

SECOND AMENDMENT CONTRACT FOR CONSTRUCTION

THIS IS A SECOND AMENDMENT TO CONTRACT, by and between THE TOWN OF CUTLER BAY, FLORIDA, a municipal corporation of the State of Florida, (hereinafter referred to as "Town"), and Acosta Tractors, Inc., a Florida corporation, (hereinafter referred to as "Contractor".)

W I T N E S S E T H, that Contractor and Town, for the considerations hereinafter named, agree as follows:

ARTICLE 1

SCOPE OF WORK

- 1.1 Contractor hereby agrees to furnish all of the labor, materials, equipment, services and incidentals necessary to perform all of the Work described in the Contract Documents including Plans, Specifications and Addenda thereto for the following Project:

**CARIBBEAN BLVD. IMPROVEMENTS
GAP #2 (From the Homestead Extension of
Florida's Turnpike to the C-100 Canal Bridge)
JOINT PARTICIPATION AGREEMENT - MIAMI-DADE COUNTY
TOWN OF CUTLER BAY**

as described in the Plans prepared by Stantec Consulting Services, Inc. (the "Town's Project Engineer").

ARTICLE 2

CONTRACT TIME

- 2.1 Contractor shall be instructed to commence the Work by written instructions in the form of a Notice to Proceed issued by the Town Manager. The Notice to Proceed will not be issued until Contractor's submission to Town of all required documents and after execution of this Contract.
- 2.2 Time is of the essence throughout this Contract. The Contractor shall prosecute the work with faithfulness and diligence and the Base Bid Work shall be substantially completed within Two Hundred Twenty Eight (228) calendar days from the date specified in the Notice to Proceed. The Work shall be completed and ready for final payment in accordance with Article 3 within thirty (30) calendar days from the date certified by Town's Project Engineer as the date of Substantial Completion.
- 2.3 Upon failure of Contractor to substantially complete the Contract within the specified period of time, Contractor shall pay to Town the sum of Three Thousand

Dollars (\$3,000.00) for each calendar day after the time specified in Section 2.2 above for Substantial Completion. After Substantial Completion, should Contractor fail to complete the remaining Work within the time specified in Section 2.2 above for completion and readiness for final payment, Contractor shall pay to Town the sum of Two Thousand Dollars (\$2,000.00) for each calendar day after the time specified in Section 2.2 for completion and readiness for final payment. These amounts are not penalties but are liquidated damages to Town for its inability to obtain full beneficial occupancy and use of the Project. Liquidated damages are hereby fixed and agreed upon between the parties, recognizing the impossibility of precisely ascertaining the amount of damages that will be sustained by Town as a consequence of such delay, and both parties desiring to obviate any question or dispute concerning the amount of said damages and the cost and effect of the failure of Contractor to complete the Contract on time. The above-stated liquidated damages shall apply separately to each phase of the Project for which a time for substantial and/or final completion is given.

- 2.4 Town is authorized to deduct the liquidated damages from monies due to Contractor for the Work under this Contract.

ARTICLE 3

CONTRACT PRICE

- 3.1 Town shall pay to Contractor for the performance of the Contract, the total sum of **One Million One Hundred Two Thousand One Hundred Eighty Eight Dollars and Thirty Nine Cents (\$1,102,188.39)** subject to the conditions, limitations and restrictions of Sections 3.4, herein. This price shall be full compensation for all costs, including overhead and profit, associated with completion of all the Work in full conformity with the requirements as stated or shown, or both, in the Plans and Specifications.
- 3.2 The sum set forth in Paragraph 3.1 shall constitute the Contract Price which shall not be modified except by any Change Order issued by Town or as otherwise specified herein.
- 3.3 The Contract Price may be adjusted by Town pursuant to Article 12 of the General Conditions.
- 3.4 Town and Contractor agree that this Contract shall be subject to the condition precedent that Town funds are available and budgeted for the accomplishment of the Work for this Project, and that the Town secures and obtains any necessary loans for the accomplishment of this Project pursuant to a borrowing enabling ordinance and any loan implementing resolution adopted by the Town Council and as described in the Town Council Resolution which awards and authorizes the execution of this Contract.

ARTICLE 4

CONTRACT DOCUMENTS

- 4.1 The Contract Documents which comprise the entire agreement between the Town and the Contractor concerning the Work consist of this Contract for Construction, the Drawings, Plans and Specifications, the Invitation for Bids, the Addenda, the Bid, Instructions to Bidders, the General and Supplementary Conditions, Miami-Dade County Responsible Wages & Benefits, Miami-Dade County Community Small Business Enterprises (CSBE) Program Goals, the Performance Bond and Payment Bond, Insurance Certificates, the Notice of Award, the Notice to Proceed, any Change Orders and any other Contract Documents, not specifically listed herein which shall be considered incorporated into and made a part of this Contract by this reference and shall govern this Project. Contractor is reminded and hereby recognizes that all Work under this contract must comply with applicable federal regulations. Any mandatory clauses which are required by such federal regulations shall be deemed to be incorporated herein immediately upon Town's written request.
- 4.2 This document incorporates and includes all prior negotiations, correspondence, conversations, agreements, or understandings applicable to the matters contained herein and the parties agree that there are no commitments, agreements, or understandings concerning the subject matter of these Contract Documents that are not contained herein. Accordingly it is agreed that no deviation from the terms hereof shall be predicated upon any prior representations or agreements, whether oral or written.
- 4.3 The Contract Documents shall remain the property of the Town. The Contractor shall have the right to keep one record set of the Contract Documents upon completion of the Project; provided; however, that in no event shall the Contractor use, or permit to be used, any or all of such Contract Documents on other Projects without the Town's prior written authorization.

ARTICLE 5

WAIVER OF JURY TRIAL

Town and Contractor knowingly, irrevocably, voluntarily and intentionally waive any right either may have to a trial by jury in State and or Federal court proceedings in respect to any action, proceeding, lawsuit or counterclaim based upon the Contract for Construction, arising out of, under, or in connection with the Construction of the Work, or any course of conduct, course of dealing, statements or actions or inactions of any party.

ARTICLE 6

ASSIGNMENT

No assignment by a party hereto of any rights under or interests in the Contract Documents will be binding on another party hereto without the written consent of the party sought to be bound; and specifically but without limitation, moneys that may become due and moneys that are due may not be assigned without such consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.

ARTICLE 7

MISCELLANEOUS

7.1 Insurance Requirements

Contractor shall provide and maintain in force until all the Work to be performed under this Contract has been completed and accepted by Town (or for such duration as is otherwise specified hereinafter), the insurance coverages set forth in the Contract Documents.

7.2 Default and Termination

7.2.1 Default/Failure to Perform: The Town shall be the sole judge of nonperformance, which shall include any failure on the part of the successful bidder to accept the award, to furnish required documents, and/or to fulfill any portion of this contract within the time stipulated.

Upon default by the successful bidder to meet any terms of this agreement, the Town will notify the bidder three (3) days (weekends and holidays excluded) to remedy the default. Failure on the contractor's part to correct the default within the required three (3) days shall result in the contract being terminated and upon the Town notifying in writing the contractor of its intentions and the effective date of the termination. The following shall constitute default:

- A) Failure to perform the work required under the contract and/or within the time required or failing to use the subcontractors, entities and personnel as identified and set forth, and to the degree specified in the contract.
- B) Failure to begin the work under this contract within the time specified.
- C) Failure to perform the work with sufficient workers and equipment or with sufficient materials to ensure timely completion.

- D) Neglecting or refusing to remove materials or perform new work where prior work has been rejected as non-conforming with the terms of the contract.
- E) Becoming insolvent, being declared bankrupt, or committing act of bankruptcy or insolvency, or making an assignment renders the successful bidder incapable of performing the work in accordance with and as required by the contract..
- F) Failure to comply with any of the terms of the contract in any material respect.

In the event of litigation or arbitration arising from a default by the contractor, the contractor shall also be liable for all damages caused by its default which damages may include but not be limited to any and all costs incurred by the Town in completing the project, and damages arising out of the contractor's failure to adhere to the contract requirements and all attorney's fee and costs incurred by the Town in seeking legal relief for the default.

7.2.2 The Town of Cutler Bay reserves the right to cancel this contract by written notice to the contractor effective the date specified in the notice should any of the following apply:

- A) The Town has determined that such cancellation will be in the best interest of the Town to cancel the contract for its own convenience. In the event the contract is terminated for the Town's convenience, the contractor will be paid for all labor and materials provided as of the termination date. No consideration will be given for anticipated lost revenue, overhead, mobilization or demobilization or the canceled portions of the contract.
- B) Funds are not available to cover the cost of the services. The Town's obligation is contingent upon the availability of appropriate funds.

7.3 **Contractor to Check Plans, Specifications and Data**

Contractor shall verify all dimensions, quantities and details shown on the plans, specifications or other data received from Town's Project Engineer, and shall notify Town's Project Engineer in writing of all errors, omissions and discrepancies found therein within three (3) calendar days of discovery and Town's Project Engineer will promptly review the same. Any Work done after such discovery, but prior to written authorization of the Town's Project Engineer, will be done at the Contractor's sole risk.

7.4 **Contractor's Responsibility for Damages and Accidents**

7.4.1 Contractor shall accept full responsibility for the Work against all loss or damage of any nature sustained until final acceptance by Town, and shall promptly repair any damage done from any cause.

7.4.2 Contractor shall be responsible for all materials, equipment and supplies pertaining to the Project. In the event any such materials, equipment and supplies are lost, stolen, damaged or destroyed prior to final acceptance by Town, Contractor shall replace same without cost to Town.

7.5 **Defective Work/Guarantee**

7.5.1 Town shall have the authority to reject or disapprove Work which the Town finds to be defective. If required by the Town, Contractor shall promptly either correct all defective Work or remove such defective Work and replace it with nondefective Work. Contractor shall bear all direct, indirect and consequential costs of such removal or corrections including cost of testing laboratories and personnel.

7.5.2 Should Contractor fail or refuse to remove or correct any defective Work or to make any necessary repairs in accordance with the requirements of the Contract Documents within the time indicated in writing by Town's Project Consultant, Town shall have the authority to cause the defective Work to be removed or corrected, or make such repairs as may be necessary at Contractor's expense. Any expense incurred by Town in making such removals, corrections or repairs, shall be paid for out of any monies due or which may become due to Contractor. In the event of failure of Contractor to make all necessary repairs promptly and fully, Town may declare Contractor in default.

7.5.3 The Contractor shall unconditionally guarantee all materials and equipment furnished and Work performed for a period of one (1) year from the date of substantial completion. If, within one (1) year after the date of substantial completion, any of the Work is found to be defective or not in accordance with the Contract Documents, Contractor, after receipt of written notice from Town, shall promptly correct such defective or nonconforming Work within the time specified by Town without cost to Town. Nothing contained herein shall be construed to establish a period of limitation with respect to any other obligation which Contractor might have under the Contract Documents including but not limited to any claim regarding latent defects.

7.5.4 Failure to reject any defective Work or material shall not in any way prevent later rejection when such defect is discovered.

7.6 **Legal Restrictions and Traffic Provisions**

Contractor shall conform to and obey all applicable laws, regulations, or ordinances with regard to labor employed, hours of Work and Contractor's general operations. Contractor shall conduct its operations so as not to interfere with or close any thoroughfare, except as provided for in the Contract Documents, without the written consent of the proper authorities.

7.7 **Examination and Retention of Contractor's Records**

- 7.7.1 The Town or any of their duly authorized representatives shall, until 5 years after final payment under this contract, have access to and the right to examine any of the Contractor's books, ledgers, documents, papers, or other records involving transactions related to this contract for the purpose of making audit, examination, excerpts, and transcriptions.
- 7.7.2 The Contractor agrees to include in first-tier subcontracts under this contract a clause substantially the same as subparagraph 7.7.1 above. "Subcontract," as used in this clause, excludes purchase orders not exceeding \$10,000.
- 7.7.3 The right to access and examination of records in subparagraph 7.7.1 shall continue until disposition of any mediation, claims, litigation or appeals.

7.8 **Public Records Law**

- 7.8.1 Contractor agrees to keep and maintain public records in Contractor's possession or control in connection with Contractor's performance under this Agreement. Contractor additionally agrees to comply specifically with the provisions of Section 119.0701, Florida Statutes. Contractor shall ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed, except as authorized by law, for the duration of the Agreement, and following completion of the Agreement until the records are transferred to the Town.
- 7.8.2 Upon request from the Town's custodian of public records, Contractor shall provide the Town with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided by Chapter 119, Florida Statutes, or as otherwise provided by law.
- 7.8.3 Unless otherwise provided by law, any and all records, including but not limited to reports, surveys, and other data and documents provided or created in connection with this Agreement are and shall remain the property of the Town.
- 7.8.4 Upon completion of this Agreement or in the event of termination by either party, any and all public records relating to the Agreement in the possession of the Contractor shall be delivered by the Contractor to the Town Manager, at no cost to the Town, within seven (7) days. All such records stored electronically by Contractor shall be delivered to the Town in a format that is compatible with the Town's information technology systems. Once the public records have been delivered upon completion or termination of this Agreement, the Contractor shall destroy any and all duplicate public records that are exempt or confidential and exempt from public records disclosure requirements.

- 7.8.5 Any compensation due to Contractor shall be withheld until all records are received as provided herein.
- 7.8.6 Contractor's failure or refusal to comply with the provisions of this section shall result in the immediate termination of this Agreement by the Town.

Section 119.0701(2)(a), Florida Statutes

IF THE CONTRACTOR HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE CONTRACTOR'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS CONTRACT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS.

Custodian of Records:	Jacqueline N. Wilson, Town Clerk
Mailing address:	10720 Caribbean Boulevard, Suite 105 Cutler Bay, Florida 33189
Telephone number:	(305) 234-4262
Email:	jwilson@cutlerbay-fl.gov

7.9 **No Damages for Delay**

No claim for damages or any claim, other than for an extension of time shall be made or asserted against Town by reason of any delays. Contractor shall not be entitled to an increase in the Contract Price or payment or compensation of any kind from Town for direct, indirect, consequential, impact or other costs, expenses or damages, including but not limited to, 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. Contractor shall be entitled only to extensions of the Contract Time as the sole and exclusive remedy for such resulting delay. Notwithstanding the above, and in accordance with the requirements of Article 12 of the General Conditions, the Contractor shall be granted an extension of time and suspension of liquidated damages for any delay beyond the control of the Contractor. Should any delay, disruption, interference or hindrance be caused by the Town, for a continuous period or cumulative period of thirty (30) days, the Contractor may terminate the Contract upon seven days written notice to the Town.

7.10 **Public Entity Crimes Affidavit**

Contractor shall comply with Section 287.133, Florida Statutes, (Public Entity Crimes Statute) notification of which is hereby incorporated herein by reference, including execution of any required affidavit.

7.11 **Indemnification**

The parties agree that 1% of the total compensation paid to the Contractor for the performance of this agreement shall represent the specific consideration for the Contractor's indemnification of the Town as set forth in this Section and in the Terms and Conditions.

To the fullest extent permitted by Laws and Regulations, Contractor shall indemnify and hold harmless the Town and their consultants, agents and employees from and against all claims, damages, losses and expenses, direct, indirect or consequential (including but not limited to fees and charges of attorneys and other professionals and court costs) arising out of or resulting from the performance of the work, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself) including the loss of use resulting there from and (b) is caused in whole or in part by any willful and wanton or negligent or gross negligent acts or omission of Contractor, any subcontractor, any person or organization directly or indirectly employed by any of them to perform or furnish any of the work or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder or arises by or is imposed by Law and Regulations regardless of the negligence of any such party.

In any and all claims against the Town or any of their consultants, agents or employees by any employee of Contractor, any Subcontractor, any person or organization directly or indirectly employed by any of them to perform or furnish any of the work or anyone for whose acts any of them may be liable, the indemnification obligation under the above paragraph shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or any such Subcontractor or other person or organization under workers or workman's compensation acts, disability benefit acts or other employee benefit acts.

It is the specific intent of the parties hereto that the foregoing indemnification complies with Florida Statute 725.06 (Chapter 725). It is further the specific intent and agreement of the parties that all of the Contract Documents on this project are hereby amended to include the foregoing indemnification and the "Specific Consideration" therefore.

The official title of the Town is "Town of Cutler Bay". This official title shall be used in all insurance, or other legal documentation. Town of Cutler Bay is to be included as "Additional Insured" with respect to liability arising out of operations performed for Town of Cutler Bay by or on behalf of Contractor or acts or omissions of Contractor in connection with such operation.

7.12 **Capitalized Terms**

Capitalized terms shall have their plain meaning as indicated herein.

7.13 **Independent Contractor**

The Contractor is an independent contractor under the Contract. Services provided by the Contractor shall be by employees of the Contractor and subject to supervision by the Contractor, and not as officers, employees, or agents of the Town. Personnel policies, tax responsibilities, social security and health insurance, employee benefits, purchasing policies and other similar administrative procedures, applicable to services rendered under the Contract shall be those of the Contractor.

7.14 **Payment to Sub-contractors**

Certification of Payment to Subcontractors: The term “subcontractor”, as used herein, includes persons or firms furnishing materials or equipment incorporated into the work or stockpiled for which the Town made partial payment and firms working under equipment-rental agreements. The Contractor is required to pay all subcontractors for satisfactory performance of their Contracts before the Town will make a further progress (partial) payment. The Contractor shall also return all retainage withheld to the subcontractors within 30 days after the subcontractor’s work is satisfactorily complete, as determined by the Town. Prior to receipt of any progress (partial) payment, the prime contractor shall certify that all subcontractors having an interest in the Contract were paid for satisfactory performance of their Contracts and that the retainage is returned to subcontractors within 30 days after satisfactory completion of the subcontractor’s work. Contractor shall provide this certification in the form designated by the Town.

The Town will not make any progress payments after the initial partial payment until the Contractor completes the Equal Opportunity monthly report, unless the Contractor demonstrates good cause for not making any required payment and furnishes written notification of any such good cause to both the Town and the affected subcontractors and suppliers.

Within 30 days of the Contractor’s receipt of the final progress payment or any other payments thereafter, except the final payment, the Contractor shall pay all subcontractors and suppliers having an interest in the Contract for all work completed and materials furnished. The Town will honor an exception to the above when the Contractor demonstrates good cause for not making any required payment and furnishes suppliers within said 30-day period.

7.15 **Governing Law**

The law of the State of Florida shall govern the contract between the Town of Cutler Bay and the successful bidder and any action shall be brought in Miami-Dade County, Florida. In the event of litigation to settle issues arising hereunder, the prevailing party in such litigation shall be entitled to recover against the other party its costs and expenses, including reasonable attorney fees, which shall include any fees and costs attributable to appellate proceedings arising on and of such litigation.

IN WITNESS WHEREOF, the parties hereto have made and executed this Agreement on the respective dates under each signature: TOWN OF CUTLER BAY, FLORIDA, signing by and through its Town Manager authorized to execute same by Council action on the ____ day of

_____2016, and _____ signing by and through _____, duly authorized to execute same.

ATTEST:

TOWN OF CUTLER BAY, FLORIDA

Town Clerk

By: _____
Town Manager

APPROVED AS TO FORM
AND LEGAL SUFFICIENCY:

By: _____
TOWN ATTORNEY

This ____ day of _____, 2016.

CONTRACTOR MUST EXECUTE THIS CONTRACT AS INDICATED BELOW. USE CORPORATION FORMAT, AS APPLICABLE.

CONTRACTOR

ATTEST:

(Secretary)

By: _____
(Signature and Title)

(Corporate Seal)

(Type Name/Title signed above)

This ____ day of _____, 2016.