | Class VII |

INSURANCE REQUIREMENTS

1. **BUILDER'S RISK**

City shall obtain and maintain **Builder's Risk insurance** for the Project, providing coverage for all risks of direct physical loss or damage including flood, earthquake, and named windstorm, as more fully described in the original policy wording. Construction Manager, and all Subcontractors of every tier performing a portion of the Work on the Project, shall be additional insureds under the Builder's Risk insurance, as their respective interests appear. The Builder's Risk insurance will provide for property in the course of construction, including off-site storage, transit, buildings, structures, fixtures, materials, foundations, machinery and equipment, cold testing, and damage to existing property business interruption at the Miami Beach Convention Center, all as more fully described in the original policy wording. The Builders Risk insurance shall be written to insure the Project's completed value or such other amounts as may be agreed-upon by City and Construction Manager, based on the consideration of the costs and/or commercial availability of such coverage. Construction Manager shall be responsible for deductibles under the Builder's Risk insurance up to \$25,000 per occurrence. The policy shall be written such that the building can be occupied during the project, and coverage will remain in force. The builders risk coverage shall terminate only upon acceptance of the completed project by the City, and only when the City has had an opportunity to report and insure the additional values under the City's property insurance program.

2. **CONTRACTOR-CONTROLLED INSURANCE PROGRAM**

Construction Manager shall provide, pay for, and maintain in force until all times during the term of this Agreement (unless otherwise provided) and any extensions thereof, a Contractor Controlled Insurance Program ("CCIP") for the Project with the insurance coverages set forth in this Appendix E.

2.1. Parties of all tiers performing labor or services at the Project Site shall be eligible to enroll in the CCIP for the Project duration. The CCIP will provide to Enrolled Parties (as defined below) Workers' Compensation and Employer's Liability insurance, Commercial General Liability insurance, Excess Liability insurance, as summarily described below, in connection with the performance of the Work ("CCIP Coverages").

2.2. **Summary of CCIP Coverages.** CCIP Coverages shall apply only to those operations of each Enrolled Party performed at the Project Site in connection with the Work. An Enrolled Party's operations away from the Project Site, including product manufacturing, assembling, or otherwise, shall only be covered if such off-site operations are identified and are dedicated solely to the Project. The CCIP shall provide the following insurance to eligible and Enrolled Parties:

a) **Workers' Compensation insurance** at the Statutory Limit in compliance with the Workers' Compensation Law of the State of Florida, and in compliance with all federal laws, including U.S. Longshore & Harbor Workers Act, and Jones Act coverage, where appropriate.

This insurance is primary for all occurrences at the Project Site.

Employer's Liability Insurance with the following limits:

| | |
|--|-------------|
| Bodily Injury by Accident, each accident | \$1,000,000 |
| Bodily Injury by Disease, each employee | \$1,000,000 |
| Bodily Injury by Disease, policy limit | \$1,000,000 |

This insurance is primary for all occurrences at the Project Site.

b) **Commercial General Liability** Insurance provided on ISO Occurrence Form, or its equivalent, with the following limits:

| | |
|---|-------------|
| Each Occurrence Limit | \$2,000,000 |
| General Aggregate Limit for all Enrolled Parties | \$4,000,000 |
| Products & Completed Operations Aggregate for all Enrolled Parties | \$4,000,000 |
| Ten (10) Years Products & Completed Operations Extension | |
| This insurance is primary for all occurrences at the Project Site. | |

c) **Excess Liability Insurance** (over Employer's Liability & General Liability), with the following limits:

| | |
|---|---------------|
| Combined Single Limit | \$200,000,000 |
| General Annual Aggregate for all Enrolled Parties | \$200,000,000 |
| Products & Completed Operations Aggregate for all Enrolled Parties | \$200,000,000 |
| Ten (10) Years Products & Completed Operations Extension | |

2.3. Except as to the Workers' Compensation policy, shall name City, Architect-Engineer Architects, Hill International, Inc., Global Spectrum, their respective officers, agents and employees, and any additional entities as City may request, as additional insureds of the CCIP.

2.4. **Construction Manager's CCIP Obligations**. Construction Manager shall furnish City with monthly reports concerning the status of enrolled parties, and excluded parties and other information as may be requested by the City.

2.5. For all policies provided under this Section, the policy(ies) must be endorsed to provide City with at least ninety (90) days' notice of cancellation and/or restriction.

2.6. Construction Manager shall furnish to the City Certificates of Insurance or endorsements evidencing the insurance coverage specified above within fifteen (15) days after notification of award of the Agreement. The required Certificates of Insurance shall name the types of policies provided, refer specifically to this Agreement, and state that such insurance is as required by this Agreement. The Certificate of Insurance shall be in form similar to and contain the information set forth in a standard Accord form 25-S. The failure to provide the Certificate of Insurance within fifteen (15) days shall be the basis for the rescission of the awarding Agreement. Additional insured certificates for the City shall read "City of Miami Beach, Florida", 1700 Convention Center Drive, Miami Beach, FL, 33139, Attn: Risk Management, 3rd Floor.

2.7. **Right to revise or reject**. City's Risk Management Division reserves the right, but not the obligation, to review and revise any insurance requirements at the time of contract renewal and/or any amendments, including deductibles, limits, coverages and endorsements based on insurance market conditions affecting the availability or affordability of coverage; or changes in the scope of work/specifications affecting the applicability of coverage.

2.8. **Duty of Care**. Nothing contained in this Appendix E shall relieve the Construction Manager or any of its Subcontractors of any tier of their respective obligations to exercise due care in the performance of their duties in connection with the Work, and to complete the Work in strict compliance with the Contract Documents.

2.9. **Construction Manager's Failure to Procure**. Construction Manager's failure to procure or maintain the insurance required by this Appendix E during the entire term of the Work shall constitute a material breach of the Agreement. In the event of such a breach, the City may exercise all available rights and remedies hereunder, including the right to immediately suspend or terminate the Agreement or, at its discretion, procure or renew such insurance to protect the City's interests and pay any and all premiums in connection therewith, and withhold or recover all monies so paid from the Construction Manager.

2.10. **Waiver of Subrogation.** Where permitted by law, Construction Manager hereby waives all rights of recovery by subrogation or otherwise (including claims related to deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage), against City, and its respective officers, agents, or employees. Certificate of insurance shall evidence the waiver of subrogation in favor of the City, and that coverage shall be primary and noncontributory, and that each evidenced policy includes a Cross Liability or Severability of Interests provision, with no requirement of premium payment by the City.

2.11. As part of the GMP Amendment, City reserves the right to elect to implement an Owner Controlled insurance Program at least equal to the Contractor Controlled Insurance Program.

3. OTHER INSURANCE

Construction Manager shall also provide, pay for and maintain in force until all times during the term of this Agreement (unless otherwise provided) and any extensions thereof, the following insurance:

3.1. Business Automobile Liability with minimum limits of One Million Dollars (**\$1,000,000**) per occurrence, combined single limit for Bodily Injury Liability and Property Damage Liability. Coverage must be afforded on a form no more restrictive than the latest edition of the Business Automobile Liability policy, without restrictive endorsements, as filed by the Insurance Services Office, and must include:

Owned Vehicles.

Hired and Non-Owned Vehicles.

3.2. Pollution Liability, which covers mitigation expenses and third-party liability in the minimum amount of Ten Million Dollars (\$10,000,000) per claim, subject to a maximum deductible acceptable to the City. Such policy shall include an annual policy aggregate in the amount of Twenty Million Dollars (\$20,000,000) and name City as additional insured. Construction Manager shall indicate the deductible for this coverage on its Certificate of Insurance.

3.3. If the initial insurance expires prior to the completion of the Work, renewal copies of policies shall be furnished at least fourteen (14) days prior to the date of their expiration. The policy(ies) must be endorsed to provide the City with at least thirty (30) days' notice of cancellation and/or restriction.

3.4. Construction Manager shall furnish to the City Representative Certificates of Insurance or endorsements evidencing the insurance coverage specified herein within fifteen (15) days after notification of award of the Agreement. The required Certificates of Insurance shall name the types of policies provided, refer specifically to this Contract, and state that such insurance is as required by this Agreement. The Certificate of Insurance shall be in form acceptable to and subject to approval by City. The failure to provide the Certificate of Insurance within fifteen (15) days shall be the basis for the rescission of the awarding Agreement. The official title of the certificate holder is City of Miami Beach, Florida. This official title shall be used in all insurance documentation. Construction Manager, at City's request, may review a certified copy of any insurance policy specified herein.

3.5. City's Risk Management Division reserves the right, but not the obligation, to review and revise any insurance requirements at the time of contract renewal and/or any amendments, including deductibles, limits, coverages and endorsements based on insurance market conditions affecting the availability or affordability of coverage; or changes in the scope of work/specifications affecting the applicability of coverage.

3.6. City, Architect-Engineer Architects, Hill International, Inc. and Global Spectrum shall be expressly included as an Additional Insured on all policies, as applicable, and with an endorsement that is acceptable to the City. Additional insured certificates for the City shall read "City of Miami Beach, Florida", 1700 Convention Center Drive, Miami Beach, FL, 33139, Attn: Risk Management, 3rd Floor.

3.7. Notice of Cancellation and/or Restriction--The policy(ies) must be endorsed to provide City with at least ninety (90) days' notice of cancellation or non-renewal and/or restriction. A copy of the endorsement(s) shall be provided with the Certificates of Insurance.

3.8. City's review of Construction Manager's insurance policies, or Construction Manager's furnishing of insurance coverage, shall in no way relieve or limit, or be construed to relieve or limit, Construction Manager or any of its Subcontractors of any responsibility, liability, or obligation imposed by the Contract Documents, or by law, including any indemnification obligations which Construction Manager or any of its Subcontractors have to City thereunder.

3.9. Construction Manager's Failure to Procure. Construction Manager's failure to procure or maintain the insurance required by this Appendix E during the entire term of the Work shall constitute a material breach of the Agreement. In the event of such a breach, the City may exercise all available rights and remedies hereunder, including the right to immediately suspend or terminate the Agreement or, at its discretion, procure or renew such insurance to protect the City's interests and pay any and all premiums in connection therewith, and withhold or recover all monies so paid from the Construction Manager.

3.10. **Waiver of Subrogation.** Where permitted by law, Construction Manager hereby waives all rights of recovery by subrogation or otherwise (including claims related to deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage), against City, and its respective officers, agents, or employees. Certificate of insurance shall evidence the waiver of subrogation in favor of the City, and that coverage shall be primary and noncontributory, and that each evidenced policy includes a Cross Liability or Severability of Interests provision, with no requirement of premium payment by the City.

APPENDIX F
DIRECT PURCHASE PROGRAM

1. The City is generally exempt from taxation and may elect to implement a direct purchase program whereby it may purchase materials and equipment included in any bid for a portion of the Work directly from the supplier of such materials or equipment in order to achieve sales tax savings.

2. Any equipment, materials or supplies directly purchased by the City that are included in the Construction Manager's contract shall be referred to as Owner-Purchased Materials and the responsibilities of both City and Construction Manager relating to such Owner-Purchased Materials shall be governed by the terms and conditions of these procedures.

3. Material suppliers shall be selected by the Construction Manager. The Construction Manager included the price for all construction materials plus applicable taxes in the GMP. City purchasing of construction materials, if selected, will be administered on a deductive Change Order basis. The Cost of the Work and Guaranteed Maximum Price amount shall be reduced by the net, undiscounted, amount of the City's purchase order, plus all sales taxes that would have applied.

4. Construction Manager (including its Subcontractors) shall provide City with a list of all intended suppliers, vendors, and materialmen for consideration as Owner-Purchased Materials. This list shall be submitted at the same time as the preliminary schedule of values and the Project/CPM Schedule. Construction Manager shall submit a description of the materials to be supplied, estimated quantities and unit prices.

5. Upon request from City, Construction Manager shall prepare a standard Purchase Order Requisition Form in a form acceptable to the City, to specifically identify the materials which City has, at its sole option, elected to purchase directly. The Purchase Order Requisition Form shall include:

- a) The name, address, telephone number and contact person for the material supplier;
- b) Manufacturer or brand, model or specification number of the item;
- c) Quantity needed as estimated by Construction Manager or subcontractor;
- d) The price quoted by the supplier for the materials identified therein;
- e) Any sales tax associated with such quote; and
- f) Delivery dates as established by Subcontractor.

6. City to utilize its standard purchase order terms and conditions for Owner-Purchased Materials. Construction Manager must obtain approval of the City for any proposed deviations from the standard terms and conditions i.e. payment terms, warranties, retainage, etc. Such Purchase Order Requisition Form is to be submitted to City no less than thirty (30) days prior to the date required for ordering such Owner-Purchased Materials, in order to provide sufficient time for City review and approval and to assure that such Owner-Purchased Materials may be directly purchased by City and delivered to the Project Site so as to avoid any delay to the Project.

7. After receipt of the Purchase Order Requisition Form, City shall prepare its Purchase Orders for equipment, materials or supplies. Pursuant to the Purchase Order, the vendor will provide the required quantities of material at the price established in the vendor's quote to the Construction Manager, less any sales tax associated with such price. Promptly upon receipt of each Purchase Order, Construction Manager shall verify the terms and conditions of the Purchase Order prior to its issuance to supplier and in a manner to assure proper and timely delivery of items. The Project Coordinator, or his or her designee, shall be the approving authority for the City on Purchase Orders in conjunction with Owner-Purchased materials. The Purchase Order shall require that the supplier provide the required shipping

and handling insurance. The Purchase Order shall also require the delivery of the Owner-Purchased Materials on the delivery date(s) provided by the Construction Manager in the Purchase order Requisition Form and shall indicate F.O.B. Jobsite. The City's Purchase Orders shall contain, or be accompanied by, the City's exemption certificate, a Certificate of Entitlement in accordance with applicable law, and must include the City's name, address, and exemption number with issue and expiration date shown.

8. In conjunction with the execution of the Purchase Orders by the supplier, the Construction Manager shall execute and deliver to City one or more deductive Change Orders, referencing the full value of all Owner-Purchased Materials plus all sales tax savings associated with such materials in the bid to Construction Manager or its Subcontractors.

9. All Shop Drawings and submittals shall be made by the Construction Manager in accordance with the Contract Documents.

10. Construction Manager shall be fully responsible for all matters relating to the receipt of materials furnished by City in accordance with these procedures, including verifying correct quantities, verifying documentation or orders in a timely manner, coordinating purchases, providing and obtaining all warranties and guarantees required by the Contract Documents, inspection and acceptance of the goods at the time of delivery, and loss or damage to equipment and materials following acceptance of items by the City due to the negligence of the Construction Manager or its Subcontractors. The Construction Manager shall coordinate delivery schedules, sequence of delivery, loading orientation, and other arrangements normally required by the Construction Manager for the particular materials furnished. The Construction Manager shall provide all services required for the unloading, handling and storage of materials through installation. The Construction Manager agrees to indemnify and hold harmless the City from any and all Claims of whatever nature resulting from nonpayment of goods to suppliers arising from the actions or directions of Construction Manager.

11. As Owner-Purchased Materials are delivered to the Project Site, the Construction Manager and Owner's Representative shall visually inspect all shipments from the suppliers, and approve the vendor's invoices for materials delivered. The Construction Manager shall assure that each delivery is accompanied by documentation adequate to identify the Purchase Order against which the purchase is made. This documentation may consist of a delivery ticket and an invoice from the supplier confirming the Purchase Order, together with such additional information as the City or Construction Manager may require. The Construction Manager will verify, in writing, the accuracy of the delivery ticket. The Construction Manager will then forward the invoice to the City. The City will process and pay directly to the vendor in the manner as all other City invoices are processed. The City shall have the right to assign City personnel to verify and audit the accuracy of all Direct Purchase documents. The Construction Manager shall ensure that Owner-Purchased Materials conform to the Contract Documents and determine prior to incorporation into the Work if such materials are patently defective, and whether such materials are identical to the materials ordered and match the description on the bill of lading. If the Construction Manager discovers defects or non-conformities in the Owner-Purchased Materials, upon such visual inspection, the Construction Manager shall not utilize such non-conforming or defective materials in the Work and instead shall promptly notify the Vendor of the defective or non-conforming condition in order to pursue repair or replacement of those materials without any undue delay or interruption to the Project. Additionally, the Construction Manager shall notify the City of such occurrence. If the Construction Manager fails to perform such inspection, and otherwise incorporates Owner-Purchased Materials, the condition of which it either knew about or should have known about by performance of an inspection, Construction Manager shall promptly take action to remedy the defect or non-conformity so as not to delay the Work.

12. The Construction Manager shall maintain records of all Owner-Purchased Materials it incorporates into the Work from the stock of Owner-Purchased Materials in its possession. The Construction Manager shall account monthly to the City for any Owner-Purchased Materials delivered into the Construction Manager's possession, including portions of all such materials which have been incorporated into the Work.

13. The Construction Manager shall be responsible for obtaining and managing all warranties and guarantees for all materials and products as required by the Contract Documents. All repairs, maintenance or damage repair calls shall be forwarded to the Construction Manager for resolution with the appropriate supplier or Vendor.

14. Notwithstanding the transfer of Owner-Purchased Materials by the City to the Construction Manager's possession, the City shall retain title to any and all Owner Purchased Materials.

15. The transfer of the possession of Owner-Purchased Materials from the City to the Construction Manager shall constitute a bailment for mutual benefit of the City and the Construction Manager. The City shall be considered the bailor and the Construction Manager the bailee of the Owner-Purchased Materials. Owner-Purchased Materials shall be considered returned to the City for purposes of its bailment at such time as they are incorporated into the Project or consumed in the process of completing the Project. Bailee shall have the duty to safeguard, store and protect all Owner-Purchased Materials.

16. The City shall purchase and maintain insurance pursuant to the requirements set forth in the Contract Documents which shall be sufficient to protect against any loss or damage to Owner-Purchased equipment, materials or supplies. Such insurance shall cover the full value of any Owner-Purchased Materials not yet incorporated into the Project from the time the City first takes title.

17. The City shall in no way be liable for interruption or delay in the Project, for any defects or any other problems with the Project, or for any extra cost resulting from delay in the delivery of, or defects in, Owner-Purchased Materials.

18. On a monthly basis, Construction Manager shall be required to review invoices submitted by all suppliers of Owner-Purchased Materials delivered to the Project Site during that month and either concur or object to the City 's issuance of payment to the suppliers, based upon Construction Manager's records of materials delivered to the Project Site and any defects in such materials.

19. In order to arrange for the prompt payment to the supplier, the Construction Manager shall provide to the City a list indicating the acceptance of the goods or materials in accordance with the established monthly Payment Request Schedule. The list shall include a copy of the applicable Purchase Orders, invoices, and delivery receipts of data provided. Checks will be released, delivered and remitted directly to the suppliers. The Construction Manager agrees to assist the City to immediately obtain partial or final release of lien waivers as appropriate.

20. At the end of the Project, any salvage materials shall be the property of the City and stored or removed from the Project Site by the Construction Manager and/or its Subcontractors at the City 's discretion.

Subject to final approval by the Project Coordinator, City anticipates that it will directly purchase the following items pursuant to this Appendix F: [TBD]

APPENDIX G
DISPUTE AVOIDANCE PANEL

1. **PURPOSE.** The purpose of this dispute avoidance process is primarily to assist in the prevention of disputes between the City and Construction Manager and the mitigation of impacts to the Project, and secondarily to assist in the resolution of disputes and Claims between the Construction Manager and City arising out of the Contract Documents. The intent of the establishment of the DISPUTE AVOIDANCE PANEL ("PANEL") is to facilitate contemporaneous agreement as to the resolution of events occurring during the progress of the Work, and if agreement cannot be quickly reached, then to fairly and impartially consider disputes placed before it and to provide verbal or written recommendations for resolution of these disputes to both the City and the Construction Manager. All decisions of the PANEL are non-binding on the Parties.

2. **PANEL SCOPE**

2.1 **Operations:** The PANEL will formulate its own rules of operation, which will be kept flexible to adapt to changing situations. The City and Construction Manager will keep the PANEL informed of construction activity and progress of the Work by submitting to the PANEL monthly written progress reports and other relevant data. Selected Project records including schedule updates, Requests for Information, Requests for Work Orders, and Requests for Change Orders, will be furnished to the PANEL at the same time as they are initially furnished to the other parties engaged on the projects. The PANEL will visit the Project at regular intervals and at times of critical construction events and meet with the representatives of the City and Construction Manager based upon a mutually agreed upon schedule to be determined at the initial meeting.

2.2 **Membership of the PANEL:** The PANEL shall consist of three neutral members who shall not have been previously employed in any capacity for either Party; provided however that, prior services as a dispute panel member shall not automatically disqualify a potential member. One member shall be nominated by Construction Manager and one member shall be nominated by City. Unless reasonably objected to by the other Party, the nominees shall be appointed to the PANEL. The third member, who shall serve as Chair, shall be selected by agreement of the Parties or, if the Parties are unable to reach agreement within fifteen (15) days after the award of the Agreement and prior to the Notice to Proceed Date for the Construction Phase, by the two party-appointed members. Unless the Parties agree otherwise, each PANEL member shall have significant construction experience, with at least two of the three Panel members not being lawyers.

2.3 **Meetings' confidentiality:** The first meeting of the PANEL shall occur within thirty (30) days of the Effective Date of NTP2. Subsequent meetings will be regularly held on site as set forth in Frequency of Meetings below. Statements made in regular meetings of the PANEL will be confidential and inadmissible to the same degree as proceedings in a Court-ordered mediation under Florida law. Each meeting will consist of an informal round table discussion and, if possible, a field inspection of the work. The round table discussion will be attended by representatives of the City and Construction Manager. The round table discussions shall include discussions with the City and Construction Manager that address the following items: construction Work accomplished since the last meeting, current status of the Work, the current and future schedule, payment status, potential future problems that may come before the PANEL, proposed solutions to those problems, and an update regarding previously handled or ongoing problems. It is contemplated that other Project participants will be invited to attend regular PANEL meetings, including Architect-Engineer, major Subcontractors of the Construction Manager, and Hill, the Owner's Representative firm. In addition to round table discussions, agendas for regular meetings of the PANEL may include the following topics:

2.3.1 Discussions involving representatives of the Parties with respect to any issues that have arisen or have been properly presented to the PANEL through the below stated Request for Conference process. Issues that were not submitted to the PANEL pursuant to the procedures delineated herein shall not be presented to the PANEL for consideration without the agreement of both Parties.

2.3.2 Rebuttals, if requested, by representatives of the Parties with respect to issues raised by the representatives of the other Party.

2.3.3 Set a tentative date for next meeting.

2.4 **Disputed Matters:**

2.4.1 Only Disputed Matters can be referred to the Panel for review and recommendation. A Disputed Matter means a "Claim" as defined in Section 1.6 and Article 15 of the Agreement, which seeks an amount in excess of \$50,000, seeks time which would delay achieving any of the Milestones established by this Agreement and/or is otherwise stipulated by mutual agreement of the Parties in writing.

2.4.2 Only Disputed Matters which have been duly preserved under the terms of the Agreement and are compliant with Article 15 and Subsection 9.4.4 as applicable, thereof are eligible to be heard by the PANEL.

3. Frequency of Meetings: In order for the PANEL to become familiar with the Project circumstances, it will begin to meet at least once per month following the Notice to Proceed for the Construction Phase. If conditions warrant, the Chair, in consultation with other PANEL members, the Construction Manager and the City, may reduce/increase the time between meetings to better serve the Parties. Factors to be considered when setting the time between meetings include Work progress, occurrence of unusual events and the number and complexity of ongoing or potential disputes.

4. **PROCEDURE FOR SCHEDULING DISPUTED MATTERS BEFORE THE PANEL.** The Parties should attempt to resolve potential disputes without resorting to use of the PANEL. However, in the event that a resolution is unlikely, the following procedures must be followed:

4.1 Before referring a matter to the PANEL for a Conference, a Party that desires to initiate a PANEL Conference must first submit a letter titled Notice of Disagreement to his/her counterpart from the other Party describing the issue that has arisen. The Party receiving the notice shall have seven (7) days from receipt of the Notice of Disagreement to submit a response. If, after fourteen (14) days from the initial receipt of the Notice of Disagreement, the issue has not been resolved, the Party who sent the original Notice of Disagreement may file a written Request for a Conference to the PANEL and the matter will be scheduled before the PANEL at the next quarterly PANEL Conference. The written Request shall contain a copy of the initial Notice of Disagreement and the response to this Notice, if any, by the other Party. No Request may be filed with the PANEL without first having complied with the Notice of Disagreement requirements of this Section.

4.2 PANEL Conferences shall be scheduled on a quarterly basis to hear all pending Disputed Matters which have not been resolved following compliance with Section 4.1 herein. Upon receipt of a Request for a Conference, the Chair will schedule the matter for the next quarterly PANEL Conference at a location in Miami Beach, Florida. However, no pending Disputed Matter shall be heard at a PANEL Conference without at least thirty (30) days' notice from the date the written Request for Conference is received unless both Parties stipulate otherwise. The Parties may request that the matter be deferred in the event that additional preparation is necessary. The Parties may request an informal verbal PANEL recommendation, or the Parties may request a formal written recommendation from the PANEL.

4.3 The Parties shall provide to the PANEL appropriate supporting documentation no later than fourteen (14) days before the commencement of the Conference, along with an optional position paper, as appropriate. The Parties shall provide rebuttal papers, if any, no later than five (5) days before the Conference.

4.4 The Party submitting the Request shall be responsible to provide the PANEL with three (3) copies of each document submitted with the Request, one for each PANEL member. The Party

furnishing any written documentation to the PANEL shall also furnish copies of such information to the other Party concurrently when furnishing the documents to the PANEL. The PANEL may request that additional written documentation and explanations from both Parties be sent to each member and to the other Party for study before the Conference begins.

4.5 Both Parties will be afforded an opportunity to be heard by the PANEL and to offer documents and other information to substantiate their respective positions. However, all documentation presented at the Conference must have been provided to the other Party and the PANEL at least five (5) days prior to the Conference or as otherwise required by Section 4.3 herein. The PANEL members may ask the Parties questions, request clarification, or ask for additional data. The Parties may not question or examine each other at a Conference. In large or complex disputes, additional Conference days may be necessary in order to consider and fully understand all the documentation and other information presented by both Parties.

4.6 All of the PANEL's written recommendations for resolution of disputes will be given to the City and the Construction Manager within ten (10) days of completing the Conference(s). In cases of extreme complexity, both Parties may agree to allow additional time for the PANEL to formulate its recommendations. The PANEL's initial 10-day written recommendation will address contractual entitlement and the number of days of extension of time, if at issue. The Parties will have seven (7) days after the 10-day written recommendation to resolve the issue. The Parties may, but are not required to, agree to mediate the resolution during this 7-day period. If the Parties cannot agree on the resolution of the 10-day written recommendation during this 7-day period, the PANEL shall issue a subsequent written recommendation addressing monetary damages no later than twenty-four (24) days from completion of the Conference.

4.7 No provisions associated with the PANEL shall in any way abrogate the Construction Manager's responsibility for preserving a Claim filed in accordance with the requirements set forth in the Contract Documents.

4.8 In the event that the City is not in agreement with a decision or recommendation of the PANEL, the City may elect to issue a Work Order or Change Order, with an appropriate reservation of its rights.

4.9 The PANEL's recommendations shall be non-binding and solely intended to facilitate the Parties' settlement communications. All records and written recommendations of the PANEL will be inadmissible as evidence in any subsequent court proceeding or other dispute resolution proceeding as privileged mediation/settlement communications, to the fullest extent permitted by law and the applicable rules of procedure.

4.10 By mutual agreement of the Parties and the PANEL, the steps listed under this Section may be omitted and the time periods shortened in order to hasten resolution.

5. **NEUTRALITY OF PANEL MEMBERS.** All PANEL members shall act impartially and independently when performing their functions as PANEL members including in the consideration of any provisions of the Contract Documents and the facts and conditions surrounding any written Request to the PANEL by the City or the Construction Manager. Ex parte communications between a PANEL member and any Party are strictly prohibited. PANEL members shall not discuss or communicate with any Party without the other Party being present. Seeking any PANEL member's advice or consultation is expressly prohibited, unless it is done in the open at a PANEL meeting and in the presence of the other Party.

6. **RECORDS OF MEETINGS.** While the PANEL may take notes or keep other records during the consideration of a Notice of Disagreement, it is not necessary for the PANEL to keep a formal record. If possible, it is desirable to keep the Conferences completely informal. However, records of the formal Conferences in regards to Notices of Disagreements will be transcribed by a court reporter if requested by one Party. The Party requesting the court reporter shall be responsible for any costs. Audio

and/or video recording of the meeting is prohibited without prior written agreement by the PANEL and the Parties.

7. **RECOMMENDATIONS OF THE PANEL.** All written recommendations of the PANEL shall be executed by all PANEL members and supported by at least two members. Recommendations will be based on the pertinent provisions of the Contract Documents and the facts and circumstances involved in the dispute. This provision shall not prevent the PANEL from issuing informal verbal recommendations.

8. **RECONSIDERATIONS.** Either Party may seek written reconsideration of a written recommendation within three (3) business days of receipt of such recommendation from the PANEL.

9. **CONSTRUCTION SITE VISITS.** The PANEL members shall visit the Project Site on a regular basis to keep abreast of construction activities and to develop a familiarity of the Work in progress. The frequency, exact time, and duration of these visits shall be as mutually agreed between the City, the Construction Manager, and the PANEL at the initial meeting, but should not exceed one time per month following the Notice to Proceed for the Construction Phase, unless the Parties mutually agree otherwise.

10. **COORDINATION AND LOGISTICS.** The City, in cooperation with the Construction Manager, will coordinate the operations of the PANEL.

11. **TIME FOR BEGINNING AND COMPLETION.** The PANEL is to be in operation commencing on the Effective Date of NTP2. Once Substantial Completion has been reached, the PANEL shall remain active and in full force and effect until all Requests for Conference submitted prior to Substantial Completion are heard or Final Completion of the Project is achieved, whichever is later.

12. **PAYMENT.** The maximum not to exceed daily fee to be paid to each PANEL member shall be One Thousand Five Hundred Dollars (\$1,500.00) and travel costs in accordance with City procedures and Florida law.

12.1 **Regular Meetings.** The amounts paid to the Chair of the PANEL and the other PANEL members for their services, including travel costs, shall be paid from an Allowance Account established within the Contract Documents for that purpose. Except as specified below, the Construction Manager shall submit a request to the City for payment of all expenses incurred, without markup or bond. City shall process and pay Construction Manager for PANEL expenses as part of regular project periodic pay requests, and the Construction Manager shall be responsible to promptly pay the PANEL members with no withholding or deductions.

12.2 **Payment - Conferences.** In the event a Party files a Request for a Conference, the requesting Party shall be responsible for 100% of the expenses and fees incurred by the PANEL members in connection with the Conference.

12.3 **Payment – Non-Conference.** In addition, PANEL members shall be compensated for a maximum of four (4) hours per month of time spent reviewing Project records outside of meeting or Conference days; provided however, that this limitation shall not apply to the review of records in connection with the PANEL's consideration of a dispute which is the subject of a Conference.

13. **COSTS AND ACCOUNTING RECORDS.** The PANEL members shall keep available the cost records and accounts pertaining to all of the work by the PANEL for inspection by representatives of the City or the Construction Manager for a period of five (5) years after Final Payment. If any litigation, Claim, or audit arising out of, in connection with, or related to the Agreement is initiated before the expiration of the 5- year period, the cost records and accounts shall be retained until such litigation, Claim, or audit involving the records is completed.

14. **TERMINATION OF PANEL.** City may terminate the PANEL at its sole discretion. In the event the PANEL is terminated and there is any dispute arising between the Parties or involving any

Subcontractor or Team Member as to the interpretation of the Contract Documents or relating to the Work or the Project, the Parties shall attempt to resolve such dispute in good faith. If the dispute cannot be resolved, the Party seeking relief shall have such Claim, which has been duly preserved in accordance with the requirements of Article 15 of the Agreement, addressed at mediation following Substantial Completion as set forth in Subsection 15.2. In the event the PANEL is terminated, resolution by the PANEL of any pending or future Disputed Matters shall not be a condition precedent to filing litigation.

15. TERMINATION OR WITHDRAWAL/REPLACEMENT OF PANEL MEMBERS

15.1 PANEL members may withdraw from the PANEL by providing four (4) weeks' written notice to the other PANEL members and the City.

15.2 Should the need arise to appoint a replacement PANEL member, the replacement PANEL member shall be selected as was the departing PANEL member. The selection of a replacement PANEL member shall begin promptly upon notification of the necessity for a replacement.

15.3 The Chair of the PANEL may be terminated without cause by agreement of the Parties. Each Party may change its appointed PANEL member on one occasion during the life of the Agreement without cause.

15.4 PANEL members may be terminated for cause by any of the Parties. The Party desiring to terminate a PANEL member for cause will notify the other Party and the other PANEL members and shall provide an explanation for the requested termination. If the other Party does not agree that cause exists, the remaining PANEL members shall convene and decide whether cause exists and such decision shall be effectuated.

16. **INDEPENDENT CONTRACTOR.** Each PANEL member, in the performance of his or her duties on the PANEL, shall act in the capacity of an independent agent and not as an employee of either the City or the Construction Manager. Each PANEL member shall have the same immunity as does a mediator appointed by Court order, as provided by Florida law.

17. **PUBLIC RECORDS.** Each PANEL member, Construction Manager, and the City shall allow public access to all documents, papers, letters, and other material made or received by the Parties that are related to this PANEL and the activities of this PANEL, subject to the provisions of Chapter 119, Florida Statutes. However, upon receipt of any such public records request, the Parties hereto shall immediately notify the City and obtain prior written consent from the City before releasing such records. Plans, schematics, security plans and other Project elements may not be released unless the recipient executes an appropriate confidentiality agreement.

18. **STATUTE OF LIMITATIONS.** None of the procedures delineated herein will in any way toll any statutes of limitations for either of the Parties.

19. **NO BONUS.** PANEL members shall not be paid, nor will they receive or accept any commission, percentage, bonus, or consideration of any nature, other than the payment provided for in this Section, for their performance and services.

20. **NO CONFLICT.** The members of the PANEL shall affirm that at no time, while performing their duties under this Section, shall they have any direct or indirect ownership or financial interest in, or be employed in any capacity by, the City, the Construction Manager, any Architect or Engineer organization working on the Project, any Team Member, any Subcontractor or supplier of the Project, or any other PANEL member. The members of the PANEL shall affirm and agree that, except for services as a PANEL member on other City or Construction Manager projects, that they have not been an employee, contractor, or Consultant to the City, Construction Manager, any Architect or Engineer organization working on the Project, any Team Member, any Subcontractor or supplier of the Project, or of another PANEL member, and that during the term of this Contract they shall not become so involved. The members of the PANEL, the City, and the Construction Manager agree that during the life of the

Agreement, no discussion or agreement will be made between any PANEL member and any Party to this Agreement for employment after the Agreement is completed.

21. **INTERPRETATION.** Nothing herein shall in any way limit the rights of the City to issue Field Orders or Change Orders, issue any other type of order or instruction, or take any other type of action that is permitted by the Contract Documents. Nor shall any of the provisions herein limit the remedies or obligations of the Construction Manager pursuant to Contract Documents, except that submission of a Disputed Matter to the PANEL for a written recommendation as to resolution shall be a condition precedent to pursuit of any claim in litigation to the extent the Disputed Matter arises, and is submitted, prior to Substantial Completion of the Project. Resolution by the PANEL of a Disputed Matter that arises after Substantial Completion shall not be a condition precedent to filing suit in a court of competent jurisdiction. However, nothing in this Section shall in any way waive the Parties' obligations to strictly comply with the contractual requirements to duly preserve a Claim in Article 15 of the Agreement.

22. **SUBSEQUENT PROCEEDINGS.** In the event that a Party files suit in connection with this project, no member of the PANEL shall be called to testify in such proceedings, and the personal notes of PANEL members shall not be admissible. Any and all claims against any of the PANEL members arising out of the work of the PANEL are waived.

Appendix H Software Functional Requirements

Construction Manager shall utilize a software solution that meets the following functional requirements:

A. Generic Information

- Cloud-based system.
- All participants can access via web
- No additional software necessary
- System is SOC I Type II compliant
- 7-year retention/back up of all draw documents

B. Contract Process

- Ability to receive real-time contract values and change orders from Construction Manager's enterprise resource planning software (ERP), including each of the following:
 - Contract number
 - Vendor number
 - Contract item level detail
 - Approved budget amount
- Single point of entry for subcontractors working on multiple projects

C. Budgeting Process

- Systematic control that enforces subcontractor budget information
 - Subcontractors cannot exceed subcontracted amounts
 - Subcontractor schedule of values can be locked to prevent adjustments
 - Ability to lock subcontractor Schedules of Value (SOVs)
 - Workflow that provides functionality for Construction Manager to approve budget amounts/SOVs prior to subcontractor entering their invoice
 - Subcontractors cannot add unapproved change orders to their budget/SOVs
- Real-time visibility into subcontractor schedules of value by Construction Manager and City
- Tax-life (depreciation coding) at SOVs detail level

D. Invoicing Process

- Construction Manager initiates subcontractor invitation to invoice process
- All invites delivered systematically, via e-mail, with embedded hyperlink, by a third-party
- Construction Manager ability to allow/disallow retention billing on a contract-level basis
- Systematic control over billed to date calculations, retention withholding, and enforcement of mathematical accuracy
- Ability for subcontractor to make comments electronically on a line-item basis
- Ability for subcontractors to add attachments (e.g., bills of lading, photos, receipts)
- Ability for subcontractors to "opt-out" of a draw
 - E-mail notification to Construction Manager informing them of subcontractor opt-out status
- Ability for subcontractors and Construction Manager to assign authorized signatories electronically within the system

E. Approval Process

- Invoice approvers are notified electronically, via e-mail, of approval actions
- Custom workflow approval can be assigned, by project (serially or in parallel)
- Electronic modification of subcontractor invoices, including line-item level markup
- Ability to "lock" subcontractor invoice changes
- System provides electronic audit trails of each invoice submission by a subcontractor, including:
 - Line-item markups
 - Line-item comments
 - Date/Time Stamp of invoice submission

F. Draw Document Process

- Standardized draw documents (uniform across all subcontractors, agreed between Construction Manager and City) applied to the project electronically
 - Invoice, Sworn Statement, Lien Waivers (both conditional and unconditional), Invoice Cover Sheets
 - System automatically calculates amounts, carries forward prior period billed amounts, and retention amounts, based on City and Construction Manager specifications
- System utilizes audit trails behind each and every electronic signature, including:
 - Additional layer of security via Personal Identification Number (PIN) for all authorized signers
 - Name and e-mail of signer
 - Date and Time stamp of when document was accessed
 - Date and Time stamp of when document was signed
 - IP address of computer from which document was signed
 - Embedded link validating authenticity of signature
- Electronic notarization capability

G. Lien Waiver Process

- Electronic, systematic deployment of required lien waiver forms
 - Lien waiver documents cannot be altered in any way
 - City has ability to see copies of all lien waivers from all subcontractors, including those whose signatures aren't yet released to the funding organization.
- Current period, unconditional lien waivers are presented as part of the invoicing process for subcontractor signature
 - System does not release signed current period unconditional lien waiver until 72 hours after payment is disbursed to subcontractor
- Automatic creation of partial or final versions of lien waiver documents based on billed amounts by subcontractor
- Systematic collection of sub-tier lien waivers
 - Ability to collect lien waivers electronically from sub-tiers
 - Automated payment holds for missing sub-tier waivers
 - Ability to stipulate sub-tier specific lien waiver documents
- Ability to collect zero-dollar lien waivers electronically
- Ability to track "Notice-To-Owner (NTO)"
 - Notice date and notice amount fields can be populated with Construction Manager information
- Ability to assign 3rd -parties (e.g., 3rd party developers, inspecting agencies, banks) to view draw documents
- System ability to provide City access to view real-time status of receipt of first- and second-tier lien waivers
- Systematically-applied holds for missing current- or prior-period sub-tier waivers

H. Compliance Process

- Automated payment holds for missing compliance information
- Automated expiration notice e-mail generation to subcontractors. For example:
 - Automated e-mail notification 30-days and 15-days prior to expiration of Certificate of Auto Insurance document
- System can be utilized as a channel for electronic submission of subcontractor compliance documents. For example:
 - Subcontractor can upload Auto Certificate to the Construction Manager, and the system automatically routes that certificate to the person responsible for marking it as received

I. Payment Process

- Systematic enforcement of subcontractor payment eligibility, including:
 - Subcontractor invoice must be approved
 - Subcontractor must sign current period unconditional waiver

- Subcontractor cannot be on hold for compliance-related items
 - Ability to enforce the following payment hold criteria:
 - Manual Hold
 - Split Payment (joint check) confirmation hold
 - Receipt of sub-tier lien waivers (conditional and unconditional)
 - Document Compliance holds
 - System is a third-party ACH facilitator
 - System sends ACH instructions to funding bank at the request of the funding organization
 - System allows subcontractors to self-service banking information for receipt of payment
 - System allows multiple partial payments, via ACH, to subcontractors
 - System allows for joint check payments to be created
 - System allows for direct-payment to sub-tier organizations
 - Systematic control over release of current period unconditional lien waivers for payment
 - Current period unconditional lien wavers are released to funding organization 72 hours after payment is made to subcontractors
- Direct e-mail notification to subcontractor of payment via ACH

APPENDIX I
QUALITY CONTROL/QUALITY ASSURANCE

The Construction Manager shall submit, subject to the approval of the City, a Quality Control Plan as provided in the Specifications. The City or Owner's Representative shall monitor and review the performance of the Quality Control Plan by the Construction Manager, including observation of inspections and testing activities, as provided in the Specifications and other provisions of the Contract Documents. All Submittals required pursuant to the Construction Manager's Quality Program Plan, or in other provisions of the Contract Documents, shall be delivered to the City, unless otherwise expressly provided in the Contract.

The City shall have the right to reject Work which does not conform to the Contract Documents. If the Owner's Representative determines that a defect exists, the Construction Manager shall cause the defective condition to be corrected or replaced with a conforming installation, product or result, subject to the approved Quality Control Plan, provisions of the Specifications and approval of City.

1. **Quality Control (QC) Plan.** The Construction Manager shall submit for the City's approval a Quality Program Plan for the execution of the Work and the Construction Manager shall organize and conduct all activities to be performed under the Contract with strict attention and adherence to the approved Quality Control Plan. The scope of the Quality Program Plan shall include the quality assurance and quality control elements necessary for the design, procurement, manufacturing, installation, construction, start-up, integrated Systems testing, and execution of the Work by the Construction Manager and Subcontractors, and shall comply with the requirements of the Contract Documents. The Quality Control Plan shall include the preparation of documented quality control procedures and instructions in accordance with the requirements defined in this Section, as well as those specified in the Contract Documents, specifically the Construction Documents.

The Construction Manager shall be responsible for controlling the quality of all Work, including the Work of Subcontractors. The Construction Manager shall include in its Subcontracts those provisions which it considers necessary to assure that the quality of subcontracted Work will be consistent with that required of the Construction Manager.

The City or Owner's Representative may audit and inspect the Construction Manager's and Subcontractors' Quality Control Programs at any time. Such audits may be conducted on a random or routine basis and may include an audit of the Construction Manager's inspection records and data. Additionally, the City or Owner's Representative shall have the right to witness any quality control tests or inspections and shall have access to all test data, including test procedures, test specifications and test results. Further, the City or Owner's Representative shall have the right to conduct independent tests or inspections (at the City's expense) of any material or equipment to be used in the Work. Such audits, inspections or tests conducted shall be performed to verify that all Work is performed in compliance with applicable provisions of the Contract Documents, but shall not relieve the Construction Manager of any of its obligations under the Contract.

2. **Quality Assurance Management.** The Construction Manager shall prepare a management structure and organizational chart which shall reflect a commitment for an effective quality assurance policy, and which shall define and document its Quality Program Plan approach and objectives for, and commitment to, quality. The Construction Manager shall ensure that the Quality Program Plan is understood, implemented, and maintained at all levels of the Construction Manager's organization. Management personnel responsible for performing quality control and assurance functions shall report directly to the Construction Manager's Project Executive and Project Manager.

a) **Quality Assurance Personnel.** In its Quality Program Plan, the Construction Manager shall identify the qualifications and experience of personnel responsible for implementation of quality assurance elements of the Quality Program Plan, and a description of the duties of the assigned personnel by job description. Personnel responsible for quality assurance shall be qualified by virtue of skill, education and experience on projects of similar type and complexity. The City reserves the right to approve the Construction Manager's QA/QC manager.

b) Quality Assurance Verifications. The Construction Manager shall identify internal verification requirements, provide adequate resources, and assign trained personnel for verification activities. Verification activities shall be performed by personnel independent of those having the responsibility for the Work being performed. Verification activities shall include verifying the adequacy and enforcement of quality control procedures as they relate to inspections, tests, monitoring of the design, procurement, construction, installation and start-up of the equipment, materials, Systems and completed Work.

c) Procurement Quality Assurance. The Construction Manager shall establish and employ procedures for the selection and control of Subcontractors, including suppliers, which will assure the use of qualified procurement sources and which will provide methods of monitoring the quality levels of the products and services to ensure that they conform to Contract requirements. The Construction Manager shall select Subcontractors, in part, on the basis of their ability to meet the Quality Control Plan requirements.

3. [NOT USED]

4. **Quality Control of Construction, Manufacturing and Installation**

The Construction Manager and each Subcontractor shall be responsible for the establishment and implementation of quality control procedures and instructions for the inspection and testing of manufactured and installed materials, equipment, and assemblies.

a) Inspection and Testing. The Construction Manager shall conduct a complete review of the Contract requirements and shall identify all inspections and tests required for procurement, and the installation and construction of the project Facilities. The Construction Manager shall establish and employ written receiving inspection procedures to ensure that materials, assemblies, and equipment or other elements of the Work are not incorporated into the Work until each item has been inspected or otherwise verified to conform to applicable requirements of the Contract Documents. Verification shall be in accordance with the Quality Program Plan and other documented procedures of the Construction Manager.

The Quality Control Plan and written procedures for first article inspection, final inspection and testing shall provide procedures to ensure that upon completion of all required inspections and tests (including those to be conducted either on receipt of material or equipment or while the material, equipment or other elements of the Work are in process) the results are satisfactory and in compliance with all applicable requirements, and that the results are documented in test reports. No material, equipment or other element of the Work shall be accepted until all the activities specified in the Quality Control Plan and other documented procedures have been satisfactorily completed and the inspection and testing results and documentation are available and approved by the Construction Manager. The Construction Manager shall establish and maintain records which document the fact that each item of material, equipment or other element of the Work has satisfied all applicable inspection and test criteria and other requirements.

b) Field Samples and Mock-ups. Field samples and mock-ups shall be prepared at the Project Site or other location by the Construction Manager as specified in the Contract Documents. Affected finish Work shall not be started until the Construction Manager's Authorized Representative has accepted as satisfactory field samples or mock-ups in writing. The City or Owner's Representative shall be notified in advance and afforded an opportunity to review field samples and mock-ups before affected finish Work is started.

c) Construction Manager's Control of Inspection and Testing. The Construction Manager shall be responsible for control inspection and testing of all materials, equipment and other elements of the Work prior to their delivery from a manufacturer, or during construction (e.g., electrical equipment load tests, soil compaction tests, concrete tests, piping system leakage tests), to ensure compliance with the Contract Documents. Such inspection and testing shall be performed by a qualified independent testing and inspection firm, to be engaged by the Construction Manager at its expense, and approved by the City or Owner's Representative. The Construction Manager shall submit to the City or Owner's Representative the name, address, and qualifications, together with the scope of services, of the proposed testing and inspection firm at least sixty (60) days prior to scheduled commencement of any Work involving such inspection or testing. Should the Construction Manager desire to use more than one firm for control inspection and testing, the required information shall be submitted for each such proposed firm.

All laboratory testing shall be performed by an independent, qualified testing laboratory, employing equipment and qualified testing personnel approved by the City or Owner's Representative.

d) Control of Nonconforming Material, Equipment, or Elements of Work. The Construction Manager shall establish and maintain a nonconformance system and procedures for uniform reporting, controlling and disposition of Nonconformance Items (NCI's). Procedures shall be established to prevent the inadvertent use or installation of nonconforming material, equipment or other elements of the Work. Control procedures shall provide for identification, evaluation, segregation and, when practical, disposition of nonconforming material, equipment or other elements of the Work and for notification to the Construction Manager, the City or Owner's Representative and all personnel involved in the affected Work. The responsibility for review and authority for the disposition of nonconforming material, equipment or other Work shall be as established by the Construction Manager in the approved Quality Control Plan.

e) Corrective Action. The Construction Manager shall establish and maintain written procedures for:

- i. Investigating the cause of nonconforming material, equipment or other elements of the Work and the corrective action needed to prevent recurrence;
- ii. Analyzing all processes, work operations, concessions, quality records, service reports, and complaints of the City or Owner's Representative to detect and eliminate potential causes of nonconforming material, equipment, or other elements of the Work;
- iii. Initiating preventive actions to deal with problems at a level corresponding to risks encountered;
- iv. Applying controls to ensure that effective corrective actions are taken; and
- v. Implementing and recording changes in procedures resulting from corrective action.

f) Handling, Storage, Packaging and Delivery. The Construction Manager shall establish and maintain written procedures for handling, storage, packaging and delivery of materials, equipment and other elements of the Work, including coordination with those materials included in the City's Direct Purchase Program. The Construction Manager shall provide methods and means of handling and provide secure storage areas or stock rooms that prevent damage or deterioration of materials, equipment and other elements of the Work pending delivery, use, or incorporation into the Work. Appropriate methods for authorizing receipt and the release to and from such areas shall be stipulated. The condition of materials, equipment and other elements of the Work in storage shall be assessed at regular and appropriate intervals.

g) **Quality Record.** The Construction Manager and Subcontractors shall establish and maintain procedures for identification, collection, indexing, storage, maintenance and disposition of records concerning the quality of the Work. Such records shall be maintained at the Project Site and at manufacturing facilities and shall document achievement of the requirements of this Section, and the effective operation of the Quality Program Plan. All quality records shall be legible and identifiable as to the material, equipment or other element of the Work involved. When methods of inspection and testing are changed, the Construction Manager shall obtain review and acceptance of written procedures from the City before implementation of any change.

Quality records shall be stored and maintained in such a manner that they are readily retrievable in facilities that provide a suitable environment to minimize deterioration or damage to prevent loss. Retention times of quality records shall be established and recorded. Quality records should be made available, at all times, for evaluation and review by the City or Owner's Representative.

5. Conformity with Contract Requirements

a) **Verification.** All Work shall be performed and furnished by the Construction Manager pursuant to, and in full conformity with, the Contract Documents. Throughout the duration of the Contract, the Construction Manager will be required to so establish such conformance to the City and/or Owner's Representative. In addition, the City and/or Owner's Representative may inspect and audit the Work, at all stages of its manufacture, fabrication, factory testing, construction, installation, on-site testing, completion and acceptance procedures, at any time. Review, verification and acceptance of the Work will be accomplished through the design review and construction inspection and testing process. All design documents shall be checked and verified by the Construction Manager for compliance with all applicable Contract Documents and with Applicable Laws.

b) **No Implied Duties.** No right to act granted to the City or Owner's Representative under this Section, nor any decision made by the City or Owner's Representative in good faith either to exercise or not to exercise such right, shall give rise to any implied duty or responsibility of the City or Owner's Representative, respectively, to the Construction Manager, any Subcontractor, any of their agents or employees, or any other person performing any of the Work, or relieve the Construction Manager from its sole responsibility for performing its obligations hereunder. Review of Submittals and any action taken by the City or Owner's Representative with respect to Submittals shall not relieve the Construction Manager from its sole responsibility for accuracy, completeness, coordination, errors or omissions in the Construction Manager Drawings, the Construction Manager Specifications and Submittals and associated calculations, or for deviations from the Contract Documents or compatibility of the item with contiguous or dependent items of the Work.

6. **No Interference.** The City or Owner's Representative shall not supervise the Construction Manager's forces or Subcontractors or perform other duties for the Construction Manager, nor interfere with the management of the Work by the Construction Manager. Any advice, instruction, direction or other order which the City or Owner's Representative may give the Construction Manager shall not be construed as releasing the Construction Manager from fulfilling all of the terms of the Agreement or other Contract Documents.

7. **Rejection and Removal of Nonconforming or Defective Work.** As more fully delineated in Section 2.7.17.20, all Work which does not conform to the Construction Manager's warranties or to any other requirements of the Contract Documents will be considered unacceptable, unless otherwise determined to be acceptable as provided in the last paragraph of this Section. Any defective condition, whether the result of poor workmanship, use of materials containing defects, damage through carelessness or any other cause, found by, or disclosed to, the City or Owner's Representative shall be removed and replaced by Work and materials which conform to the Contract Documents or shall be remedied to the satisfaction of the City and/or Owner's Representative. Upon failure on the part of the Construction Manager to comply promptly with any order of the City or Owner's Representative to remedy, remove or replace Work which is nonconforming or contains Defects, the City may cause such nonconforming Work or Defect to be remedied or removed and replaced by separate Contractors employed by the City at the Construction Manager's expense. In such event, the costs of such removal, remediation and replacement shall be deducted from any monies due or to

become due the Construction Manager under the Agreement.

In the event the City or Owner's Representative finds, as a result of monitoring of the Construction Manager's quality assurance and quality control activities, that any materials, equipment or the finished product in which materials, equipment or finished product are used are not in conformity with the requirements of the Contract Documents, but that acceptable Work has, nonetheless, been produced, the City shall then determine whether the Work shall nevertheless be accepted. If the City determines that the Work should be accepted, the City will document the basis of acceptance by a Change Order for Diminished Value, which will provide for an appropriate adjustment in the Contract Sum. Any such acceptance shall not, however, ever result in an increase of the Contract Sum or the Guaranteed Maximum Price.

8. **Construction Manager's Continuing Obligation**. Neither the issuance of the Certificate of Final Completion, nor the making of Final Payment by the City will constitute acceptance of any portion of the Work which is not in compliance with the requirements of the Contract Documents or constitute a release or diminution of the Construction Manager's continuing obligations with respect to the Work pursuant to applicable provisions of the Agreement or other Contract Documents.

**APPENDIX J
FORMS AND EXHIBITS**

The attached forms will be used throughout the Project, to be due at different times.

TABLE OF CONTENTS FOR FORMS

| DESCRIPTION | PAGE |
|--|------|
| Payment Bond & Performance Bond | — |
| Construction Contract Change Order | — |
| Contractor's Affidavit / Certificate of Contract Completion | — |
| Contractor's Certification of No Asbestos-Containing Materials | — |
| GMP Amendment | — |
| RFP Proposal Submission | — |

FORM OF PERFORMANCE BOND

[Form of Performance Bond subject to amendment by City at its discretion prior to award of contract]

By this Bond, We _____ as Principal, whose principal business address is _____, as the Construction Manager under the agreement dated _____, 20____, between Principal and the City of Miami Beach, Florida (hereinafter referred to as "City") for the construction of the **Miami Beach Convention Center Renovation and Expansion Project pursuant to RFP No. 2015-129-ME** (which agreement and the other Contract Documents referenced therein are hereinafter referred to as "Contract"), the terms of which Contract are incorporated by reference in its entirety into this Bond, and _____, a corporation, whose principal business address is _____ as Surety, are bound to City, as obligee, in the sum of _____ U.S. dollars (\$_____), for payment of which we bind ourselves, our heirs, personal representatives, successors, and assigns, jointly and severally.

THE CONDITION OF THIS BOND is that if Principal:

1. Performs all the work under the Contract, including but not limited to guarantees, warranties and the curing of latent defects, said Contract being made a part of this Bond by reference, and at the times and in the manner prescribed in the Contract; and
2. Pays City all losses, damages, expenses, costs and attorney's fees, including appellate proceedings, that City sustains as a result of default by Principal under the Contract, including but not limited to a failure to honor all guarantees and warranties or to cure latent defects in the Work or materials within the time period provided in Section 95.11(2)(b), Florida Statutes; and
3. Performs the guarantee of all work and materials furnished under the Contract for the time specified in the Contract, including all warranties and curing all latent defects within the time period provided in Section 95.11(2)(b), Florida Statutes;

then this bond is void; otherwise it remains in full force.

Surety specifically assumes liability for any and all damages, including but not limited to liquidated damages set forth in the Contract, arising from Principal's default of the Contract, as well as all latent defects uncovered in the work of the Principal after final acceptance of the work by the City.

If no specific periods of warranty are stated in the Contract for any particular item or work, material or equipment, the warranty shall be deemed to be a period of one (1) year from the date of final acceptance by the City; provided, however, that this limitation does not apply to suits seeking damages for latent defects in materials or workmanship, such actions being subject to the limitations found in Section 95.11(2)(b), Florida Statutes.

Whenever the Principal shall be, and is declared by City to be, in default under the Contract, City having performed City's obligations thereunder, the Surety may promptly remedy the default, or shall promptly:

- (1) Complete the Contract in accordance with its terms and conditions; or
- (2) Obtain a bid or bids for completing the Contract in accordance with its terms and conditions, and upon determination by Surety of the lowest responsible bidder, or, if City elects, upon determination by City and Surety jointly of the lowest responsible bidder, arrange for a contract between such bidder and City, and make available as work progresses (even though there should be a default or a succession of defaults under the Contract or Contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the Contract Price; but not exceeding, including other costs and

damages for which the Surety may be liable hereunder, the amount set forth in the first paragraph hereof. The term "balance of the Contract Price" as used in this paragraph, shall mean the total amount payable by City to Principal under the Contract and any amendments thereto, less the amount properly paid by City to Principal.

The Surety hereby waives notice of and agrees that any changes in or under the Contract and compliance or noncompliance with any formalities connected with the Contract or the changes does not affect Surety's obligation under this Bond.

No right of action shall accrue on this bond to or for the use of any person or corporation other than City named herein. Any action under this Bond must be instituted in accordance with the notice and time limitations provisions prescribed in Section 255.05(2), Florida Statutes.

Signed and sealed this _____ day of _____, 20_____.

WITNESSES:

(Name of Corporation)

Secretary

By: _____
(Signature)

(CORPORATE SEAL)

(Print Name and Title)

Countersigned by Resident
Florida Agent of Surety

INSURANCE COMPANY:

By: _____
Attorney-in-Fact

[attach copy of Agent's ID card
Issued by Fla. Ins. Commissioner]

Address: _____
(Street)

(City/State/Zip Code)

[Atty in fact power of atty must be attached]

Telephone No.: _____

FORM OF PAYMENT BOND

[Form of Payment Bond subject to amendment by City at its discretion prior to award of contract]

By this Bond, We _____ as Principal, whose principal business address is _____, and whose telephone number is _____, as the Construction Manager under the agreement dated _____, 20____, between Principal and the City of Miami Beach, Florida (hereinafter referred to as "City") for the construction of the **Miami Beach Convention Center Renovation and Expansion Project pursuant to RFP No. 2015-129-ME** (which agreement and the other Contract Documents referenced therein are hereinafter referred to as "Contract"), the terms of which Contract are incorporated by reference in its entirety into this Bond, and _____, a corporation, whose principal business address is _____ as Surety, are bound to City, as obligee, in the sum of _____ U.S. dollars (\$ _____), for payment of which we bind ourselves, our heirs, personal representatives, successors, and assigns, jointly and severally.

THE CONDITION OF THIS BOND is that if the Principal:

1. Promptly makes payments to all claimants, as defined by Florida Statute 255.05(1), providing Principal with labor, materials, or supplies, used directly or indirectly by Principal in the prosecution of the work provided for in the Contract, and in the times and in the manner prescribed in the Contract; and
2. Pays City all losses, damages, expenses, costs and attorney's fees including appellate proceedings, that City sustains because of a failure by Principal to make any payments required under the Contract;

then this bond is void; otherwise it remains in full force.

A claimant shall have a right of action against the Principal and the Surety for the amount due it. Such action shall not involve the City in any expense.

A claimant, except a laborer, who is not in privity with Principal and who has not received payment for its labor, materials, or supplies shall, within forty-five (45) days after beginning to furnish labor, materials, or supplies for the prosecution of the work, furnish to Principal a notice that he intends to look to the bond for protection. A claimant who is not in privity with Principal and who has not received payment for its labor, materials, or supplies shall, within ninety (90) days after performance of the labor or after complete delivery of the materials or supplies, deliver to Principal and to the Surety, written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment.

No action for the labor, materials, or supplies may be instituted against Principal or the Surety unless both of the above-referenced notices have been given.

Any action under this Bond must be instituted in accordance with the notice and time limitations prescribed in Section 255.05(2), Florida Statutes.

The Surety hereby waives notice of and agrees that any changes in or under the Contract Documents and compliance or noncompliance with any formalities connected with the Contract or the changes does not affect the Surety's obligation under this Bond.

[signature page to follow]

Signed and sealed this _____ day of _____, 20____.

Principal

ATTEST:

(Name of Corporation)

(Secretary)

By: _____
(Signature)

(Corporate Seal)

(Print Name and Title)

____ day of _____, 20____.

Countersigned by Resident
Florida Agent of Surety

INSURANCE COMPANY:

By: _____
Attorney-in-Fact

[attach copy of Agent's ID card
Issued by Fla. Ins. Commissioner]

Address: _____
(Street)

(City/State/Zip Code)

[Atty in fact power of atty must be attached]

Telephone No.: _____

CONTRACTOR'S AFFIDAVIT / CERTIFICATE OF CONTRACT COMPLETION

PROJECT NAME: _____

PROJECT LOCATION: _____

CONTRACTOR: _____

CONTRACT DATE: _____ CONTRACT AMOUNT: \$ _____

CONTRACTOR'S AFFIDAVIT

I solemnly swear and affirm: The work under the above named contract and all amendments thereto have been completed in accordance with the requirements of said contract; that all costs incurred for equipment, materials, labor, and services against the Project have been paid; that no liens have been attached against the Project; that no suits are pending by reason of work on the Project under the contract; that all Workers' Compensation claims are covered by Workers' Compensation insurance as required by law; that all public liability claims are adequately covered by insurance, and that the Contractor shall save, protect, defend, indemnify, and hold harmless the City from and against any and all claims which arise as a direct or indirect result of any transaction, event, or occurrence related to performance of the work contemplated under said contract.

Contractor's Signature: _____ Date: _____

Printed Name & Title: _____

Address: _____

STATE OF FLORIDA COUNTY OF _____

Personally appeared before me this _____ day of _____, _____ known
(or made known to me to be the _____)

(Sole Proprietor, Partner, or Corporate Officer's Name & Title)

Contractor(s), who, being by me duly sworn, subscribed to the foregoing affidavit in my presence.

(Form of Identification Produced)

(Notary Public - Print Name)

My Commission Expires: _____

(Notary Public - Signature)

CONTRACTOR'S AFFIDAVIT / CERTIFICATE OF CONTRACT COMPLETION

PROJECT NAME: _____
CONTRACTOR: _____
CONTRACT DATE: _____ DATE OF FINAL COMPLETION: _____

CERTIFICATE OF ARCHITECT-ENGINEER:

I CERTIFY, the work under the above Contract has been satisfactorily completed on the date set forth in accordance with the terms of the Contract; that the Contractor has submitted its sworn affidavit as evidence that the Construction Manager has paid all labor, materials, and other charges against the Project in accordance with the terms of the Contract Document.

Architect-Engineer Name: _____

By: _____ Date: _____

CONTINUED ON NEXT PAGE

TO BE COMPLETED BY ARCHITECT-ENGINEER THROUGH SUBSTANTIAL COMPLETION

DATE DAYS

LIQUIDATED DAMAGES
to be Completed by the City

| | | | |
|---|--|--|---------------------|
| 1. Notice to Proceed (N.T.P.) | | | |
| 2. Time Specified in Original Contract for Substantial Completion (S.C.) | | | |
| 3. Extension Granted by Change Orders (Days Between Original Contract S.C. and Final Contract S.C.) | | | |
| 4. Total Days Allowable to Substantial Completion (Add Lines 2 and 3) | | | |
| 5. Project Substantially Completed as Certified by Architect-Engineer (Total Days from N.T.P. through Date Certified by Architect-Engineer) | | | |
| 6. Substantial Completion Overrun (Subtract Line 4 from 5 and Enter Overrun) | | | @\$ Per Day=\$ |

THROUGH THE FINAL COMPLETION PHASE

| | | | |
|---|--|--|---------------------|
| 1. Time Specified in Contract, Between Substantial and Final Completion | | | |
| 2. Extensions Granted by Change Orders (Days Between Substantial Completion and Final Completion) | | | |
| 3. Total Days Allowable Between Substantial and Final Completion (Add Lines 1 and 2) | | | |
| 4. Date Actually Completed and Total Days Between Actual Substantial Completion and Date Certified By Architect-Engineer as Actually Being Finally Completed. | | | |
| 5. Final Completion Overrun (Subtract Line 3 from 4 and Enter Overrun) | | | @\$ Per Day=\$ |

TOTAL LIQUIDATED DAMAGES

Per Day= \$

Project Coordinator's Signature: _____ Date: _____

CONTRACTOR'S CERTIFICATION OF NO ASBESTOS-CONTAINING MATERIALS

Project Name: _____

Project Location: _____

**I CERTIFY THAT NO MATERIALS CONTAINING ASBESTOS WERE USED IN THE
CONSTRUCTION OF THIS PROJECT.**

Contractor's Signature

Date

Contractor's Name (Typed)

Street Address:

City, State & Zip:

Telephone () _____ FAX () _____

FEID Number

CHANGE ORDER FORM

Date: [Click here to enter a date.](#)
To: Construction Manager

Reason: Choose an item.

1. CHANGE IDENTIFICATION: The following changes are hereby made to the above-referenced Contract:

2. ADJUSTMENT TO CONTRACT AMOUNT: As consideration for the change(s) identified in Section 1, the Contract is **increased** / (decreased) by:

| | DOLLARS | \$ |
|--|---------|-------|
| Original Contract Amount: | \$ | _____ |
| Net of Previous Executed Change Orders: | \$ | _____ |
| Amended Contract Amount (prior to this Change Order) : | \$ | _____ |
| The Amount of this Change Order: | \$ | _____ |
| Revised Contract Amount: | \$ | _____ |

IF NO ADJUSTMENT IS MADE, THE CONTRACT AMOUNT REMAINS UNCHANGED.

3. ADJUSTMENT TO TIME FOR PERFORMANCE: *In connection with the change(s) noted in Section 1, CONSTRUCTION MANAGER'S TIME FOR PERFORMANCE REMAINS UNCHANGED unless specifically noted herein:*

Adjustment in Time: 0 Days

This Change Order is an amendment to the Agreement between the Construction Manager and City. The amount and time change designated herein are the maximum agreed to by both the City and Construction Manager for this Change Order. Construction Manager attests that the Contract adjustment provided herein is reasonable, and constitutes compensation in full for all costs, claims, markup, and expenses, direct or indirect, attributable to this or any other prior Change Orders, including but not limited to compensation in full for any delays, acceleration, or loss of efficiency encountered by Construction Manager in the performance of the Work through the date of this Change Order, and for the performance of this and any prior Change Orders by or before the date of Substantial Completion. In consideration of the compensation and time, if any, in this Change Order, the Construction Manager hereby releases the City from all Claims, demands, or causes of action arising out of the transactions, events and occurrences giving rise to this Change Order. This written Change Order is the entire agreement between the City and Construction Manager with respect to this Change Order. No other agreements or modifications shall apply to this contract amendment unless expressly provided herein

EXCEPT AS EXPRESSLY MODIFIED HEREIN, THE TERMS AND CONDITIONS OF THE CONTRACT DOCUMENTS REMAIN UNCHANGED.

By: _____

Construction Manager:

By: _____

GMP AMENDMENT

**AMENDMENT NO. __ TO AGREEMENT BETWEEN
CITY OF MIAMI BEACH AND CONSTRUCTION MANAGER FOR THE
MIAMI BEACH CONVENTION CENTER RENOVATION AND EXPANSION PROJECT**

Pursuant to the Agreement dated _____, 2015 between the City and (name of firm) (Construction Manager) for the Miami Beach Convention Center Renovation and Expansion Project ("Project"), the City and Construction Manager hereby agree to amend and modify the Agreement by this GMP Amendment, dated and effective as of _____, 2015, to establish a Guaranteed Maximum Price for the Project and time for completion of the Construction Phase of the Project as set forth below:

**ARTICLE 1
SCOPE OF WORK**

Construction Manager shall be responsible for and shall perform all Work delineated in and reasonably inferable from the Contract Documents, including Attachments I through _ below, which are hereby incorporated into and made a part of the Amendment by this reference:

| Attachment No. | Description | Pages | Date |
|----------------|--|-------------|------|
| 1. | List of Construction Documents | _ through _ | |
| 2. | Assumptions and Clarifications | _ through _ | |
| 3. | Completion Schedule | _ through _ | |
| 4. | Schedule of Values | _ through _ | |
| 5. | List of Itemized General Conditions | _ through _ | |
| 6. | List of Subcontractors and Major Suppliers | _ through _ | |

**ARTICLE 2
GUARANTEED MAXIMUM PRICE**

Construction Manager's Guaranteed Maximum Price for the Work, including the estimated Cost of the Project as defined in Section 8 of the Agreement, the Construction Manager's Construction Overhead and Profit Fee and General Conditions Fee as defined in Section 7 of the Agreement, and the Construction Manager's Contingency as defined in Article 6 and set forth below; is _____ dollars, (\$ _____) (the "GMP"), which includes the following:

2.1 The Subcontract Costs for Work of Subcontractors and Suppliers selected pursuant to Article 4 of the Agreement, for the entire Work anticipated on this Project will be based on actual Subcontractor invoices to the Construction Manager up to the established amount of _____dollars (\$ _____), and said amount stated in this Section 2.1 is included within the GMP.

2.2 The General Conditions Fee for all general conditions items and expenses as defined in Section 7.1.2 of the Agreement, for the entire Work anticipated on this Project are hereby established as a lump sum amount of _____ dollars (\$_____), and said lump sum amount stated in this Section 2.2 is included within the GMP. The items included as General Condition expenses are listed in the List of Itemized General Conditions attached hereto and incorporated herein as Attachment No. 5. Construction Manager acknowledges and agrees that the City shall have no liability for any General Condition costs or expenses, either listed in Attachment No. 5 or specified in Section 7.1.2 of the Agreement, beyond payment of the lump sum stated in this Section 2.2 and Construction Manager agrees that it shall not be entitled to receive any additional compensation from the City for the General Conditions beyond the lump sum amount unless expressly adjusted by a Change Order in accordance with the Contract Documents.

2.3. The Construction Overhead and Profit Fee as defined in Section 7.1.3 of the Agreement, for the entire Work anticipated on this Project, shall be 3.80% of the Cost of the Project (as identified in Section 2.1 above) plus the Construction Manager's General Conditions Fees (as identified in Section 2.2 above), and is included in the GMP. The Construction Overhead and Profit Fee for Change Orders or Construction Change Directives shall be 3.80% of the Costs of the Project associated with the Work that is the subject of the Change Order or Construction Change Directive, except for Change Orders for an extension of the Contract Time due to Excusable Delays, for which Construction Manager expressly acknowledges and agrees that it shall not receive any Construction Overhead and Profit Fee and its sole and exclusive remedy is as provided for in the Agreement. For Subcontractors and Suppliers, the overhead and profit markups or fees for Change Orders or Construction Change Directives shall not exceed [_____] % of the Cost of the Project associated with the Work that is the subject of the Change Order or Construction Change Directive.

2.4 A Construction Manager's Contingency, which shall only be used for the limited purposes specified in Subsection 6.4.1 of the Agreement, is hereby established in the amount of _____ (\$_____), and said amount stated in this Section 2.4 is included within the GMP. In no event shall the use of the Construction Manager's Contingency cause for the GMP to be exceeded. The Construction Manager shall be solely responsible for all costs that exceed the GMP (as adjusted by Change Order or Construction Change Directive), without any reimbursement from the City. Construction Manager shall use all diligent, good-faith efforts to maximize cost savings and minimize use of the Construction Manager's Contingency. Draws made against the Construction Manager's Contingency shall be made as specified in and to the limited extent permitted by the Contract Documents.

2.5. The City retains exclusive use and control of the City's Contingency, and all expenditures must be approved in writing by the City Manager or Project Coordinator by Change Order or Construction Change Directive in accordance with the Contract Documents. Construction Manager shall not proceed with any portion of the Work, which it intends to charge against the City Contingency without first obtaining City's express written authorization to proceed. Any unused City Contingency remaining at the completion of the Project shall accrue solely to the City, and shall not be used for purposes of calculating any Project Cost Savings.

2.6 Applications for Payment of the Cost of the Project, General Conditions Fee, the Construction Overhead and Profit Fee shall be made monthly based upon the percent completion of the Work for each particular month and in accordance with the Contract Documents. The percent completion shall be based on the updated and City-approved Construction Schedule as required by the Contract Documents. The Construction Manager will be required to furnish documentation evidencing all expenditures for which it seeks payment or reimbursement, and demonstrating that the costs incurred were necessary for the Work, in accordance with the Contract Documents, including Article 11 of the Agreement.

2.7 Construction Manager recognizes that this Contract includes work for trench excavation in excess of five feet deep. Construction Manager acknowledges the requirements set forth in Section 553.63 of the Florida Statutes entitled Trench Safety Act. Construction Manager certifies that the required trench safety

standards will be in effect during the period of construction of the Project and Construction Manager agrees to comply with all such required trench safety standards. The amount of _____ dollars (\$_____) has been separately identified for the cost of compliance with the required trench safety standards; said amount is included within the GMP.

2.8 The GMP may be adjusted pursuant to the terms herein for Change Order and Construction Change Directive in accordance with the Contract Documents.

ARTICLE 3 CONTRACT TIME

3.1 The Construction Phase Commencement Date for the Work is _____. The total period of time beginning with the Construction Phase Commencement Date through the date required for Substantial Completion of the Work is _____ (_____) calendar days ("Contract Time"). **THE SUBSTANTIAL COMPLETION DATE IS THEREFORE ESTABLISHED AS _____, 2018 [TARGETED/ANTICIPATED TO BE MAY 31, 2018].**

3.2 Pursuant to this Agreement, the parties have established the limitations of liability and liquidated damages rates set forth in Section 5.1.3.1, which the parties acknowledge and agree apply to this GMP Amendment and Construction Manager's responsibility to complete the Work within the Contract Time and achieve the Milestones as stated therein.

ARTICLE 4 ADDITIONAL PROVISIONS

4.1. Pursuant to Subsection 2.5.2.3 of the Agreement, the Construction Manager hereby acknowledges and agrees that it shall not be entitled to an adjustment in the Project Schedule or the Guaranteed Maximum Price based on general or local conditions affecting the Project, the Project Site and/or the performance of the Work, and the Construction Manager waives and releases City from any and all Claims associated therewith.

4.2. Pursuant to Subsection 5.6.3 of the Agreement, except to the limited extent of reasonable acceleration costs funded from the City's Contingency pursuant to Subsection 5.2.3.b. to regain lost schedule progress directly resulting from Excusable Delays, the Construction Manager hereby acknowledges and agrees that its pricing of the Work and the determination of the Guaranteed Maximum Price is expressly based upon the Construction Manager's assuming the cost risks of taking all steps that may be necessary, including implementation of a Recovery Schedule, acceleration of the Work, or extraordinary measures, in order to achieve the critical Art Basel 2016 Milestone and Art Basel 2017 Milestone. In no event shall Construction Manager be entitled to any other compensation or recovery of any damages in connection with acceleration or constructive acceleration, including consequential damages, lost efficiency, opportunity costs or similar remuneration.

4.3. Pursuant to Section 9.2 of the Agreement and based on the information reasonably identified or inferable from the tests or studies conducted by the City and made available to Construction Manager, Construction Manager acknowledges and agrees that it has satisfied itself as to what the Construction Manager anticipates will be the character, quality and quantity of soil, surface and subsurface materials or obstacles that may be encountered by the Construction Manager at the Project Site, and the condition of the existing foundations and building structure, including the environmental conditions identified in the Phase I and Phase II environmental reports provided by the City, and that the entire cost risk of such matters, as well as any concealed, latent, known, unknown or other conditions, shall be borne by the Construction Manager as part of the Guaranteed Maximum Price unless such conditions could not have reasonably been identified upon reasonable investigation during the Pre-Construction Phase by the Construction Manager. The Construction Manager expressly acknowledges and agrees that it has had

ample opportunity to investigate the Project Site, has had access to the Project Site since the Effective Date of this Agreement, and agrees that its pricing of the Work and the determination of the Guaranteed Maximum Price were expressly based upon the Construction Manager's assuming the foregoing cost risks of Project Site conditions.

4.4. Pursuant to Subsection 9.3.1.2 of the Agreement, Construction Manager acknowledges and agrees that, except as specified herein, all delays or events and their potential impacts on the performance by the Construction Manager are specifically contemplated and acknowledged by the Parties in entering into this GMP Amendment and that Construction Manager's pricing of the Work and the determination of the Guaranteed Maximum Price is expressly based on the Construction Manager's assumption of the risks thereof, and Construction Manager hereby waives any and all Claims it might have for any of the foregoing losses, costs, damages and expenses, except to the extent specifically provided for in the Agreement.

4.5. All defined terms herein shall have the same meaning ascribed to them in the Agreement or other Contract Documents. Except as expressly modified herein, the terms and conditions of the Agreement remain unchanged. In the event of a conflict between the terms of this Amendment and those of the Agreement, City and Construction Manager agree that the terms of this GMP Amendment shall prevail and control.

IN WITNESS WHEREOF, the Parties hereto have executed this GMP Amendment the day and year first written above.

CITY OF MIAMI BEACH, FLORIDA

ATTEST:

By: _____
City Clerk

By: _____
Philip Levine
Mayor

ATTEST:

CLARK CONSTRUCTION GROUP, LLC

Print Name:

Print Name:

By: _____
Sidney J. Jordan
Division CEO/President
Northern & Southern Region

Condensed Title:

A Resolution Of The Mayor And City Commission Of The City Of Miami Beach, Florida, Accepting The Recommendation Of The City Manager, Pursuant To Request For Proposals (RFP) No. 2015-103-Me, For The Development Of A Convention Headquarter Hotel Adjacent To The Miami Beach Convention Center ("Project"); Authorizing The Administration To Negotiate A Development And Ground Lease Agreement With Portman Holdings, LLC, With Said Agreement Subject To Prior Approval By The Mayor And City Commission Before Final Execution Thereof.

Key Intended Outcome Supported:

Improve alliance with key business sectors, namely hospitality, arts & international business with a focus on enhanced culture, entertainment & tourism.
Supporting Data (Surveys, Environmental Scan, etc.): N/A

Item Summary/Recommendation:

On January 29, 2015 the City issued Request for Proposals No. 2015-103-ME (the RFP) for the Development of a Convention Headquarter Hotel Adjacent to the Miami Beach Convention Center. A voluntary pre-proposal meeting was held on February 26, 2015.

On April 10, 2015 the City received proposals from Portman Holdings, LLC ("Portman") and Oxford Capital Group/RLB Swerdling ("Oxford Capital"). On April 21, 2015, the City Manager notified Oxford Capital that its proposal was not responsive to the RFP.

On April 29, 2015, the City Manager via Letter to Commission (LTC) No. 176-2015, appointed an Evaluation Committee (the "Committee"), which convened on May 7, 2015 to consider the Portman proposal and interview the Portman team. The average score by the Committee members was 91 on a 100-point scale.

After reviewing the Proposer's qualifications and submission, the City Manager exercised his due diligence and is recommending that the Mayor and City Commission authorize the Administration to negotiate a development and ground lease Agreement with Portman Holdings, LLC.

Advisory Board Recommendation:

N/A

Financial Information:

| Source of Funds: | | Amount | Account |
|---|-------|--------|---------|
| <div style="border: 1px solid black; width: 40px; height: 40px; margin: 0 auto; display: flex; align-items: center; justify-content: center;"> OBPI </div> | 1 | | |
| | 2 | | |
| | 3 | | |
| | Total | | |

Financial Impact Summary:

City Clerk's Office Legislative Tracking:

Maria Hernandez, Extension 2584

Sign-Offs:

| | | |
|----------------------------|-------------------------------|---------------------|
| Department Director | Assistant City Manager | City Manager |
| MH | | JLM |

T:\AGENDA\2015\May\MBCC Headquarter Hotel\MBCC Hotel Developer Summary 2015 05 20.docx

MIAMI BEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

COMMISSION MEMORANDUM

TO: Mayor Philip Levine and Members of the City Commission

FROM: Jimmy L. Morales, City Manager

DATE: May 20, 2015

SUBJECT: **A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, ACCEPTING THE RECOMMENDATION OF THE CITY MANAGER, PURSUANT TO REQUEST FOR PROPOSALS (RFP) NO. 2015-103-ME, FOR THE DEVELOPMENT OF A CONVENTION HEADQUARTER HOTEL ADJACENT TO THE MIAMI BEACH CONVENTION CENTER ("PROJECT"); AUTHORIZING THE ADMINISTRATION TO NEGOTIATE A DEVELOPMENT AND GROUND LEASE AGREEMENT WITH PORTMAN HOLDINGS, LLC, THE SOLE RESPONSIVE PROPOSER TO THE RFP, WITH SAID AGREEMENT SUBJECT TO PRIOR APPROVAL BY THE MAYOR AND CITY COMMISSION BEFORE FINAL EXECUTION THEREOF.**

ADMINISTRATION RECOMMENDATION

Adopt the Resolution.

KEY INTENDED OUTCOME

Improve alliance with key business sectors, namely hospitality, arts & international business with a focus on enhanced culture, entertainment & tourism.

BACKGROUND

On January 29, 2015 the City issued Request for Proposals No. 2015-103-ME (the RFP) for the Development of a Convention Headquarter Hotel Adjacent to the Miami Beach Convention Center. A voluntary pre-proposal meeting was held on February 26, 2015.

On April 10, 2015 the City received proposals from Portman Holdings, LLC ("Portman") and Oxford Capital Group/RLB Swerdling ("Oxford Capital"). On April 21, 2015, the City Manager notified Oxford Capital that its proposal was not responsive to the RFP.

On April 29, 2015, the City Manager via Letter to Commission (LTC) No. 176-2015, appointed an Evaluation Committee (the "Committee"), which convened on May 7, 2015 to interview the Portman team and score the proposal consistent with the evaluation criteria outlined in the RFP.

ANALYSIS

Firm Experience

The Portman proposal meets the experience requirements of the RFP. The Portman team has extensive convention hotel development and architectural experience that includes the projects shown below. Portman reports to have raised and developed over \$6 billion and developed over 55 million square feet of real estate.

| Project Name/Completion Date | Role | Rooms | Meeting/Ballroom SF |
|---|-------------------------------|-----------------------|----------------------------|
| Hilton San Diego Bayfront Hotel (2008) | Developer/Architect | 1,190 | 165,000 |
| Westin Charlotte (2003) | Owner/Developer/ Architect | 700 | 44,000 |
| Lane Field San Diego (Phase I under construction; Phase II in design) | Developer/Architect | 800 (Phase I & II) | 31,200 (Phase I & II) |
| Ritz-Carlton at Shanghai Centre (1990) | Owner/Developer/ Architect | 700 | 20,300 |
| Marriott Marquis Times Square (1985) | Developer/Architect | 1,892 | 101,500 |
| Atlanta Marriott Marquis (1985) | Developer/Architect | 1,663 | 160,000 |
| Westin Peachtree Plaza Atlanta (1976) | Developer/Architect | 1,100 | 29,000 |
| Hyatt Regency Atlanta (1967) | Developer/Architect | 1,260 | 180,000 |

Design Team Experience

John Portman & Associates (“JPA”) is the lead designer for the Project. JPA was founded in 1953 and is an internationally recognized architectural and engineering firm with 75 employees. In addition to designing the above referenced hotel projects, JPA has also been the design architect for the 500-room Renaissance Schaumburg Hotel and Convention Center; in 2006 and the 690-room Shandong China Hotel & Conference Center in 2003.

In addition to JPA, the design team is to include the local architectural firm of Revuelta Architecture International. Some of Revuelta’s recent local projects include the 204-room Saxony Hotel in Miami Beach and the 104-room/350-residential unit Epic Residences and Hotel in Miami.

JPA has also teamed with West 8, an international landscape architectural firm. Examples of West 8’s landscape design projects include Miami Beach Soundscape; Madrid Rio in Madrid, Spain; and Toronto Central Waterfront.

Finally, Portman has teamed with HDC International who will assist in preliminary cost estimating, scheduling and scope description and review. HDC has advised on multiple convention hotels, including the Gaylord Palms Resort & Convention Center.

Key Terms

The Portman proposal accepts of the City's key terms, including:

- No Public Participation:
 - No public subsidies or public financing
 - Use of MBCC facilities at prevailing/market rates
- No Gambling:
 - Use restriction to prohibit gambling on Hotel Site
 - Developer/owners for term of lease may not own, operate or manage any establishment offering gambling or wagering in Miami-Dade County
- Developer Funds:
 - All costs to develop, design, construction, equip and operate hotel
 - Referendum (general elections) cost
- Room Block Agreement:
 - Portman has agreed to the City's terms outlined in the draft Room Block Agreement.

The proposal also recognized the requirement for a voter referendum whereby 60% of voters must approve the lease. The referendum is contemplated to occur in November 2015.

Aspirational City and County Employment Goals

Portman has stated their commitment to the City and County employment goals. The following include excerpts from their response:

- "The Portman team is unequivocally capable and committed to meet or exceed the Miami Beach and Miami-Dade County employment goals..."
- "The Portman team believes in maximizing opportunities for local, minority, women, veteran and small business enterprises."
- "We reach out to include local businesses to supplement the knowledge brought by the international experts on our team."
- "The Portman team will contact local and certified diversity businesses.....We pledge to keep the City Commission informed of our efforts through the issuance of monthly reports throughout the project schedule."
- "It is the Portman team's desire to see hotel operations provide opportunities for employment to City of Miami Beach and Miami-Dade County residents. We will do our part to ensure the hotel operator selected has equal opportunity and that local outreach programs are in place."

Proposed Hotel Program

Portman proposes to develop an 800-room convention headquarter hotel to include the following program elements:

| <u>Ballroom/Meeting Space</u> | <u>Sq. Feet</u> | <u>Food & Beverage</u> | <u>Seats</u> |
|-------------------------------|-----------------|----------------------------|--------------|
| Grand Ballroom | 26,500 | 3-meal | 300 |
| Junior Ballroom (2) | 21,000 | Lobby Lounge | 180 |
| Breakout Meeting | <u>47,700</u> | Pool Grille | 130 |
| Total | <u>95,200</u> | Rooftop | 120 |
| | | Club Lounge | 92 |
| Parking Spaces | 320 | Café | 40 |

The 320 parking spaces proposed adheres to the requirement in the RFP of 0.4 parking spaces per room.

Hotel Brand

Portman has indicated they intend to consider national hotel brand/operators with an established and consistently maintained reputation for quality operations. Brands to be considered include Marriott, Marriott Marquis, JW Marriott, Westin, Omni, Hyatt Regency and Hilton. During negotiations, Portman will work with the City to determine the best brand/operator for the hotel.

Development Budget and Finance Plan

Portman has estimated the preliminary development budget to be \$405.5 million and intends to finance the hotel with an estimated 60% in debt and 40% in equity. Portman Holdings has indicated they plan to provide \$17 million in equity, with the remaining equity to be funded by Portman institutional relationships. The Portman proposal included construction debt financing support letters from Regions Bank and PNC Bank and an equity support letter from China Orient Summit Capital.

Development Schedule

Portman is estimating the hotel design to be complete in late 2016 and construction to be complete in late 2018 with the hotel opening targeted to occur prior to Art Basel 2018.

Lease Proposal

Portman has proposed to lease the Hotel Site for a period of 99 years. Lease payments are proposed to be the greater of a fixed schedule or 4% of gross hotel operating revenues. A schedule of the proposed lease payments is in attached Exhibit 1. Below is a table of the total and net present value ("NPV") of the lease payments:

| | <u>Over 30 Years</u> | | <u>Over 99 Years</u> | |
|--------------------|----------------------|-----------------|----------------------|-----------------|
| | Total | NPV @ 5% | Total | NPV @ 5% |
| Minimum Fixed Rent | \$91m | \$36m | \$708m | \$60m |
| Variable Rent | 89m | 35m | 705m | 59m |
| Percentage Rent | \$180m | \$71m | \$1.4B | \$119m |

The lease stream NPV of \$119 million over the term of the lease equates to \$149,000 per room. This is higher than the City 2013 independent appraisal indicating a range of value from \$103,500 to \$129,900 per room. Prior to executing the lease, the City Administration plans to update the 2013 appraisal.

Transaction Rent

Portman has proposed the City will receive additional rent in connection with the first three sales of the hotel to a third party if the sales price exceeds \$580 million. In those events, the City is to receive the lesser of \$2 million or 0.25% of the gross sales price.

Public Revenue Impact

The Hotel Site is currently a parking lot that generates \$263,700 annually in revenues for the City. If the site is developed with a hotel annual (year 4) lease and tax revenue generated is estimated to be \$22.2 million. Over time the hotel is estimated to generate:

- City: \$438 million (\$178 million NPV) over 30 years and \$3 billion (\$278 million NPV) over 99 years in lease payments, resort taxes, CRA revenues, property taxes and County CDT allocations to the City.
- County: \$110 million (\$42 million NPV) over 30 years and \$1.25 billion (\$87 million NPV) over 99 years in convention development taxes, local option sales taxes and property taxes.
- Schools: \$60 million (\$24 million NPV) over 30 years and \$453 million (\$40 million NPV) over 99 years in property taxes.
- State: \$264 million (\$107 million NPV) over 30 years and \$2 billion (\$176 million NPV) over 99 years in sales taxes.
- Total: \$878 million (\$354 million NPV) over 30 years and \$6.7 billion (\$586 million NPV) over 99 years in lease payments and taxes.

Refer to attached Exhibit 2.

RFP Evaluation Committee

The Evaluation Committee (the “Committee”) consisted of the following individuals:

- Randy Weisburd, Chief Operating Officer, Atlantic & Pacific Companies and Resident
- Larry Gragg, President and Chief Operating Officer, Codina Partners
- Tom Mooney, Planning Director
- James Goldsmith, President and CEO, Gator Investments and Resident*
- Max Sklar, Tourism, Culture and Economic Development Director*

*James Goldsmith and Max Sklar were not able to attend the Evaluation Committee meeting.

The Committee reviewed and scored Portman’s submittal based upon the criteria outlined in the RFP. The table below represents the scores by the committee members.

| CRITERIA | Committee Member Scoring | | | | |
|--|--------------------------|-----------|-----------|-----------|---------------|
| | Potential Score | #1 | #2 | #3 | Average Score |
| Hotel finance plan and Proposer financial capabilities | 30 | 28 | 25 | 25 | 26.0 |
| Proposed financial and other terms of the Development and Ground Lease Agreement | 25 | 22 | 25 | 23 | 23.3 |
| Hotel program, conceptual design and preliminary development budget | 20 | 18 | 15 | 18 | 17.0 |
| Proposer experience and qualifications | 10 | 10 | 10 | 10 | 10.0 |
| Design team experience and qualifications | 10 | 9 | 10 | 10 | 9.7 |
| Organization plan | 5 | 5 | 5 | 5 | 5.0 |
| TOTAL | 100 | 92 | 90 | 91 | 91 |

CONCLUSION / RECOMMENDATION

The Administration recommends that the Mayor and City Commission authorize the Administration to negotiate a development and ground lease Agreement with Portman Holdings, LLC, pursuant to Request for Proposals (RFP) No. 2015-103-ME for the Development of a Convention Headquarter Hotel Adjacent to the Miami Beach Convention Center, with said Agreement subject to prior approval by the Mayor and City Commission before the final execution thereof.

JLM / MT / AD / MH

T:\AGENDA\2015\May\MBCC Headquarter Hotel\MBCC Hotel Developer Memo 2015 05 20.docx

Exhibit 1 Summary of Lease proposal

| | | Minimum Fixed Rent | Growth | Variable Rent | Growth | Percentage Rent | Growth |
|---------|------|-----------------------|--------|----------------------|--------|------------------------|--------|
| | 2016 | - | | - | | - | |
| | 2017 | - | | - | | - | |
| | 2018 | - | | - | | - | |
| 1 | 2019 | \$583,365 | | \$253,749 | | \$837,114 | |
| 2 | 2020 | 1,071,059 | 83.6% | 702,103 | 176.7% | 1,773,161 | 111.8% |
| 3 | 2021 | 1,820,800 | 70.0% | 1,498,025 | 113.4% | 3,318,825 | 87.2% |
| 4 | 2022 | 2,476,287 | 36.0% | 2,190,634 | 46.2% | 4,666,921 | 40.6% |
| 5 | 2023 | 2,525,813 | 2.0% | 2,282,161 | 4.2% | 4,807,974 | 3.0% |
| 6 | 2024 | 2,576,329 | 2.0% | 2,375,884 | 4.1% | 4,952,213 | 3.0% |
| 7 | 2025 | 2,627,856 | 2.0% | 2,472,923 | 4.1% | 5,100,779 | 3.0% |
| 8 | 2026 | 2,680,413 | 2.0% | 2,573,390 | 4.1% | 5,253,803 | 3.0% |
| 9 | 2027 | 2,734,021 | 2.0% | 2,677,396 | 4.0% | 5,411,417 | 3.0% |
| 10 | 2028 | 2,788,702 | 2.0% | 2,785,057 | 4.0% | 5,573,759 | 3.0% |
| 11 | 2029 | 2,844,476 | 2.0% | 2,840,758 | 2.0% | 5,685,234 | 2.0% |
| 12 | 2030 | 2,901,365 | 2.0% | 2,897,574 | 2.0% | 5,798,939 | 2.0% |
| 13 | 2031 | 2,959,392 | 2.0% | 2,955,526 | 2.0% | 5,914,918 | 2.0% |
| 14 | 2032 | 3,018,580 | 2.0% | 3,014,636 | 2.0% | 6,033,216 | 2.0% |
| 15 | 2033 | 3,078,952 | 2.0% | 3,074,928 | 2.0% | 6,153,880 | 2.0% |
| 16 | 2034 | 3,140,531 | 2.0% | 3,136,427 | 2.0% | 6,276,958 | 2.0% |
| 17 | 2035 | 3,203,341 | 2.0% | 3,199,156 | 2.0% | 6,402,497 | 2.0% |
| 18 | 2036 | 3,267,408 | 2.0% | 3,263,139 | 2.0% | 6,530,547 | 2.0% |
| 19 | 2037 | 3,332,756 | 2.0% | 3,328,402 | 2.0% | 6,661,158 | 2.0% |
| 20 | 2038 | 3,399,412 | 2.0% | 3,394,969 | 2.0% | 6,794,381 | 2.0% |
| 21-99 | | <u>655,311,235</u> | | <u>654,454,915</u> | | <u>1,309,766,150</u> | |
| Total | | <u>\$708,342,093</u> | | <u>\$705,371,752</u> | | <u>\$1,413,713,845</u> | |
| NPV @5% | | \$60,462,084 | | \$58,911,951 | | \$119,374,035 | |

Note: The minimum fixed rent adjusts up or down every 10 years to 55% of the prior five year's average total rent paid.

Exhibit 2 Summary of Public Revenue Impact

| | 2022 (Yr 4) | Over 30 years | | Over 99 years | |
|-------------------------------|----------------|---------------|---------------|-----------------|---------------|
| | | Total | NPV @ 5% | Total | NPV @ 5% |
| CITY | | | | | |
| Hotel Lease | | | | | |
| Minimum Fixed Rent | \$2.5m | \$91m | \$36m | \$708m | \$60m |
| Variable Rent | 2.2m | 89m | 35m | 705m | 59m |
| Percentage Rent (4% Gross) | \$4.7m | 180m | 71m | 1,414m | 119m |
| Taxes | | | | | |
| CRA City (thru 3/2044) | 1.1m | 34m | 16m | 34m | 16m |
| CRA County (thru 3/2044) | 0.8m | 26m | 12m | 26m | 12m |
| New Resort Tax (Hotel 1%) | 0.8m | 30m | 12m | 229m | 20m |
| Resort Tax (Hotel 3%, F&B 2%) | 3.0m | 118m | 48m | 902m | 79m |
| CDT Allocation (thru 2044) | 1.5m | 36m | 16m | 36m | 16m |
| Property Taxes* | 0.1m | 13m | 4m | 326m | 16m |
| Subtotal | 7.2m | 258m | 108m | 1,553m | 159m |
| CITY TOTAL | \$11.9m | \$438m | \$178m | \$2,967m | \$278m |
| COUNTY | | | | | |
| Convention Devl. Tax (3%) | 0.8m | 54m | 20m | 650m | 44m |
| Local Option Sales Tax (1%) | 1.1m | 44m | 18m | 336m | 29m |
| Property Taxes* | 0.1m | 12m | 4m | 266m | 14m |
| Subtotal County | 2.0m | 110m | 42m | 1,252m | 87m |
| SCHOOLS (Property Tax) | 1.5m | 60m | 24m | 453m | 40m |
| OTHER PROPERTY** | 0.2m | 7m | 3m | 55m | 5m |
| STATE SALES TAX (6%) | 6.6m | 264m | 107m | 2,019m | 176m |
| TOTAL | \$22.2m | \$878m | \$354m | \$6,746m | \$586m |

* 95% of general property taxes allocated to CRA through 3/2044

** Regional property tax and Children's Trust property tax

Key Assumptions:

All analysis completed on a calendar year basis

Year 1 through 10 based on developer proforma

Assumed 2% growth rate beginning in year 11 and beyond

NPV to 2016

\$1.5m of County CDT allocated to City beginning in third year of hotel opening through 2044

Sources: Portman, City of Miami Beach, SAG.

RESOLUTION NO. _____

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, ACCEPTING THE RECOMMENDATION OF THE CITY MANAGER, PURSUANT TO REQUEST FOR PROPOSALS (RFP) NO. 2015-103-ME, FOR THE DEVELOPMENT OF A CONVENTION HEADQUARTER HOTEL ADJACENT TO THE MIAMI BEACH CONVENTION CENTER ("PROJECT"); AUTHORIZING THE ADMINISTRATION TO NEGOTIATE A DEVELOPMENT AND GROUND LEASE AGREEMENT WITH PORTMAN HOLDINGS, LLC, WITH SAID AGREEMENT SUBJECT TO PRIOR APPROVAL BY THE MAYOR AND CITY COMMISSION BEFORE FINAL EXECUTION THEREOF.

WHEREAS, Request for Proposals No. 2015-103-ME (the RFP) was issued on January 29, 2015, with an opening date of April 10, 2015; and

WHEREAS, a voluntary pre-proposal meeting was held on February 26, 2015; and

WHEREAS, the City received proposals from the following firms: (1) Portman Holdings, LLC ("Portman"); and (2) Oxford Capital Group/RLB Swerdling ("Oxford Capital"); and

WHEREAS, on April 21, 2015, the City Manager notified Oxford Capital that its proposal was not responsive to the RFP; and

WHEREAS, on April 29, 2015, the City Manager via Letter to Commission (LTC) No. 176-2015, appointed an Evaluation Committee (the "Committee"), which convened on May 7, 2015 to consider the Portman proposal and interview the Portman team; and

WHEREAS, after reviewing the Proposer's qualifications and submission, the City Manager exercised his due diligence and is recommending that the Mayor and City Commission authorize the Administration to enter into negotiations with Portman.

NOW, THEREFORE, BE IT DULY RESOLVED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, that the Mayor and City Commission hereby accept the recommendation of the City Manager pertaining to Request for Proposals (RFP) No. 2015-103-ME, for the Development of a Convention Headquarter Hotel Adjacent to the Miami Beach Convention Center; and authorizes the Administration to negotiate a Development and Ground Lease Agreement with Portman Holdings, LLC, with said agreement subject to prior approval by the Mayor and City Commission before final execution thereof.

PASSED AND ADOPTED this _____ day of _____ 2015.

ATTEST:

Rafael E. Granado, City Clerk

Philip Levine, Mayor

APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION

[Signature] 5/12/15

City Attorney *RA*

Date

Condensed Title:

A Resolution Of The Mayor And City Commission of the City of Miami Beach, Florida, Approving and Authorizing The Mayor And City Clerk To Execute Amendment No. 7 To The Professional Services Agreement Between The City of Miami Beach and Strategic Advisory Group Dated October 19, 2011 For Consulting Services Relative To The Expansion And Enhancement Of The Miami Beach Convention Center in an Amount Not To Exceed \$358,825, including All Reimbursable Expenses.

Key Intended Outcome Supported:

Improve alliance with key business sectors, namely hospitality, arts & international business with a focus on enhanced culture, entertainment & tourism.

Supporting Data (Surveys, Environmental Scan, etc N/A

Item Summary/Recommendation:

On October 19, 2011, the City Commission authorized the Mayor and City Clerk to enter into an agreement with Strategic Advisory Group (SAG) for services relative to the expansion and enhancement of the Miami Beach Convention Center District, in an amount not to exceed \$175,000. On February 6, 2013, and March 13, 2013 respectively, the Commission authorized Amendments No. 1 and 2, totaling \$307,232, for additional services relative to RFQ No. 22-11/12, issued for the selection of developers for a public-private mixed-use development including the expansion of the Miami Beach Convention Center and development of a Convention Center Hotel (Hotel).

On January 15, 2014, the City Commission terminated negotiations with the developer and on February 12, 2014, the City Commission approved the issuance of the RFQ for a Design Criteria Professional to prepare a Design Criteria Package for the Convention Center Renovation Project. Amendments No. 3 and 4, for related services through May 31, 2015, were executed for a total not to exceed amount of \$548,900.

On September 10, 2014, the City Commission directed the Administration to prepare a traffic study related to the development of a Convention Center Headquarter Hotel and to prepare a schedule for the potential procurement of a hotel developer. Amendment No.5, for consulting services associated with these tasks, was executed in an amount not to exceed \$30,000. On December 18, 2014, the City Commission approved Amendment No. 6 for consulting services relative to the procurement process of a hotel developer, in an amount not to exceed \$166,375.

On February 11, 2015, the City Commission elected to re-bid the Project under a Construction Manager-at-Risk (CMAR) project delivery method. Under the CMAR approach, the City takes a more active roll in managing the project. Since this approach was not originally anticipated, this Amendment provides for SAG's continuing services related to the extended need for pre-construction services through December 31, 2015, for a not to exceed amount of \$198,825 (\$28,404 per month on average).

On a parallel path, on September 10, 2014 the City Commission directed the Administration to work with the Greater Miami Convention and Visitors Bureau to create a performance-based contract that outlines specific goals, objectives and success measures for any future Convention Center marketing agreement. This Amendment also provides for SAG's asset management services to guide, monitor and oversee the transformation of the sales and marketing efforts, event and revenue focus, branding and operating strategies of the new convention center, for a not to exceed amount of \$160,000 (\$14,545 per month on average over eleven months).

The Administration recommends the City Commission adopt the Resolution.

Advisory Board Recommendation:

N/A

Financial Information:

| Source of Funds: | | Amount | Account |
|---|--------------|------------------|---|
|  OBPI | 1 | \$198,825 | 165-2816-061357 Miami Beach Redevelopment Agency Non-Trust Fund Special Revenue Account |
| | 2 | \$160,000 | 160-4300-000312 Resort Tax Fund |
| | Total | \$358,825 | |

Financial Impact Summary: N/A

City Clerk's Office Legislative Tracking:

Maria Hernandez, ext. 2584

Sign-Offs:

| Department Director | Assistant City Manager | City Manager |
|--|------------------------|---|
| MH  | | JLM  |

T:\AGENDA\2015\May\MBCC\SAG Amendment No. 7\SAG Amendment #7 - SUMMARY.docx



MIAMI BEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

COMMISSION MEMORANDUM

TO: Mayor Philip Levine and Members of the City Commission

FROM: Jimmy L. Morales, City Manager

DATE: May 20, 2015

SUBJECT: **A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING AND AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE AMENDMENT NO. 7 TO THE PROFESSIONAL SERVICES AGREEMENT BETWEEN THE CITY OF MIAMI BEACH AND STRATEGIC ADVISORY GROUP DATED OCTOBER 19, 2011 FOR CONSULTING SERVICES RELATIVE TO THE EXPANSION AND ENHANCEMENT OF THE MIAMI BEACH CONVENTION CENTER IN AN AMOUNT NOT TO EXCEED \$358,825, INCLUDING ALL REIMBURSABLE EXPENSES.**

ADMINISTRATION RECOMMENDATION

Adopt the Resolution.

KEY INTENDED OUTCOME

Improve alliance with key business sectors, namely hospitality, arts & international business with a focus on enhanced culture, entertainment & tourism.

FUNDING

- Convention Center Expansion and Renovation Services: \$198,825 is available from Miami Beach Redevelopment Agency Non-Trust Fund Special Revenue Account No. 165-2816-061357 and is included in the Convention Center Project Budget.
- Convention Center Asset Management Services: \$160,000 is to be funded from the City's Resort Tax Fund, Account Number 160-4300-000312. These funds are available as a result of the contract extension for the Greater Miami Convention and Visitors Bureau (GMCVB), which was approved by the City Commission in September 2014 via Resolution No. 2014-28745. This resolution kept funding for the GMCVB at the then current level of \$5,366,000 and recommended the City hire an owner's representative in an amount not to exceed \$161,000 at the City Manager's discretion.

BACKGROUND

MBCC Expansion and Renovation Services:

On October 19, 2011, the City Commission authorized the Mayor and City Clerk to enter into an agreement with Strategic Advisory Group (SAG) for services relative to the expansion and enhancement of the Miami Beach Convention Center District, in an amount not to exceed \$175,000. SAG's fees were exhausted upon completion of Phase I of RFQ No. 22-11/12, issued for the selection of qualified developers for a public-private mixed-use development including the expansion of the Miami Beach Convention Center and development of a Convention Center Hotel (Hotel).

On February 6, 2013, and March 13, 2013, the Commission authorized Amendments No. 1 and 2 to the SAG Agreement, respectively, for additional services relative to the 2012 RFQ, totaling \$307,232.

On January 15, 2014, the City Commission adopted Resolution No. 2014-28479 terminating negotiations with the developer, and directing the Administration to prepare a new RFP or RFQ for design-build or design services for the renovation of the Convention Center alone, and further directing the Administration to identify potential sites for a Hotel.

On February 12, 2014, the City Commission approved the issuance of RFQ 2014-142ME, for a Design Criteria Professional to prepare a Design Criteria Package for the Convention Center Renovation Project, and authorized the City Manager to negotiate and execute any additional contracts, as required, in order to expedite this process, including but not limited to additional amendments to the SAG Agreement. Amendments No. 3 and 4, totaling \$548,900 have been executed pursuant to this directive, for services through May 31, 2015.

On September 10, 2014, the City Commission directed the Administration to prepare a traffic study related to the development of a Convention Center Headquarter Hotel and to prepare a schedule for the potential procurement of a hotel developer. Amendment No.5, for consulting services associated with these tasks was executed in an amount not to exceed \$30,000.

On December 18, 2014, the City Commission authorized the Mayor and City Clerk to execute Amendment No. 6 for consulting services relative to the procurement process of a hotel developer, for an amount not-to-exceed of \$166,375.

On February 11, 2015, the City Commission elected to re-bid the Project under a Construction Manager-at-Risk (CMAR) project delivery method, an approach that allows for the continued development of the design for the Project with the benefit of input from the Construction Manager prior to establishment of the Guaranteed Maximum Price (GMP) for the Project, currently anticipated to occur on or about October, 2015, followed by bond issuance occurring on or about December 15, 2015.

Under the CMAR approach, the City takes a more active roll in managing the project. Since this approach was not originally anticipated, this amendment provides for SAG's continuing services related to the extended need for pre-construction services such as: i) design oversight, construction manager oversight, construction manager guaranteed maximum price negotiations, cost estimating oversight, early bid package planning and oversight, bond funding / financing assistance, presentations, and City Commission approvals for the period beginning June 1, 2015 through December 31, 2015.

MBCC Asset Management Services:

In September, 2014, the City Commission withheld a portion of the funding to the Greater Miami Convention and Visitors Bureau for fiscal year 2015 to provide resources to ensure the marketing efforts and approach to convention services are best aligned to capitalize on the renovated and expanded convention center. In addition, the City Commission directed the Administration to work with the GMCVB to create a performance-based contract that outlines specific goals, objectives and success measures for any future Convention Center marketing agreement.

SAG's Dan Fenton has been assisting the City with these efforts since the City Commission's direction. Mr. Fenton is a seasoned marketing executive that has assisted several similar destinations with improving their approach to convention center marketing. Recent clients include the State of Hawaii, New Orleans, Atlantic City, and Houston.

The City desires to engage SAG's Fenton over a eleven-month period to guide, monitor and oversee the transformation of the sales and marketing efforts, event and revenue focus, branding, and operating strategies of the new MBCC. This will include:

- Helping guide and oversee the implementation of the most effective sales and marketing approach for the new MBCC.
- Helping guide and oversee the implementation of a service model that aligns MBCC/destination services with the quality of the new MBCC and the types of groups that are combatable with Miami Beach hotel pricing. This will include all aspects of the meeting planner and attendee experience from the first sales contact through the move out process.
- Facilitating the development of a new brand for the new MBCC, which will come with a “brand promise”.

FEE AND SCHEDULE INFORMATION

A copy of the SAG Amendment #7 is attached. SAG’s hourly billing rates will remain at the same, reduced, level as approved in 2014. The fees and expenses in this Amendment shall not exceed \$358,825:

- Pre GMP Services (June 2015 – December 2015) - Fees and expenses are not to exceed \$198,825 (*\$28,404 per month on average over 7 months*).
- Asset Management Services (May 2015 – March 2016) - Fees and expenses are not to exceed \$160,000 (*\$14,545 per month on average over 11 months*).

CONCLUSION/RECOMMENDATION

The Administration recommends that the Mayor and City Commission adopt the attached Resolution approving and authorizing the Mayor and City Clerk to execute an amendment to the professional services agreement between the City of Miami Beach and Strategic Advisory Group dated October 19, 2011 for consulting services relative to the expansion and enhancement of the Miami Beach Convention Center in an amount not to exceed \$358,825, including all reimbursable expenses.

Attachments:

1. Amendment No. 7

JLM / KGB / MH / MS

T:\AGENDA\2015\May\MBCC\SAG Amendment #7 - Memo.docx

RESOLUTION NO. _____

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING AND AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE AMENDMENT NO. 7 TO THE PROFESSIONAL SERVICES AGREEMENT BETWEEN THE CITY OF MIAMI BEACH AND STRATEGIC ADVISORY GROUP DATED OCTOBER 19, 2011 FOR CONSULTING SERVICES RELATIVE TO THE EXPANSION AND ENHANCEMENT OF THE MIAMI BEACH CONVENTION CENTER IN AN AMOUNT NOT TO EXCEED \$358,825.00, INCLUDING ALL REIMBURSABLE EXPENSES.

WHEREAS, on October 19, 2011, the City Commission authorized the Mayor and City Clerk to enter into an Agreement with Strategic Advisory Group (SAG) for services relative to the expansion and enhancement of the Miami Beach Convention Center District, in an amount not to exceed \$175,000; and

WHEREAS, on January 11, 2012, the City Commission authorized the issuance of Request for Qualifications No. 22-11/12 for qualified developers for a public-private mixed-use development in Miami Beach for the enhancement of the MBCC district, including the expansion of the Miami Beach Convention Center and development of a Convention Center Hotel (the "2012 RFQ"); and

WHEREAS, on February 6, 2013, and March 13, 2013, the Commission authorized Amendments No. 1 and 2 to the SAG Agreement, respectively, for additional services relative to the 2012 RFQ;

WHEREAS, on January 15, 2014, the City Commission adopted Resolution No. 2014-28479, canceling the 2012 RFQ and directing the Administration to prepare a new RFP or RFQ for design-build or design services for the renovation of the Convention Center, and further directing the Administration to identify potential sites for a Convention Center Headquarter Hotel; and

WHEREAS, on February 12, 2014, the City Commission approved the issuance of RFQ 2014-142ME, for a Design Criteria Professional to prepare a Design Criteria Package for the Convention Center Renovation Project, and authorized the City Manager to negotiate and execute any additional contracts, as required, in order to expedite this process, including but not limited to additional amendments to the SAG Agreement; and

WHEREAS, Amendments No. 3 and 4, totaling \$548,900, were executed pursuant to the Commission's February 12, 2014 directive, covering all of SAG's services from the beginning of the current design-build RFQ process through the anticipated selection of a Design-Builder in 2015 and execution of a Design-Build Agreement; and

WHEREAS, on September 10, 2014 the City Commission directed the Administration to work with the Greater Miami Convention and Visitors Bureau to create a performance-based contract that outlines specific goals, objectives and success measures for any future Convention Center marketing agreement; and

WHEREAS, Amendment No. 5, for consulting services associated with the development of a Convention Center Headquarter Hotel, was executed in an amount not to exceed \$30,000; and

WHEREAS, on December 18, 2014, the City Commission authorized the Mayor and City Clerk to execute Amendment No. 6 for the additional services associated with the procurement process of the hotel developer, in an amount not to exceed \$166,375; and

WHEREAS, on February 11, 2015, the City Commission elected to re-bid the Project under a Construction Manager-at-Risk (CMAR) project delivery method; and

WHEREAS, this Amendment provides for SAG's continuing services related to the pre-construction phase services through December 31, 2015, for a not to exceed amount of \$198,825 (\$28,404 per month on average), and for asset management services to guide, monitor and oversee the transformation of the sales and marketing efforts, event and revenue focus, branding and operating strategies of the new convention center, for a not to exceed amount of \$160,000 (\$14,545 per month on average over eleven months); and

WHEREAS, SAG's fees are based on time worked on the project multiplied by the hourly rates, which have been reduced from the rates approved in the original Agreement.

NOW, THEREFORE, BE IT DULY RESOLVED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH FLORIDA, that the Mayor and City Commission hereby approve and authorize the Mayor and City Clerk to execute Amendment No. 7 to the Professional Services Agreement between the City of Miami Beach and Strategic Advisory Group dated October 19, 2011, for Consulting Services relative to the expansion and enhancement of the Miami Beach Convention Center, in an amount not-to-exceed \$358,825, including reimbursable expenses.

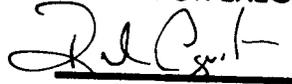
PASSED and ADOPTED this _____ day of May, 2015.

Philip Levine, Mayor

ATTESTED BY:

Rafael E. Granado, City Clerk

**APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION**



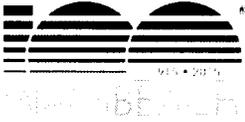
City Attorney *RAP*

5/14/15

Date

R9

**NEW BUSINESS
AND
COMMISSION REQUESTS**



City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

COMMISSION MEMORANDUM

TO: Mayor Philip Levine and Members of the City Commission

FROM: Rafael E. Granado, City Clerk

DATE: May 20, 2015

SUBJECT: **BOARD AND COMMITTEE APPOINTMENTS – CITY COMMISSION APPOINTMENTS**

ADMINISTRATION RECOMMENDATION

Make appointments as indicated.

ANALYSIS

At the May 6, 2015 Commission Meeting direction was given for this item to come back to the May 20, 2015 Presentation & Awards Commission Meeting to consider Planning Board appointment.

BOARDS AND COMMITTEES

1. AFFORDABLE HOUSING ADVISORY COMMITTEE

VACANT CATEGORIES (6):

- One citizen who is actively engaged in the residential home building industry in connection with affordable housing.
- One citizen who is a representative of those areas of labor actively engaged in home building in connection with affordable housing.
- One citizen actively engaged as an advocate for low-income persons in connection with affordable housing.
- One citizen who is actively engaged as a not-for-profit provider of affordable housing.
- One citizen who actively serves on the local planning agency pursuant to Florida Statute §163.3174 (Planning Board member).
- One citizen who represents essential services personnel, as defined in the local housing assistance plan.

2. **BUDGET ADVISORY COMMITTEE**

VACANT CATEGORY (1):

- One certified public accountant.

3. **HEALTH ADVISORY COMMITTEE**

VACANT CATEGORIES (4):

- Two (2) members shall be an administrator from an Adult Congregate Living Facility (ACLF), and/or an Assisted Living Facility (ALF).
- One (1) private individual.
- One (1) individual from the corporate level.

4. **MIAMI BEACH CULTURAL ARTS COUNCIL**

VACANT CATEGORY (1):

- One (1) member to be appointed At-Large.

5. **MIAMI BEACH HUMAN RIGHTS COMMITTEE**

VACANT CATEGORY (1):

- One (1) member to be appointed At-Large.

6. **PLANNING BOARD**

VACANT CATEGORIES (1):

- One architect registered in the State of Florida; or a member of the faculty of a school of architecture in the State, with practical or academic expertise in the field of design, planning, historic preservation or the history of architecture; or a landscape architect registered in the State of Florida; or a professional practicing in the fields of architectural or urban design, or urban planning.

Please see the "Agenda - Agenda Archives" for the continuously updated Releases of City Commission At-Large Nominations listing current information about which applicants have actually been nominated. The Agenda-Agenda Archives website is located at:

<http://miamibeachfl.gov/cityclerk/scroll.aspx?id=82117>

Alternatively, the Releases can be found by going to the City's main portal located at <http://miamibeachfl.gov>; and under the City Clerk section, located on the bottom right hand side of the webpage, click on the "Agenda Archives" link; thereafter choose the first listed Commission meeting and click on City Commission At-Large Nominations.

R9 - New Business and Commission Requests

- R9B Discussion Regarding Rescheduling The June Commission Meeting From June 10, 2015 To June 8, 2015.
(Sponsored by Mayor Philip Levine)

THIS PAGE INTENTIONALLY LEFT BLANK

R9 - New Business and Commission Requests

R9C Discussion Regarding City Of Miami Beach Requiring Mandatory Nighttime Closure Of All Ocean Drive Sidewalk Umbrellas For The Duration Of Memorial Day Weekend.
(Sponsored by Commissioner Michael Grieco)

THIS PAGE INTENTIONALLY LEFT BLANK