

**TOWN OF CUTLER BAY
TOWNWIDE ROADWAY RESURFACING & SIDEWALK IMPROVEMENTS
ITB #18-07**

**CONTRACT FOR CONSTRUCTION
BETWEEN TOWN OF CUTLER BAY AND
H&R PAVING, INC.**

THIS IS A CONTRACT FOR CONSTRUCTION ("Contract"), dated _____ ("Effective Date") by and between TOWN OF CUTLER BAY, FLORIDA, a Florida municipal corporation, (hereinafter referred to as "Town"), and H&R Paving, Inc., a Florida corporation (hereinafter referred to as "Contractor").

W I T N E S S E T H

WHEREAS, the Town solicited bids for the construction of TOWNWIDE ROADWAY RESURFACING & SIDEWALK IMPROVEMENTS ("Project") through Invitation to Bid No.18-07; and

WHEREAS, the Contractor responded to the Town's solicitation by submitting its bid ("Bid"), attached and incorporated hereto as Exhibit "A"; and

WHEREAS, after review and consideration of all submitted bids, the Town Manager recommended the Contractor to _____ (the "Work") for the Project; and

WHEREAS, on _____, pursuant to Resolution No. 19-____, attached and incorporated hereto as Exhibit "B", the Town Council approved the Contractor to perform the Work and authorized the Town to contract with the Contractor to perform the Work for the Project; and

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein, the Contractor and the Town agree as follows:

**ARTICLE 1
SCOPE OF WORK**

- 1.1 Contractor shall perform the Work as set forth in the Bid attached hereto as Exhibit "A" and incorporated herein by reference.
- 1.2 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 Technical Specifications and Addenda thereto and in accordance with any drawings and specifications prepared by the Town's Engineer for the following Project(s):

**TOWNWIDE ROADWAY RESURFACING & SIDEWALK IMPROVEMENTS
TOWN OF CUTLER BAY, FLORIDA**

- 1.3 All work under this Agreement shall be assigned under a Notice to Proceed or Work Order basis issued by the Town to the Contractor for each phase of the work.

Contractor bears the risk and responsibility that compensation may not be amended due to delay or extensions of time.

**ARTICLE 2
TERM**

- 2.1 The initial work order will be substantially completed, as determined by the Town, within the date specified in the Notice(s) to Proceed. The Work shall commence within thirty (30) days issuance of the Notice(s) to Proceed. The Work shall be completed and ready for Final Payment in accordance with section 14.7 of the General Conditions, attached hereto and incorporated herein as Exhibit "C" ("General Conditions"). The Town may allow extended daily working hours and work on weekends if requested by Contractor with advanced notice and approved by the Town in writing.

The Term of this Contract shall be effective and commence upon full execution of this Contract by both parties, and shall continue for a term of three (3) years. At its sole discretion, the Town shall have the right and option to renew this Contract for up to three (3) additional one (1) year terms, upon the same terms and conditions, including unit pricing (the "Renewal Options"). The Renewal Option(s) may be exercised by the Town Manager, at his sole discretion. Such renewal shall be effective upon receipt of a written notice from the Town Manager to the Contractor received no later than thirty (30) days prior to the date of termination of the initial term or applicable Renewal Option term.

**ARTICLE 3
BENCHMARKS AND REMEDIES FOR BREACH**

- 3.1 Contractor shall be instructed to commence each phase of the Work as specified in the written form of a Notice to Proceed ("Notice to Proceed") issued by the Town Manager. Contractor acknowledges and agrees that the Town shall have no obligation to issue a Notice to Proceed for the Work or any portion thereof. Each Notice to Proceed issued by the Town will provide for a commencement date for the Work, or a portion thereof, and required completion dates for the Work, or portion thereof, including Substantial Completion, as defined in section 1.1(45) of the General Conditions, and final completion dates. A Notice to Proceed will not be issued until Contractor's submission to Town of all required documents and execution of this Contract.
- 3.2 Contractor and Town agree time is of the essence for performance of this Contract. The Work, or any portion thereof, shall not commence until the date specified in the Notice to Proceed. The Work, or any portion thereof, shall achieve Substantial Completion and final completion, as determined in the sole discretion of the Town, within the number of days specified in the applicable Notice to Proceed. The Contractor shall prosecute all

Work with faithfulness and diligence.

- 3.3 Upon failure of Contractor to substantially complete the Contract within the Term, or portion of Work within the specified period of time of the applicable Notice to Proceed, Contractor shall pay to Town the sum of One Thousand Dollars (\$1,000.00) for each calendar day after the time specified in the Notice to Proceed for Substantial Completion. After Substantial Completion, in the event Contractor fails to complete the remaining Work within the time specified in the Notice to Proceed for final completion and readiness for final payment, then Contractor shall pay to Town the sum of Five Hundred Dollars (\$500.00) for each calendar day after the time specified for completion and readiness for final payment. These amounts are not penalties but are liquidated damages (collectively "Liquidated Damages") to Town for its inability to obtain full beneficial occupancy and use of the Project.
- 3.4 Recognizing the impossibility of ascertaining the precise amount of damages that will be sustained by Town as a consequence of such delay, Liquidated Damages are hereby fixed and agreed upon between the parties. The parties have agreed upon on Liquidated Damages to obviate any question or dispute regarding the amount of damages and costs and effect of Contractor's failure to complete the Work within the applicable timeframe. 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 pursuant to a Notice To Proceed.
- 3.5 The Contractor hereby agrees that the Town is authorized to deduct the Liquidated Damages from monies due to Contractor for the Work pursuant to this Contract. In the event that the amount of Liquidated Damages due to the Town by Contractor exceeds the payment or monies due to the Contractor pursuant to this Contract, the Contractor shall be liable and shall immediately, upon demand by Town, make payment to the Town in the amount of said excess.

ARTICLE 4

CONTRACT PRICE

- 4.1 Pursuant to a Notice to Proceed, the Town shall pay to the Contractor for the performance of the Work, or any portion thereof, completed for the prior month based on the Unit Pricing as set forth in Exhibit "A", subject to the conditions, limitations, and restrictions of Section 4.4 herein and in accordance with the General Conditions. The unit price shall be full compensation for all costs, including overhead and profit, associated with completion of the Work, or any portion thereof, as authorized by the applicable Notice To Proceed and in full conformity with the requirements as stated or shown, or both, in the Plans and Specifications, as defined in the General Conditions.
- 4.2 The sum set forth in Section 4.1 shall constitute the Contract Price which shall not be modified except by a Change Order issued by the Town or as otherwise specified herein.

- 4.3 The Contract Price may be adjusted by the Town pursuant to section 12 of the General Conditions. The Town has no obligation to adjust the Contract Price as Contractor bears the risk that the Contract Price does not exceed the amount as stated in Article 1 of this Contract.
- 4.4 Town and Contractor agree that this Contract, and any Work authorized pursuant to this Contract, shall be subject to the condition precedents that Town funds are available, appropriated, and budgeted for the accomplishment of the Work, or any portion thereof, for this Project, and that the Town secures and obtains any necessary loans, grants, or proceeds necessary for the accomplishment of this Project pursuant to a duly authorized Town borrowing enabling ordinance and any loan implementing resolution, or acceptance resolution, adopted by the Town Council as described in the Town Council resolution which awards and authorizes the execution of this Contract.
- 4.5 Town shall make progress payments on the basis of Work completed and Contractor's Application for Payment(s), as defined by section 1.1(3) of the General Conditions, on or before thirty (30) days after receipt of the Application for Payment so long as it also complies with section 14 of the General Conditions of the Contract Documents. Rejection of an Application for Payment by the Town shall be within twenty (20) days after receipt of the Application for Payment. Any rejection shall specify the applicable deficiency and necessary corrective action. Any undisputed portion shall be paid as specified above. All such payments will be made in accordance with the Schedule of Values established in section 14.1 of the General Conditions, or, in the event there is no Schedule of Values, then payments will be made for Work completed as provided in Article 3 of this Contract.
- 4.5.1 In the event the Contract Documents do not provide a Schedule of Values or other payment schedule, Applications for Payment shall be submitted monthly by Contractor on or before the 10th of each month for the prior month. Progress payments shall be made in an amount equal to the percentage of Work completed, but, in each case, less the aggregate of payments previously made and less such amounts as Town shall determine, or, Town may withhold taking into account the aggregate of payments made and the percentage of Project completion in accordance with the Contract Documents and Schedule of Value, if any.
- 4.5.2 The Contractor agrees that ten percent (10%) of the amount due for each progress payment, or Application For Payment, shall be retained by Town (the "Retainage") until final completion and acceptance of the Work by Town. In the event there is a dispute between the Contractor and the Town concerning an Application For Payment, dispute resolution procedures shall be conducted by the Town commencing within forty-five (45) days of receipt of the disputed Application for Payment. The Town shall reach a conclusion within fifteen (15) days thereafter and promptly notify Contractor of the outcome, including payment, if applicable.
- 4.6 Each Application for Payment shall include an affidavit, or partial release, or waiver of lien by Contractor indicating that partial payments received from Town for the Work

have been applied by Contractor to discharge in full all of Contractor's obligations, including payments to subcontractors and material suppliers.

- 4.7 The payment of any Application for Payment by Town, including the final request for payment, does not constitute approval or acceptance by Town of any item of the Work reflected in such Application for Payment, nor shall it be construed as a waiver of any of the Town's rights hereunder or at law or in equity.

ARTICLE 5

CONTRACT DOCUMENTS

- 5.1 Each of the following are made a part of this Contract for the Project (collectively "Contract Documents"):

Exhibit "A"	Bid or Proposal Submitted by Contractor
Exhibit "B"	Town Authorization: Resolution No. 19-____
Exhibit "C"	General Conditions
Exhibit "D"	Drawings, Plans and Specifications approved by the Town
Exhibit "E"	Supplementary Technical Specifications
Exhibit "F"	Special Conditions
Exhibit "G"	Form Notice to Proceed
Exhibit "H"	Invitation to Bid No. 18-07, as amended
Exhibit "I"	Notice of Award
Exhibit "J"	Insurance Certificates
Exhibit "K"	Payment and Performance Bond
Exhibit "L"	Project Manual

- 5.2 **Priority of Interpretation.** The Code and any Town resolutions take precedence over this agreement and its exhibits. This document without exhibits is referred to as the "Base Agreement." In the event of any conflict or inconsistency in the definition or interpretation of any word, responsibility, schedule, or the contents or description of any task, deliverable, service, or other work, or otherwise, between the Base Agreement and the exhibits, or between exhibits, such conflict or inconsistency shall be resolved by giving precedence first to the body of this Base Agreement, and then to the exhibits according to the following priority:

- a) Town Resolution Approving Contractor
- b) Town Invitation to Bid ("ITB")
- c) Drawings, Plans and Specifications approved by the Town
- c) Contractor's Response to ITB
- d) Insurance Certificates
- e) Notice to Proceed (NTP)
- f) Performance and Payment Bond

- 5.3 Any mandatory clauses which are required by such federal, state, or other governmental regulations shall be deemed to be automatically incorporated herein. In the event of any

conflict among the foregoing Contract Documents, the documents shall govern in the order listed and/or as determined by the Town Engineer.

- 5.4 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 6

INDEMNIFICATION

- 6.1 The parties agree that 1% of the total compensation paid to the Contractor for the performance of this Contract shall represent the specific consideration for the Contractor's indemnification of the Town as set forth in this Article.
- 6.2 To the fullest extent permitted by law, Contractor shall defend, indemnify, and hold harmless the Town and its officials, consultants, agents and employees from and against all demands, claims, suits, liabilities, damages, losses and expenses, direct, indirect or consequential (including but not limited to fees and charges of attorneys and other professionals and court costs including appeals) arising out of, related to, or resulting from the performance or non-performance of the Work, or Contractor's obligations, or the Work under this Contract, including but not limited to any such claim, damage, loss or expense that is attributable to bodily injury, sickness, disease or death sustained by any person, or to injury to or destruction of tangible property or any other property (other than the Work itself) including the loss of use resulting therefrom, 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 applicable law and regardless of the negligence of any such party.
- 6.3 In any and all claims against the Town or any of its officers, consultants, agents or employees by any employee of Contractor, any Subcontractor, any person or organization directly or indirectly employed by Contractor, any Subcontractor, person or organization to perform or furnish any of the Work or any person or entity 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 worker's or workman's compensation acts, disability benefit acts or other employee benefit acts.
- 6.4 It is the specific intent of the parties hereto that the foregoing indemnification shall comply with Section 725.06, Florida Statutes. It is further the specific intent and agreement of the parties that all of the Contract Documents for this Project are hereby

amended to include the foregoing indemnification and the "Specific Consideration" therefore.

- 6.5 Notwithstanding any obligation which may be set forth or required in the Contract or Contract Documents, the Town shall not indemnify or hold harmless the Contractor or any Subcontractor, Engineer, or any officer, director, partner, employee, agents, consultant of each or any of them from any claims, costs, losses or damages arising out of any Work performed or this Contract, and any reference or inclusion of such indemnification by the Town or Owner in the Contract Documents is hereby deleted. The parties acknowledge and agree that the Town is a municipal corporation that enjoys sovereign immunity pursuant to applicable law, and shall not and does not waive any rights and protections pursuant to such sovereign immunity. Nothing in this Contract is intended to waive the Town's sovereign immunity, nor shall anything in this Contract shall be construed to waive the Town's sovereign immunity.

ARTICLE 7

INSURANCE AND BONDS

- 7.1 **Insurance.** Contractor shall secure and maintain throughout the duration of this Contract insurance of such types and in such amounts as listed in the Contract Documents, including and in no event less than the policies, coverages and minimum limits specified below and as satisfactory to Town, naming the Town as an Additional Insured, underwritten by a firm rated A-X or better by Bests Rating and qualified to do business in the State of Florida. Certificates of Insurance shall be provided to the Town, reflecting the Town as an Additional Insured, no later than ten (10) days after award of this Contract and prior to the execution of this Contract by Town and prior to commencing any Work. Each certificate shall include no less than (30) thirty day advance written notice to Town prior to cancellation, termination, or material alteration of said policies or insurance. The insurance coverage shall be primary insurance with respect to the Town, its officials, employees, agents and volunteers naming the Town as additional insured.

Any insurance maintained by the Town shall be in excess of the Contractor's insurance and shall not contribute to the Contractor's insurance. The insurance coverages shall include at a minimum the amounts set forth in this Section.

- a. Commercial General Liability coverage with limits of liability of not less than a \$2,000,000 per Occurrence combined single limit for Bodily Injury and Property Damage. This Liability Insurance shall also include Completed Operations and Product Liability coverages and eliminate the exclusion with respect to property under the care, custody and control of Contractor. The General Aggregate Liability limit (except for Products/Completed Operations) shall be in the amount of \$2,000,000.
- b. Workers Compensation and Employer's Liability insurance, to apply for all employees for statutory limits as required by applicable State and Federal laws. The policy(ies) must include Employer's Liability with minimum limits of

\$1,000,000.00 each accident. No employee, subcontractor or agent of the Contractor shall be allowed to provide Work pursuant to this Contract who is not covered by Worker's Compensation insurance.

- c. Business Automobile Liability with minimum limits of \$1,000,000 per Occurrence combined single limit for Bodily Injury and Property Damage. 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, Hired, and Non-Owned Vehicles.
- d. Builder's Risk property insurance upon the entire Work to the full replacement cost value thereof. This insurance shall include the interest of Town and Contractor and shall provide All-Risk coverage against loss by physical damage including, but not limited to, Fire, Extended Coverage, Theft, and Vandalism and Malicious Mischief.
- e. Contractor acknowledges that it shall bear the full risk of loss for any portion of the Work damaged, destroyed, lost or stolen until Final Completion has been achieved for the Project, and all such Work shall be fully restored by the Contractor, at its sole cost and expense, in accordance with the Contract Documents.
- f. **Certificate of Insurance.** On or before the Effective Date of this Contract, the Contractor shall provide the Town with Certificates of Insurance for all required policies. The Contractor shall be responsible for assuring that the insurance certificates required by this Section remain in full force and effect for the duration of this Contract, including any extensions or renewals that may be granted by the Town.

The Certificates of Insurance shall not only name the types of policy(ies) provided, but also shall refer specifically to this Contract and shall state that such insurance is as required by this Contract. The Town reserves the right to inspect and return a certified copy of such policies, upon written request by the Town.

If a policy is due to expire prior to the completion of the Work, renewal Certificates of Insurance shall be furnished thirty (30) calendar days prior to the date of their policy expiration. Each policy certificate shall be endorsed with a provision that not less than thirty (30) calendar days' written notice shall be provided to the Town before any policy or coverage is cancelled or restricted. Acceptance of the Certificate(s) is subject to approval of the Town.

- g. **Additional Insured.** The Town is to be specifically included as an Additional Insured for the liability of the Town resulting from Work performed by or on behalf of the Contractor in performance of this Contract. The Contractor's insurance, including that applicable to the Town as an Additional Insured, shall

apply on a primary basis and any other insurance maintained by the Town shall be in excess of and shall not contribute to the Contractor's insurance.

The Contractor's insurance shall contain a severability of interest provision providing that, except with respect to the total limits of liability, the insurance shall apply to each Insured or Additional Insured (for applicable policies) in the same manner as if separate policies had been issued to each.

- h. **Deductibles.** All deductibles or self-insured retentions must be declared to and be reasonably approved by the Town. The Contractor shall be responsible for the payment of any deductible or self-insured retention in the event of any claim.
 - i. The provisions of this Section shall survive termination of this Contract.
- 7.2 **Bonds.** Prior to performing any portion of the Work and within three (3) days of the Effective Date hereof, the Contractor shall deliver to Town the Bonds required to be provided by Contractor hereunder and the Contract Documents (collectively, "Bonds"). Pursuant to and in accordance with Section 255.05, Florida Statutes, the Contractor shall obtain and thereafter at all times during the performance of the Work maintain a separate performance bond and labor and material payment bond for the Work, in the amount of the total bid amount, or Contract Price, whichever is greater, in the form provided in the Contract Documents or another form satisfactory to, and approved in writing by the Town and executed by a surety of recognized standing with a rating of A or better for bonds up to Two Million Dollars. The surety providing such Bonds must be licensed, authorized, and admitted to do business in the State of Florida and must be listed in the Federal Register (Dept. of Treasury, Circular 570). The cost of the premiums for such Bonds is included in the Contract Price. If notice of any change affecting the Scope of the Work, the Contract Price, Contract Time or any of the provisions of the Contract Documents is required by the provisions of any bond to be given to a surety, the giving of any such notice shall be Contractor's sole responsibility, and the amount of each applicable bond shall be adjusted accordingly. If the surety is declared bankrupt or becomes insolvent or its right to do business in Florida is terminated or it ceases to meet applicable law or regulations, the Contractor shall, within five (5) days of any such event, substitute another bond (or Bonds as applicable) and surety, all of which must be satisfactory to Town.
- 7.3 Notwithstanding any obligation which may be set forth or required in the Contract Documents, the Town shall not be required to procure or maintain any insurance in connection with the Work or this Contract, including, but not limited to, Owner's Liability Insurance or Property Insurance.

ARTICLE 8

CONTRACTOR'S REPRESENTATIONS AND WARRANTIES

- 8.1 In order to induce the Town to enter into this Contract, the Contractor makes the following representations and warranties:

- 8.1.1 Contractor has examined and carefully studied the Contract Documents and the other data identified in the bidding documents, including, without limitation, the “technical specifications and data” and plans and specifications, attached hereto and incorporated herein, as Exhibit “E”.
- 8.1.2 Contractor has visited the Project site and has become familiar with the site and is satisfied as to the general, local, and site conditions that may affect cost, progress, performance or furnishing of the Work.
- 8.1.3 Contractor has taken affirmative efforts, either in past experience or active due diligence, to become familiar with, and warrants to comply, with all federal regulated stated herein, and other applicable federal, state, and local laws, regulations, and permits necessary for the legal performance of this Contract. Contractor is aware of all regulations and permits that may affect cost, progress, performance and furnishing of the Work. Contractor agrees that it will at all times comply with all requirements of the federal, state, and local laws, regulations, and permits applicable to the Work—even if such laws and regulations are not specifically enumerated in this Agreement.
- 8.1.4 Contractor has had the opportunity and made, or caused to be made, examinations, investigations, tests and/or studies as necessary to determine surface and subsurface conditions at or on the Project site. Contractor acknowledges that the Town does not assume responsibility for the accuracy or completeness of information and data shown or indicated in the Contract Documents with respect to underground or ground facilities at, contiguous or near the Project sites or for existing improvements at or near the sites. Contractor has obtained and carefully studied (or assumes responsibility for having done so) all such additional supplementary examinations, investigations, explorations, tests, studies and data concerning conditions (surface, subsurface and underground facilities and improvements) at, contiguous or near to the site or otherwise which may affect cost, progress, performance or furnishing of the Work or which relate to any aspect of the means, methods, techniques, sequences and procedures of construction to be employed by Contractor and safety precautions and programs incident thereto. Contractor does not consider that any additional examinations, investigations, explorations, tests, studies or data are necessary for the performance and furnishing of the Work at the Contract Price, within the Contract Time and in accordance with the other terms and conditions of the Contract Documents.
- 8.1.5 Contractor is aware of the nature of work to be performed by the Town and others at the site that relates to the Work as indicated in the Contract Documents.
- 8.1.6 Contractor has correlated the information known to Contractor, information and observations obtained from visits to the Project site, reports and drawings identified in the Contract Documents and all additional examinations, investigations, explorations, tests, studies and data with the Contract Documents.

- 8.1.7 Contractor has given the Town written notice of all conflicts, errors, ambiguities or discrepancies that Contractor has discovered in the Contract Documents and the written resolution thereof by Town is acceptable to Contractor, and the Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Work.
- 8.1.8 The Contractor agrees and represents that it possesses the requisite skills to perform the Work and that the Work shall be executed in a good and workmanlike manner, free from defects, and that all materials shall be new and approved by or acceptable to Town, except as otherwise expressly provided for in the Contract Documents. The Contractor shall cause all materials and other parts of the Work to be readily available as and when required or needed for or in connection with the construction, furnishing and equipping of the Project.
- 8.2 Contractor further warrants and covenants the following:
- 8.2.1 **Anti-Discrimination.** Contractor agrees that it will not discriminate against any employees or applicants for employment or against persons for any other benefit or service under this Contract because of race, color, religion, sex, national origin, or physical or mental handicap where the handicap does not affect the ability of an individual to perform in a position of employment, and agrees to abide by all federal and state laws regarding non-discrimination.
- 8.2.2 **Anti-Kickback.** Contractor warrants that no person has been employed or retained to solicit or secure this Contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, and that no employee or officer of the Town has any interest, financially or otherwise, in the Project.
- For breach or violation of this warranty, the Town shall have the right to annul this Contract without liability or, in its discretion, to deduct from the Contract Price or consideration, the full amount of such commission, percentage, brokerage or contingent fee.
- 8.2.3 **Licensing and Permits.** Contractor warrants that it shall have, prior to commencement of Work under this Contract and at all times during said Work, all required valid licenses and permits in compliance with all federal, state, county or Town regulations and laws. Contractor acknowledges that it is the obligation of Contractor to obtain all licenses and permits required for this Work for the Project.

ARTICLE 9

DEFAULT, TERMINATION, AND REMEDIES

- 9.1 The happening of any one or more of the following shall be deemed an Event of Default under this Contract, if the Contractor:

- (a) fails to timely begin the Work;
- (b) fails to perform the Work with sufficient workers and equipment or has insufficient materials to insure the prompt completion of the Work within the Contract Time as specified in Article 2 of this Contract and the applicable Notice to Proceed;
- (c) performs the Work unsuitably or causes the Work to be rejected as defective and unsuitable;
- (d) discontinues the prosecution of the Work pursuant to the accepted schedule;
- (e) fails to perform or comply with any material term set forth in the Contract Documents;
- (f) becomes insolvent, declared bankrupt, commits any act of bankruptcy or insolvency, or makes an assignment for the benefit of creditors; or
- (g) causes any act, whatsoever, not to carry on the Work in an acceptable manner.

9.2 In the Event of Default, the Town may, upon seven (7) days written notice:

- (a) terminate the services of Contractor;
- (b) exclude Contractor from the Project site;
- (c) provide for alternate prosecution of the Work;
- (d) appropriate or use any or all materials and equipment on the Project site as may be suitable and acceptable; and
- (e) finish the Work by whatever methods it may deem expedient.

In the event of an Event of Default, the Contractor shall not be entitled to receive any further payment, from the time notice of termination is sent, until the Project is completed. All damages, costs and charges incurred by Town, together with the costs of completing the Project, shall be deducted from any monies due or which may become due to Contractor. In case the damages and expenses so incurred by Town shall exceed monies due Contractor from Town, Contractor shall be liable and shall pay to Town the amount of said excess promptly upon demand therefore by Town. In the event it is adjudicated that Town was not entitled to terminate the Contract as described hereunder for default, then the Contract shall automatically be deemed terminated by Town for convenience as described below.

9.3 This Contract may be terminated by the Town for convenience, or for any reason, upon seven (7) calendar days' written notice to the Contractor, in the sole discretion of the Town, including, but not limited to, if the Town has determined that such cancellation will be in the best interest of the Town for its own convenience or funding is not available, appropriated, or budgeted.

In the event the Contract is terminated for convenience, then the Contractor shall incur no further obligations in connection with the Project and shall, to the extent possible, terminate any outstanding subcontractor obligations, and will be paid for Work performed to the satisfaction of the Town 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. In such event, the Contractor shall promptly submit to the Town its Application for Payment for final payment which shall comply with the provisions of the Contract Documents.

- 9.4 If an Event of Default, or any default of any other material term in this Contract, by the Contractor, then 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, Liquidated Damages as set forth in this Contract, damages arising out of the Contractor's failure to adhere to the Contract requirements, and all attorney's fees and costs incurred by the Town in seeking legal relief for the default.
- 9.5 The rights and remedies of the Town herein shall be cumulative and not mutually exclusive, and the Town may resort to any one or more or all of said remedies without exclusion of any other. No party other than the Town, whether the Contractor, a material man, laborer, subcontractor, or supplier, shall have any interest in the funds withheld because of a default herein, and shall not have any right to garnish or require or compel that payment thereof be applied toward the discharge or satisfaction of any claim or lien which any of them may have.

ARTICLE 10 **ASSIGNMENT**

- 10.1 Neither party shall assign the Contract, any portion of the Work, or any sub-contract, in whole or in part, without the written consent of the other, nor shall Contractor assign any monies due or to become due to it hereunder, without the previous written consent of the Town.

ARTICLE 11 **CONTRACTOR REQUIREMENTS**

- 11.1 **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 the Town's Project Engineer, and shall notify the 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.
- 11.2 **Contractor's Responsibility for Damages and Accidents.**
- 11.2.1 Contractor shall be responsible for promptly notifying the Town of any damage to irrigation systems, buildings or other structures, vehicles, or property or possessions, which occur as a result of the Work performed by Contractor pursuant to this Contract, or the improper or negligent activities of the Contractor.

11.2.2 Contractor shall accept full responsibility for, and insure, 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.

11.2.3 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.

11.3 **Defective Work/Guarantee.**

11.3.1 The Town shall have the authority to monitor the Work and Contractor's contracting terms with subcontractors, but such right shall not give right to a duty or obligation to such monitoring.

The Town shall have the authority to reject or disprove of 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 non-defective Work. Contractor shall bear all direct, indirect, and consequential costs of such removal or corrections including cost of testing laboratories and personnel.

11.3.2 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 Engineer, the 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 the 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, the Town may declare Contractor in default.

11.3.3 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.

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

- 11.4 **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 pursuant to all necessary permits from applicable jurisdictions. Contractor shall not interfere with, or close, any thoroughfare, without the written consent of the Town or governing jurisdiction.
- 11.5 **Examination and Retention of Contractor's Records.**
- 11.5.1 Contractor shall comply with the applicable provisions of Chapter 119, Florida Statutes (Public Records Law). Contractor shall retain all records associated with this Contract for a period of three (3) years from the date of final payment for all Work performed pursuant to this Contract. The Town or any of their duly authorized representatives shall, until three (3) 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 audits, examinations, excerpts, and transcriptions.
- 11.5.2 Contractor agrees to include in first-tier subcontracts under this Contract a clause substantially the same as subparagraph 11.5.1 above. "Subcontract," as used in this clause, excludes purchase orders not exceeding \$10,000.
- 11.5.3 The right to access and examination of records in subparagraph 11.5.1 shall continue until disposition of any mediation, claims, litigation or appeals.
- 11.6 **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 the Contract Documents, 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 forty-five (45) days, the Contractor may terminate the Contract upon twenty (20) days written notice to the Town.
- 11.7 **Clean Conditions. Safe Site.** Contractor shall, at all times, at its expense, keep the Project sites in a neat, clean and safe condition. Upon completion of any portion of the Work, Contractor shall promptly remove all of its equipment, construction materials,

temporary structures and surplus materials not to be used at or near the same location during later stages of the Work. Upon completion of the Work, Contractor shall, at its expense, satisfactorily dispose of all rubbish, unused materials and other equipment and materials belonging to it or used in the performance of the Work and Contractor shall leave the Project in a neat, clean and safe condition. In the event of Contractor's failure to comply with the foregoing, the same may be accomplished by the Town at Contractor's expense.

- 11.8 **Taxes and Fees.** Contractor shall pay all taxes, levies, duties and assessments of every nature which may be applicable to the Work under this Agreement. The pricing and any agreed variations thereof shall include all taxes imposed by law at the time of this Agreement. Contractor shall make any and all payroll deductions required by law. Contractor herein indemnifies and holds the Town harmless from any liability on account of any and all such taxes, levies, duties and assessments.

Notwithstanding anything contained in the Contract Documents to the contrary, the Town may exercise its right to implement an owner direct purchase program whereby the Town will directly purchase equipment or materials for the Work. Under an owner direct purchase program, Contractor shall work with the Town to identify materials and equipment for purchase by the Town. Contractor will receive, unload, properly store, and provide insurance consistent with the requirements of this Agreement and applicable law and regulations for all equipment and materials purchased under an owner direct purchase program. The Contract Price shall be reduced as appropriate by the value of the purchase order(s), plus the applicable sales tax, issued by the Town under any owner direct purchase program.

- 11.9 **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.

- 11.10 **Independent Contractor.** The Contractor is an independent contractor pursuant to this Contract. This Contract does not create any partnership or joint venture between the Town and Contractor. Work performed or 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 Work rendered under the Contract shall be those of the Contractor.

- 11.11 **DBE Contract Assurance.**

11.11.1 Town affirms it has encouraged women-owned, minority owned, and disadvantaged businesses of the Project and be responsive to the opportunity of the award of this Contract.

- 11.11.2 Contractor, or any subcontractor performing Work under this Contract, shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. Contractor shall carry out all applicable requirements of 49 CFE Part 26 in the award and administration of this Contract. Failure by the Contractor to carry out these requirements is a material breach of this Contract, which may result in the termination of this Contract or such other remedy as the Town deems appropriate.

11.12 **Scrutinized Companies.**

- 11.12.1 Contractor certifies that it and its subcontractors are not on the Scrutinized Companies that Boycott Israel List. Pursuant to Section 287.135, F.S., the Town may immediately terminate this Agreement at its sole option if the Contractor or its subcontractors are found to have submitted a false certification; or if the Contractor, or its subcontractors are placed on the Scrutinized Companies that Boycott Israel List or is engaged in the boycott of Israel during the term of the Agreement.
- 11.12.2 If this Agreement is for more than one million dollars, the Contractor certifies that it and its subcontractors are also not on the Scrutinized Companies with Activities in Sudan, Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, or engaged with business operations in Cuba or Syria as identified in Section 287.135, F.S. Pursuant to Section 287.135, F.S., the Tow may immediately terminate this Agreement at its sole option if the Contractor , its affiliates, or its subcontractors are found to have submitted a false certification; or if the Contractor, its affiliates, or its subcontractors are placed on the Scrutinized Companies with Activities in Sudan List, or Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, or engaged with business operations in Cuba or Syria during the term of the Agreement.
- 11.12.3. The Contractor agrees to observe the above requirements for applicable subcontracts entered into for the performance of work under this Agreement.
- 11.12.14. As provided in Subsection 287.135(8), F.S., if federal law ceases to authorize the above-stated contracting prohibitions then they shall become inoperative.

ARTICLE 12
MISCELLANEOUS

- 12.1 **Governing Law.** This Contract shall be construed in accordance with and governed by the laws of the State of Florida. Venue for any litigation arising out of this Contract shall be proper and exclusively in Miami-Dade County, Florida.

12.2 **Public Records Law.**

- 12.2.1 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.
- 12.2.2 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.
- 12.2.3 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.
- 12.2.4 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.
- 12.2.5 Any compensation due to Contractor shall be withheld until all records are received as provided herein.
- 12.2.6 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: Debra E. Eastman, MMC
Town Clerk

Mailing address: 10720 Caribbean Boulevard
Suite 105
Cutler Bay, FL 33189

Telephone number: (305) 234-4262

Email: Deastman@cutlerbay-fl.gov

12.3 **Notices.**

Any notices required by this Contract shall be in writing and shall be deemed to have been properly given if transmitted by hand-delivery, by registered or certified mail with postage prepaid return receipt requested, or by a private postal service, addressed to the parties (or their successors) at the following addresses:

For the Town: Town of Cutler Bay
Town Manager
10720 Caribbean Blvd., Suite 105
Cutler Bay, Florida 33189

With a copy to: Town Attorney, Town of Cutler Bay
Weiss Serota Helfman Cole & Bierman, P.L.
2525 Ponce de Leon Blvd.
Coral Gables, Florida 33134

For the Contractor: _____

12.3 **Prevailing Party; Attorneys' Fees.** In the event of any controversy, claim, dispute or litigation between the parties arising from or relating to this Contract (including, but not limited to, the enforcement of any indemnity provisions), the prevailing party shall be entitled to recover any and all reasonable costs, expenses and attorneys' fees including, but not limited to, court costs and other expenses through all appellate levels.

12.4 **Entire Agreement. All Prior Agreements Superseded.** This Contract 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.

- 12.5 **Amendment.** The Contract may only be amended in writing executed by both Parties.
- 12.6 **Town Authorization Resolution.** The Town Resolution authorizing the award of this Contract and the Town solicitation which Contractor submitted bid pursuant to (collectively, "**Town Authorization**") are incorporated by reference. To the extent of any conflict between the Town Resolution and the Contract Documents when interpreting the intent of this Contract, whichever provision is strictest will control. To the extent of any conflict between the Town Authorization, the Town Resolution will control.
- 12.7 **Counterparts.** This Contract may be executed in counterparts and any counterpart evidencing signature by one party may be delivered by electronic mail. Each executed counterpart of this Contract will constitute an original document and all executed counterparts, together, will constitute the same Agreement.
- 12.8 **Severability.** If any term or provision of this Contract or the Contract Documents shall be held or deemed invalid or unenforceable by the courts or otherwise, illegal or in conflict with any law of the State, the validity of the remaining terms or provisions of this Contract or the Contract Documents shall not be affected thereby, and shall continue in full force and effect, and be enforced to the fullest extent permitted by law.
- 12.9 **Meanings and Definitions.** Capitalized words shall have the meaning as assigned herein or as defined in the General Conditions, attached hereto as Exhibit "B."
- 12.10 **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 THIS CONTRACT, ARISING OUT OF, UNDER, OR IN CONNECTION WITH THE WORK, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS OR ACTIONS OR INACTIONS OF ANY PARTY.

IN WITNESS WHEREOF, the parties hereto have made and executed this Contract on the respective dates under each signature: TOWN OF CUTLER BAY, FLORIDA, signing by and through its Town Manager, and H&R Paving, Inc. (Contractor) signing by and through _____, duly authorized to execute same.

ATTEST:

TOWN OF CUTLER BAY, FLORIDA,
A Florida municipal corporation

By: _____ By: _____
Debra E. Eastman, MMC Rafael G. Casals, ICMA-CM, CFM
Town Clerk Town Manager

Date Executed: _____

APPROVED AS TO FORM AND Resolution No.: _____
LEGAL SUFFICIENCY FOR THE
SOLE USE OF THE TOWN OF CUTLER BAY:

By: _____
WEISS SEROTA HELFMAN
COLE & BIERMAN, P.L
Town Attorney

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

ATTEST: CONTRACTOR:
By: _____ By: _____
(Secretary) (Signature and Title)
(Corporate Seal) _____
(Type Name/Title signed above)

This _____ day of _____, 2019.