

**EXHIBIT “B” – DRAFT FIRST AMENDMENT**

**SUBJECT TO REVIEW AND REVISION**

**JUNE 17, 2019**

**FIRST AMENDMENT TO DEVELOPMENT AGREEMENT**

**THIS FIRST AMENDMENT TO DEVELOPMENT AGREEMENT** is made as of this \_\_\_\_\_ day of \_\_\_\_\_, 2019 (this “First Amendment”) by and between the CITY OF MIAMI BEACH, FLORIDA, a municipal corporation duly organized and existing under the laws of the State of Florida (the “City”), and \_\_\_\_\_, a \_\_\_\_\_ corporation (“Developer”) (the City and Developer, each a “Party” and collectively, the “Parties”).

**RECITALS**

A. The City and Developer entered into a Development Agreement (“Development Agreement”) dated as of January 9, 2019 setting forth, among other things, the City’s and Developer’s respective responsibilities and agreement to coordinate and cooperate in the planning, scheduling and approval of the design, development and construction of a mixed use residential and commercial project (the “Project”) and a 3.0 acre public park to be conveyed to the City (the “Park Project”) (“Developer’s Improvements”), as set forth in the Development Agreement.

B. The Development Agreement provided that the City might develop a pedestrian bridge over and across 5th Street and West Avenue, to connect the baywalks south of 5th Street with the area north of 5th Street;

C. Following the execution of the Development Agreement, the Parties have worked together to define the processes and refine the scope for implementing the Bridge Project and the City’s overall vision for enhancing the development of the Bridge Project, for the use and enjoyment by all residents of and visitors to the City of Miami Beach and by all visitors to the Bridge Project and the Park Project. The Parties now wish to enter into this First Amendment in order to memorialize their agreements regarding their respective obligations for implementing the foregoing.

NOW THEREFORE, it is hereby mutually covenanted and agreed by and between the Parties hereto that this First Amendment is made in consideration of the terms, covenants and conditions hereinafter set forth.

1. **Recitals.** The Recitals are incorporated herein by reference.

2. **Definitions; Interpretation.**

(a) **Definitions.** All capitalized terms used in this First Amendment shall have the definitions described in this Section 2(a).

“Architect” is defined in Section 4(c).

“Assignment of Construction Agreements” means an assignment by Developer to the City of all of Developer’s right, title and interest in and to the Construction Contract and all other Construction Agreements, which assignment shall include a duly executed consent by the

Contractor and all other Persons having any interests therein and shall otherwise be in form and substance reasonably satisfactory to the Parties, which assignment shall be an absolute assignment from Developer to the City, provided that for so long as no Default has occurred hereunder, the City shall give Developer a license to use the Construction Contract and all Construction Agreements for completion of the Bridge Project in accordance herewith.

“Assignment of Plans, Permits and Approvals” means an assignment by Developer to the City of all of Developer’s right, title and interest in and to the approved Plans and Specifications and all Permits and Approvals, which assignment shall include a duly executed consent by the Architect and all other Persons having any interests therein and shall otherwise be in form and substance reasonably satisfactory to the Parties, which assignment shall be an absolute assignment from Developer to the City, provided that for so long as no Default has occurred hereunder, the City shall give Developer a license to use all Plans and Specifications and Permits and Approvals for completion of the Bridge Project in accordance herewith.

“Bridge Project” means all of the improvements to be designed, developed and constructed within the Bridge Project Site in accordance with the provisions of this First Amendment, and which shall include a public pedestrian bridge over and across 5th Street and West Avenue, to connect the baywalks south of 5th Street with the area north of 5th Street.

“Bridge Project Aesthetic Design Elements” shall mean the plans and specifications depicting the design of the permanent protective barriers, signage, materials, finishes and related design elements for the Bridge Project, as approved by the City Commission and the DRB, each at their sole discretion, and which plans and specifications may be finalized separately from, and subsequent to, the City Manager’s approval of the Plans and Specifications and the Construction Contract.

“Bridge Project Concept Plan” means the design of the Bridge Project prepared by the Architect, in consultation with the Developer and the City Manager, which Bridge Project Concept Plan is attached as **Exhibit “A”** and incorporated herein by this reference;

“Bridge Project Costs” means all costs, fees and expenses incurred in connection with the design, development and construction of the Bridge Project.

“Bridge Project Design” means the final design for all elements of the Bridge Project (including the Bridge Project Aesthetic Design Elements), as approved by the DRB and the FDOT, as applicable, and based upon the approved Bridge Project Concept Plan attached as **Exhibit “A”**.

“Bridge Project Design Costs” shall include but not limited to all costs, fees and expenses associated with the preparation, design, engineering, permitting, planning, work, input and analysis by Developer and all of its agents, employees, consultants and professionals, including but not limited to the Architect, with respect to: (i) the Bridge Project Concept Plan; (ii) the Bridge Project Design; (iii) the Preliminary Bridge Project Budget; (iv) the City’s approval process, all subject to Sections 5(c) and 5(e) hereof; and (v) all construction administration and management fees of the Architect.

“Bridge Project Design Costs Cap” means the sum of [\$1,500,000], plus any sums due pursuant to Sections 5(c)(iv) and 5(e)(iv), if applicable, the total of which sums is deemed and agreed by the Parties to be the total allowable reimbursement to Developer for the Bridge Project Design Costs, including the total allowable reimbursement to Developer in the event the City elects not to proceed with the Bridge Project.

“Bridge Project Site” means the area described more fully in **Exhibit “B”** attached hereto and incorporated herein by this reference.

“CC” is defined in Section 9(c)(iii).

“Change Order” means an amendment to the Contract Contract, signed by Developer and Contractor, ordering any change in the Work, the time for completion of the Work, or increasing the Guaranteed Maximum Price.

“Change Requiring City Approval” means any proposed or approved addition, deletion, or revision in the Work, which involves any of: (i) a City-initiated Scope Change; (ii) any material change in the scope or quality of the Work which is not contemplated by, or reasonably inferable from, the Plans and Specifications or other Contract Documents; (iii) any increase in the Final Bridge Project Budget not funded by the Developer, including, a request for City funding in excess of the Maximum City Contribution; and/or (iv) an extension of the Final Completion Date, in each case with respect to (i) through (iv), issued on or after the Construction Contract has been approved by the City in writing.

“Certificate of Final Completion” is described in Section 9(c)(v).

“City” is defined in the Development Agreement.

“City Manager” means the chief administrative officer of the City, and shall include any duly authorized representatives designated in writing with respect to any specific matter(s) concerning the Bridge Project or this First Amendment (exclusive of those authorizations reserved to the City Commission or regulatory or administrative bodies having jurisdiction over any matter(s) related to the Bridge Project).

“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 this First Amendment or the Bridge Project. The term “Claim” also includes other disputes and matters in question between the City and Developer arising out of or relating to this First Amendment and the Bridge Project. Claims must be initiated by written notice. The responsibility for substantiating Claims shall rest with the Party making the Claim. All Claims submitted by Developer 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.

“Commence Construction” or “Commencement of Construction” and words of similar import means the commencement of any work, other than preliminary site work (such as, any environmental remediation and ancillary demolition), for construction of the Bridge Project in

accordance with the approved Plans and Specifications to be performed in connection with construction of the Bridge Project. The date of Commencement of Construction shall be memorialized in the Notice to Proceed issued by the City.

“Comprehensive Plan” means the comprehensive plan which the City has adopted and implemented for the redevelopment and continuing development of the City pursuant to Chapter 163 Part II, of the Florida Statutes.

“Construction Agreement(s)” means, collectively, the Construction Contract and any general contractor’s agreement, architect’s agreement, engineers’ agreements, or any other agreements for the provision of labor, materials, services or supplies entered into with respect to the Construction of the Bridge Project, as the same may be amended or otherwise modified from time to time.

“Construction Contract” means the contract for the construction of the Bridge Project for a guaranteed maximum price (“Guaranteed Maximum Price”) or a stipulated sum, as determined by and executed between Developer and the Contractor, which contract is subject to the City’s prior written approval, which will not be unreasonably withheld. In the event the fabrication, construction or installation of the Bridge Project Aesthetic Design Elements is procured separately by the Developer, the contract for the fabrication, construction or installation of the Bridge Project Aesthetic Design Elements shall be deemed a “Construction Contract,” and the contractor thereunder shall be deemed a “Contractor,” subject to all requirements applicable to a “Construction Contract” and “Contractor,” as applicable, in this First Amendment.

“Construction Phase” is defined in Section 4(e).

“Contract Documents” means this First Amendment, the approved Construction Contract and the approved Plans and Specifications.

“Contractor” means the duly licensed general contractor(s), design/builder or construction manager engaged by Developer for the construction of the Bridge Project and completion of the Work, subject to the City Manager’s prior written approval, which will not be unreasonably withheld.

“Contractor Contingency” means that portion of the Contractor’s Guaranteed Maximum Price available for use by the Developer to defray increased costs of the Bridge Project reasonably and necessarily incurred by the Contractor due to unforeseen circumstances relating to the construction of the Bridge Project. The Contractor Contingency shall be included as a line item specified in the Schedule of Values for the Bridge Project. In no event shall the use of the Contractor Contingency cause any increase in the Maximum City Contribution.

“CO” is defined in Section 9(c)(iii).

“CPM Schedule” means the construction schedule for the Bridge Project, which shall be prepared using the critical path method (“CPM”), which may be amended by the Developer from time to time without the City Manager’s prior written approval except to the extent such amendment contemplates that Final Completion will occur after the Final Completion Date, in

which case such amendment(s) shall require the City Manager's prior written approval, which may be granted or withheld in the City Manager's sole discretion. The CPM Schedule shall include the following:

- (i) a CPM network diagram for use in scheduling and controlling Work;
- (ii) the early and late start and stop times for each major construction activity;
- (iii) all "critical path" activities and their duration;
- (iv) the sequencing of all procurement, approval, delivery and work activities;
- (v) late order dates for all long lead time materials and equipment; and
- (vi) critical Developer and City decision dates.

"Default" is defined in Section 16(a).

"Design Phase" is defined in Section 4(e).

"Developer" is defined in the Preamble hereto.

"Developer's Improvements" is defined in the Recitals hereto.

"DRB" means the City's Design Review Board.

"Event of Default" is defined in Section 16(c).

"Expenses" is defined in Section 12(b).

"FDOT" is defined in Section 4(d).

"FDOT Approvals" is defined in Section 4(d).

"Final Bridge Project Budget" means the final budget, as mutually agreed by the Parties and approved by the City Commission prior to establishment between Developer and the Contractor of the Guaranteed Maximum Price or the stipulated sum, as applicable, and representing the final hard construction costs and Bridge Project Design Costs approved by the Parties in connection with the design, development and construction of the Bridge Project, which final costs shall not exceed the Maximum City Contribution, except to the extent expressly agreed in writing by the City pursuant to Section 6(a)(v).

"Final Completion" means the date when all conditions to Final Completion set forth in Section 9(c) have been fully satisfied, as reasonably determined by the City.

"Final Completion Date" is defined in Section 7(f).

"Maximum City Contribution" means the maximum amount of \$[10,000,000, less City's oversight/admin costs and any other costs for which City is responsible with respect to the

**Bridge Project]** to be contributed by the City towards the costs of design, development and construction of the Bridge Project. [*Developer to provide a proposed schedule of values reflecting all of Developer's anticipated costs, inclusive of design, permitting and construction.*]

"Non-Monetary Default" is defined in Section 16(b).

"Notice of Termination for Convenience" is defined in Section 17(b).

"Notice of Termination for Default" is defined in Section 16(d).

"Notice(s) to Proceed" or "NTP" means a written letter or directive issued by the City Manager, or his or her designee, to commence and proceed with portions of the Work as specified therein or a specific task of the Bridge Project, and stating any further limitations on the extent to which Developer may commence and proceed with the Work. The date of issuance of NTP shall be determined at the City's sole discretion once Developer has obtained all applicable Permits and Approvals and otherwise satisfied all conditions precedent to issuance of NTP.

"Owner's Consultant" is defined in Section 7(h).

"Park Project" is defined in the Recitals hereto.

"Payment and Performance Bond" is defined in Section 7(a)(ix).

"Permits and Approvals" shall mean any and all permits and approvals required to be issued by Governmental Authorities in connection with the construction of the Bridge Project, including, without limitation, the City of Miami Beach building permits, the approvals of the DRB, the Miami-Dade County Department of Environmental Resources Management permits, the Florida Department of Environmental Protection, FDOT, the State of Florida, and any utility access agreements with all applicable utility companies.

"Person" means an individual, corporation, partnership, joint venture, limited liability company, limited liability partnership, estate, trust, unincorporated association or other entity; any Federal, state, county or municipal government or any bureau, department, political subdivision or agency thereof; and any fiduciary acting in such capacity on behalf of any of the foregoing.

"Plans and Specifications" means, for purposes of this First Amendment, the plans and specifications for the design, development and construction of the Bridge Project at the approximately ninety percent (90%) design completion stage approved by the City Manager and the DRB, and which shall include fully detailed drawings showing the location, character, dimensions and details of the Work to be done, and specifications related to the Bridge Project, comprising all of the written directions, provisions and requirements for the Bridge Project, and describing the Work required to be performed, including detailed technical requirements as to labor, materials, supplies, equipment and standards to which such Work is to be performed, prepared by duly qualified, licensed, insured and reputable architects and engineers, in each case, consistent with the approved Bridge Concept Plan and the Bridge Project Design.

“Preliminary Bridge Project Budget” means the total costs budgeted by the City for the Bridge Project, as mutually agreed to by the Parties, which is the preliminary estimate of costs, including estimated hard construction costs and Bridge Project Design Costs, anticipated as of the date thereof to be incurred in connection with the design, development and construction of the Bridge Project, which total costs shall not exceed the Maximum City Contribution, except to the extent expressly agreed in writing by the Parties.

“Project” is defined in the Recitals hereto.

“Progress Payments” is defined in Section 6(e)(iv).

“Requirements” means:

- (i) any and all laws, constitutions, rules, regulations, orders, ordinances, charters, statutes, codes, executive orders and requirements of all Governmental Authorities having jurisdiction over a Person and/or the Bridge Project Site or any street, road, avenue or sidewalk comprising a part of, or lying in front of, the Bridge Project Site (including, without limitation, any of the foregoing relating to handicapped access, the FDOT standards or requirements relating to pedestrian bridges in FDOT Right of Way Areas, the Building Code of the City and the laws, rules, regulations, orders, ordinances, statutes, codes and requirements of any applicable Fire Rating Bureau or other body exercising similar functions);
- (ii) the temporary and/or permanent certificate or certificates of occupancy or completion issued for the Bridge Project Site as then in force;
- (iii) any and all provisions and requirements of any property, casualty or other insurance policy required to be carried by Developer under this First Amendment; and
- (iv) Local Workforce Participation Requirements, as required by Section 31-40 of the City Code.

“Requisition” is defined in Section 6(e)(iv)(C).

“Scope Changes” is defined in Section 10(c).

“Schedule of Values” means a written schedule setting forth the detailed and itemized cost breakdown of all elements comprising the guaranteed maximum price (inclusive of labor, material, taxes, fees, overhead and profit) set forth in the approved Construction Contract. The Schedule of Values shall be prepared in such form and supported by such data to substantiate its accuracy as the City may reasonably require and shall not be modified or amended after execution of the approved Construction Contract without the City Manager’s prior written approval, which may be granted or withheld in the sole discretion of the City Manager; provided, however, that Developer shall be permitted to amend the Schedule of Values without the City

Manager's approval to (a) move funds from the Contractor's Contingency to another line item to fund expenses due to unforeseen circumstances relating to the construction of the Bridge Project in accordance with Section 10(a) hereof or (b) increase any line item(s) other than the Contractor's Contingency by not more than twenty percent (20%) in the aggregate by decreasing any other line item(s) by not more than twenty percent (20%) in the aggregate, in each case, so long as no such amendment(s) or increases cause or contemplate any increase in the Maximum City Contribution.

"Substantial Completion" means the date when all conditions to Substantial Completion set forth in Section 9(a) have been fully satisfied, as reasonably determined by the City.

"Substantial Completion Date" is defined in Section 7(e).

"Substantial Completion Punch List" is defined in Section 9(b).

"Target Substantial Completion Date" is defined in Section 7(e).

"TCC" is defined in Section 9(a)(i).

"TCO" is defined in Section 9(a)(i).

"Termination for Convenience" is defined in Section 17(b).

"Unavoidable Delays" means a delay that (a) directly impacts the critical path activity delineated in the CPM Schedule, (b) is beyond the reasonable control of such Party incurring the delay, and (c) is not due to an intentional act, error, omission or negligence of such Party. Subject to the foregoing criteria, "Unavoidable Delay" may include events such as war, civil insurrection, riot, fires, epidemics, sabotage, explosions, embargo restrictions, quarantine restrictions, transportation accidents, strikes, floods, hurricanes or tornadoes, earthquakes, or other acts of God which prevent performance. "Unavoidable Delay" shall not include technological impossibility, failure of equipment supplied by Developer or Contractor, receipt of and incorporation of defective materials into the Work, shortage of funds (excepting if such shortage is the result of the City's failure to fund in default of its obligations hereunder), failure of suppliers to deliver equipment and materials except where such failure is itself the result of a Force Majeure event, or failure of Developer or Contractor to secure the required permits for prosecution of the Work. If two or more separate events of Unavoidable Delay are concurrent with each other, Developer shall only be entitled to an extension of time for each day of such concurrent critical path delay, and Developer shall not be entitled to double recovery thereon. For illustration purposes only, if two events of Unavoidable Delay are concurrent for two days, Developer shall only receive an extension of time, if at all, of a total of two days, and not four days. In no event shall (i) any Party's financial condition constitute an "Unavoidable Delay" with respect to such Party, (ii) nor shall any delay arising from a Party's default under the Development Agreement, this First Amendment or any of the Construction Agreements, constitute an "Unavoidable Delay" with respect to such Party's obligations hereunder. The times for performance set forth in this First Amendment (other than for monetary obligations of a Party) shall be extended to the extent performance is delayed by Unavoidable Delay; provided that the Party claiming Unavoidable Delay notifies the other Party in writing not later than ten



(10) days after the occurrence of such Unavoidable Delay of the occurrence thereof. Failure to provide timely notice, as set forth herein, shall be a waiver of any claim by the Party alleging an Unavoidable Delay.

“Warranties” is defined in Section 9(c)(xi).

“Work” means the construction and services required by or reasonably inferable from the Construction Contract for the Bridge Project and the Plans and Specifications, and includes all other labor, materials, equipment, supplies, tools, machinery, utilities, procurement, fabrication, transportation, construction and erection, installation, insurance, bonds, permits and conditions thereof, training, third-party provider services for inspections and testing, surveys, studies, supervision, and administration services and other services provided or to be provided by the Contractor to fulfill its obligations for the complete construction, installation, furnishing, equipping, and functioning of the Bridge Project, together with all additional, collateral and incidental items, work and services required to achieve Final Completion of the Bridge Project.

(b) Interpretation. The words “hereof”, “herein” and “hereunder” and words of similar import when used in this First Amendment shall refer to this First Amendment as a whole and not to any particular provision of this First Amendment. References herein to Sections, subsections, Schedules, Exhibits and the like are to Sections and subsections of, or Schedules or Exhibits attached to, this First Amendment unless otherwise expressly provided. The words “include”, “includes” and “including” shall be deemed to be followed by the phrase “without limitation”. References herein to “days” shall mean calendar days unless otherwise expressly provided. Unless the context in which used herein otherwise clearly requires, “or” has the inclusive meaning represented by the phrase “and/or”. Defined terms include in the singular number the plural and in the plural number the singular.

**3. Intentionally Omitted.**

**4. Development of Bridge Project.**

(a) Connectivity to Developer’s Project. The City and Developer acknowledge and agree that the design, development and construction of the Bridge Project as an aesthetically integrated project with the Developer’s Project, in accordance with the single design vision of the Architect, will maximize the benefits of the Project and the Bridge Project to the City of Miami Beach. Accordingly, the City and Developer further acknowledge and agree that the completion of the design, development and construction of the Bridge Project pursuant to the terms and provisions of this First Amendment and in accordance with the Bridge Project Design is integral to the current design, development and construction of the Project, and that Developer shall be responsible for the design, development, construction and permitting of the Bridge Project, subject to the terms herein. Notwithstanding the foregoing, in no event shall the failure by either Party to perform pursuant to the terms of this First Amendment impact Developer’s rights to undertake all of Developer’s Improvements in accordance with the Development Agreement.

(b) Selection of Contractors. The City has determined to develop the Bridge Project as contemplated herein, and the Parties hereby agree that Developer will serve as

developer of the Bridge Project on behalf of the City and shall cause the Bridge Project to be designed, developed and constructed on behalf of the City and at the City's cost and expense, subject to the terms and conditions as set forth herein, in an amount not to exceed the Maximum City Contribution, with Developer responsible for costs in excess thereof (if any). Developer will select all contractors, including the Contractor, and all subcontractors, consultants and other Persons that Developer deems necessary to complete the Bridge Project in accordance with, and subject to, the provisions of this First Amendment.

(i) Selection of Architect. Developer and the City wish to enhance the benefits to the City and the Developer of an integrated vision and design for the development of the Project and the Bridge Project, and therefore Developer, with the City's consent, has selected Arquitectonica as the design criteria professional for the Bridge Project, and Arquitectonica shall serve as the architect/engineer of record for the Bridge Project ("Architect") in the event Developer elects to utilize a design-bid-build contract methodology for the Bridge Project. In the event Developer elects to utilize a design/build contract methodology for the delivery of the Bridge Project, the Architect shall mean the qualified and professionally licensed design professional in the State of Florida that is engaged by the Contractor, as the design/builder, to perform (or cause to be performed through subconsultants) all architectural, design and engineering services required for the Bridge Project.

(c) Approvals from Third-Parties Owning Various Portions of Bridge Project Site. All Bridge Project improvements shall be designed and constructed entirely within the Bridge Project Site. Developer shall ensure that no portion of the Bridge Project or Bridge Project Site encroaches on any third-party land or airspace, without prior written consent of the owners thereof. The Parties acknowledge that the Bridge Project may require approval from the Florida Department of Transportation ("FDOT"), which approval requirement may include the grant of air rights over MacArthur Causeway and approval to construct portions of the Bridge Project in the FDOT right-of-way located adjacent to the MacArthur Causeway (collectively, the "FDOT Approvals"). Developer shall use diligent, good faith efforts to obtain all third-party approvals in connection with the Bridge Project, including the FDOT Approvals, the costs of which shall be included in the Final Bridge Project Budget.

(d) Phasing of the Work. The City intends to authorize the design and construction Work for the Bridge Project in separate phases, via issuance of one or more separate NTPs for the design phase ("Design Phase") and one or more separate NTPs for construction ("Construction Phase"). The issuance of any NTP shall be in the City's sole discretion.

(i) Preliminary Development/Design Phase. The City shall issue one or more NTPs for the Design Phase. City shall issue the first NTP for the development of the Plans and Specifications and related preliminary planning efforts within two (2) business days following (1) execution of this First Amendment; (2) Developer's delivery to the City of Developer's agreement with the Architect (or design criteria professional, as applicable), for the development of the Plans and Specifications, and (3) certificates of insurance required pursuant to Section 12 of this First Amendment.

(ii) In the event Developer selects a design/build construction methodology to deliver the Bridge Project, City shall issue a separate NTP for the

Contractor, as the design/builder, to complete the final plans and specifications for the Bridge Project (at 100% design completion), based on the approved Plans and Specifications, and for the Contractor to pursue the permitting thereof, within five (5) business days following the Developer's submission to the City of the fully executed Construction Contract and the certificates of insurance required of the Contractor pursuant to this First Amendment and the Construction Contract.

(iii) Notice to Proceed for Construction Phase. The issuance of any NTP for the Construction Phase shall be subject to and contingent upon Developer's submission to the City Manager, and the City Manager's approval of, the following:

(A) all applicable Permits and Approvals required by the Governmental Authorities having jurisdiction over the Parties, the Bridge Project and the Bridge Project Site for performance of the Work or portion thereof in which the NTP is sought;

(B) all consents from third party owners of any portion of the Bridge Project Site, and if necessary, access easements in favor of the City, Developer and Contractor, authorizing the construction and use of the Bridge Project on such owner's property;

(C) name and location of storage yard for off-site storage of materials and equipment relating to the Bridge Project;

(D) the Plans and Specifications, approved (and signed and sealed) copies of which shall be delivered to the City;

(E) the Construction Contract, including the Schedule of Values and CPM Schedule set forth therein, approved (and executed) copies of which shall be delivered to the City;

(F) the Assignment of Construction Agreements, a duly executed original of which shall be delivered to the City;

(G) the Assignment of Plans, Permits and Approvals, a duly executed original of which shall be delivered to the City;

(H) certificates of insurance for all insurance required to be carried pursuant to this First Amendment (provided that the City shall have the right to request copies of policies of insurance required hereunder and Developer shall promptly deliver same upon request); and

(I) a payment bond and performance bond (collectively, the "Payment and Performance Bond"), in the form attached hereto as **Exhibit "D"** and meeting the bonding requirements set forth in Section I of **Exhibit "E"** attached hereto, with a penal amount equal to the Guaranteed Maximum Price set forth in the Construction Contract, and issued by a surety authorized to conduct business in the State of Florida, guaranteeing the performance of the Contractor

under the Construction Contract for the Construction of the Bridge Project. The City shall be named as a dual obligee under the Payment and Performance Bond.

(iv) Developer shall have no rights under this First Amendment to perform or cause the performance of any Work for the Construction Phase, unless the Work is authorized pursuant to a Notice to Proceed. In the event the City does not proceed with the Construction Phase, and terminates this First Amendment pursuant to Sections 5(f), 6(b) or 17(b), and the City pays to Developer the amounts, if any, due pursuant to Section 5(f) and 6(b) hereof, the City and Developer shall have or owe no further obligation to each other with respect to this First Amendment.

## **5. Procedure for Bridge Project Design Approval.**

(a) Approved Bridge Project Concept Plan. The approved Bridge Project Concept Plan is attached hereto as **Exhibit “A.”**

(b) Design to Budget. The Developer shall cause the Architect to design the Bridge Project in accordance with the Bridge Project Concept Plan and the Preliminary Bridge Project Budget. The City’s costs, fees and expenses for such design and preparation work shall not exceed the Maximum City Contribution.

(c) Bridge Project Design. On or about May \_\_\_\_, 2019, City staff submitted an application to the DRB for approval of the Bridge Project together with the Bridge Project Concept Plan. The Parties acknowledge and agree that notwithstanding such submittal to the DRB, as of the date hereof, the Plans and Specifications remain subject to review by the City Manager and the Bridge Project remains subject to approval by the City Commission, in its proprietary capacity, the FDOT and any other third party owners of any portion of the Bridge Project Site as set forth herein. The final design of the Bridge Project, as approved by the DRB and the FDOT based upon the approved Bridge Project Concept Plan is hereinafter referred to as the “Bridge Project Design.”

### **(d) Plans and Specifications.**

(i) Within \_\_\_\_\_ (\_\_\_\_) days after the City’s issuance of the NTP for the Design Phase, Developer shall cause the Architect to prepare proposed Plans and Specifications and deliver same to the City Manager for review and approval. [***Note: Developer to propose date***]

(ii) The City Manager shall review the proposed Plans and Specifications within twenty-one (21) days after receipt thereof.

(iii) If such proposed Plans and Specifications are inconsistent with the Bridge Project Design, Developer, at Developer’s sole cost and expense, shall cause the Architect to revise the proposed Plans and Specifications to be consistent with the Bridge Project Design.

(iv) If such proposed Plans and Specifications are consistent with the Bridge Project Design, the City Manager’s approval shall not be unreasonably withheld.

If City Manager rejects the proposed Plans and Specifications for reasons other than as specified in clause (iii) above and requires Developer to revise or redesign the Plans and Specifications, then, regardless of whether or not the City elects not to proceed with the Bridge Project, the City shall be obligated to reimburse Developer for the cost(s) of such revision(s) and/or redesign(s) as further described in Section 5(f) hereof.

(v) The Developer shall utilize the Plans and Specifications as the basis for bidder price proposals for the construction of the Bridge Project.

(vi) The portions of the Bridge Project Design relating to the Bridge Project Aesthetic Design Elements may be approved by the City separately from, and subsequent to, the City Manager's approval of the Plans and Specifications. Upon the City Commission's approval of the Bridge Project Aesthetic Design Elements, the Developer shall procure the Construction Contract for the fabrication and installation of the Bridge Project Aesthetic Design Elements, the costs of which shall be incorporated within the Final Bridge Project Budget and without exceeding the Maximum City Contribution, except to the extent expressly agreed in writing by the Parties. **[City to discuss]**.

(e) Compliance with Requirements. Developer shall cause the Plans and Specifications to comply with all applicable Requirements. The City Manager's approval in accordance with this First Amendment of the Plans and Specifications shall be deemed to be a determination by the City that such plans and specifications so approved are in substantial conformity with the Bridge Project Design, but shall not be, and shall not be construed as being, or relied upon as, a determination that such Plans and Specifications comply with any other applicable Requirements, including any Requirements providing for the review and approval of the Plans and Specifications by any governmental authority (in its regulatory capacity as opposed to its proprietary capacity).

(f) City's Right to Terminate - Design. In the event the City Commission elects not to proceed with the Bridge Project prior to the issuance of a Notice to Proceed for the construction phase of the Bridge Project, the City Manager shall notify the Developer in writing of the City's intent to terminate this First Amendment. Within thirty (30) days after Developer's receipt of the City's notice of intent to terminate this First Amendment, the City shall reimburse Developer for all third party out of pocket Bridge Project Design Costs actually incurred by Developer **[Developer to provide Eric Carpenter with estimated amounts]**, provided, however, that if City is unable to issue a Notice to Proceed for construction within \_\_\_\_ (\_\_) months after the execution of this First Amendment due to the Developer's inability to obtain the FDOT Approvals or other regulatory approvals or permits that may be required for the Bridge Project (whether such inability is due to any third-party challenge to the Bridge Project or otherwise), then in such event, the City shall reimburse Developer for all third party out of pocket Bridge Project Design Costs actually incurred by Developer, which Bridge Project Design Costs shall not exceed the Bridge Project Design Costs Cap. Following Developer's receipt of payment in cleared funds of all sums due hereunder, this First Amendment shall terminate and shall thereafter have no force or effect, and neither Party shall have any further rights or obligations to the other pertaining to the Bridge Project under this First Amendment. Notwithstanding any election by the City not to proceed with the Bridge Project, termination of this First Amendment

shall not in any respect operate to terminate, modify, amend or affect any other of the respective rights and obligations of the Parties under the Development Agreement, all of which shall continue to be in full force and effect.

**6. Final Bridge Project Budget and Funding.**

(a) Final Bridge Project Budget.

(i) Prior to Developer's execution of the Construction Contract, Developer shall submit to the City Manager a proposed bid submittal package, which bid submittal package shall be subject to review and approval by the City Manager, and shall include:

(A) The proposed Final Bridge Project Budget, inclusive of a not-to-exceed line item for the Bridge Project Aesthetic Design Elements, if such Bridge Project Aesthetic Design Elements were not previously finalized or approved as part of the Plans and Specifications; and

(B) The qualifications of the proposed Contractor; and

(C) The Contractor's proposal (including its GMP proposal and any value engineering or other approach or proposal that would require any change to the Plans and Specifications); and

(D) The form of the Construction Contract, including the proposed Schedule of Values and proposed CPM Schedule (which CPM Schedule shall include a preliminary schedule for show drawing submissions and utility coordination schedule).

(ii) If such proposed Final Bridge Project Budget is materially inconsistent with the Preliminary Bridge Project Budget or otherwise causes the City's contribution to exceed the Maximum City Contribution, then Developer shall have the opportunity, within \_\_\_\_\_ (\_\_) days after such submission, to cause the Contractor to revise the proposed Final Bridge Project Budget to be consistent with the Preliminary Bridge Project Budget (or a higher amount if Developer agrees to contribute additional funds to offset the deficiency between the Preliminary Bridge Project Budget and such higher amount).

(iii) If such proposed Final Bridge Project Budget is consistent with the Preliminary Bridge Project Budget, then the City Manager may approve or reject same, but if the City Manager rejects the proposed Final Bridge Project Budget, either party may elect to do one or more of the following: (1) value engineer the Bridge Project to permit it to be constructed for the Preliminary Bridge Project Budget (or a higher amount if such party agrees to contribute additional funds to offset the deficiency between the Preliminary Bridge Project Budget and such higher amount); (2) agree in writing to contribute additional funds towards the cost of the Bridge Project; or (3) provided neither party has elected to value engineer the Bridge Project or contribute additional funds towards the Bridge Project, terminate this First Amendment.

(iv) To the extent either party desires to value engineer the Bridge Project, Developer shall cause the Architect to suggest value engineering, scope reductions or other cost savings options to achieve an acceptable Final Bridge Project Budget. Developer shall cause the Architect to revise the design to incorporate the value engineered options approved by the requesting Party at no additional cost to the City unless expressly agreed to by the City in writing accordance with subsections (iii)(2) and (v) hereof or one or more of the following events causes the proposed Final Bridge Project Budget to exceed the budget acceptable to the City, in which case the cost of such revisions shall be borne by the City: (A) City initiated Scope Changes; or (B) the City's decision to reduce the Preliminary Bridge Project Budget.

(v) Notwithstanding the City Manager's delegated authority in this Section 6(a), any proposed Final Bridge Project Budget which requires the Maximum City Contribution to be increased or exceeded shall be subject to and contingent upon an appropriation of funds by the City Commission, in its sole and absolute discretion. In the event the City Commission agrees to contribute additional funds towards the cost of the Bridge Project in accordance with subsection (iii)(2), the Parties promptly shall memorialize such agreement in writing by an amendment to this First Amendment increasing the "Maximum City Contribution" by such additional contribution.

(b) City's Right to Terminate – Budget. If the City elects to terminate this First Amendment pursuant to subsection 6(a)(iii)(3) hereof, then within thirty (30) days after Developer's receipt of the City's notice of intent to terminate the Bridge Project, the City shall reimburse Developer in full for all third party out of pocket Bridge Project Costs actually incurred by Developer through the termination date [*Developer to provide Eric Carpenter with estimated amounts*]. Following Developer's receipt of payment in cleared funds of all sums due hereunder, this First Amendment shall terminate and shall thereafter have no force or effect, and neither Party shall have any further rights or obligations to the other pertaining to the Bridge Project under this First Amendment. Notwithstanding any election by the City not to proceed with the Bridge Project, termination of this First Amendment shall not in any respect operate to terminate, modify, amend or affect any other of the respective rights and obligations of the Parties under the Development Agreement, all of which shall continue to be in full force and effect.

(c) Maximum City Contribution. Notwithstanding anything contained in this First Amendment or the Development Agreement, the Parties acknowledge and agree that, if and when the proposed Final Bridge Project Budget is approved by the City Commission, the Maximum City Contribution shall represent the total amount of funding that the City shall contribute towards the design, development and construction of the Bridge Project and, accordingly, the approved Final Bridge Project Budget shall not be exceeded and/or increased without the City Commission's prior written approval, which may be granted or withheld in its sole discretion. The approved Final Bridge Project Budget shall be full compensation for all labor, materials, equipment, costs, and expenses, including overhead and profit, associated with completion of all the Work in accordance with the requirements of this First Amendment, including all Work reasonably inferable therefrom, even if such item of Work is not specifically or expressly identified as part of a line item in the Final Bridge Project Budget, unless the Final

Bridge Project Budget includes costs in excess of the Maximum City Contribution for which Developer previously agreed in writing to assume liability.

(d) Developer's Contribution. Developer shall be solely responsible for the costs, fees or expenses required in connection with the design, development and construction of the Bridge Project to the extent such costs, fees and expenses actually exceed the Maximum City Contribution.

(e) Funding. The City's funding of costs and expenses of the Bridge Project, in an aggregate amount not to exceed the Maximum City Contribution, shall be made as follows:

(i) All costs and expenses paid by the City shall be in accordance with the terms of this First Amendment, the approved Final Bridge Project Budget and the Construction Contract, including the approved Schedule of Values set forth therein;

(ii) All costs and fees attributable to work performed by Developer on behalf of the City shall be identified, tracked, accounted for, invoiced and paid separately from Developer's Improvements costs, in a manner that clearly distinguishes all Bridge Project costs from Developer's Improvements costs. The City shall have the right to make payment by check or wire transfer to the Developer, or upon notice to the Developer, the City shall have the right but not the obligation to make payments approved by Developer under the Construction Contract directly to the Contractor;

(iii) Within thirty (30) days after the Parties' execution of this First Amendment, the Developer shall submit an application for a Progress Payment with supporting documentation, as required by Section 6(e)(iv), for its out of pocket Bridge Project Design Costs actually incurred by Developer through and including the execution date of this First Amendment;

(iv) Following the date of execution of this First Amendment by the Parties, the City shall appropriate (or cause to be appropriated) funds for the design, development and construction of the Bridge Project. Developer shall be entitled to be paid by the City in monthly progress payments ("Progress Payments") as set forth herein for the following portions of the Work completed and acceptable to the City, commencing with the first month after execution of this First Amendment, and continuing thereafter until the City has funded Developer up to the Maximum City Contribution:

(A) For Bridge Project Design Costs in accordance with the approved Preliminary Bridge Project Budget and approved Final Bridge Project Budget, as applicable; and

(B) For hard costs associated with the design, development and construction of the Bridge Project in accordance with the approved Preliminary Bridge Project Budget and approved Final Bridge Project Budget, as applicable, including the Schedule of Values set forth therein. No Progress Payment approved nor made shall constitute an acceptance of any Work not completed in



accordance with the approved Plans and Specifications or the approved Final Bridge Project Budget.

(C) The Developer may make applications for Progress Payments during design and/or construction by submitting to the City on or before the fifth (5th) day of each calendar month (but not more often than once per calendar month) an itemized application for payment (“Requisition”) for those items properly payable hereunder through the last day of the immediately prior calendar month. Each Requisition shall be submitted in a form acceptable to both Parties, and shall be accompanied by:

(1) evidence of proper application of all prior payments, including without limitation, an unconditional partial waiver of lien, from the Architect (in the case of design costs) or Contractor and each subcontractor, in form and substance satisfactory to the City, covering the full amount of all past payments for design costs or construction costs through the date of such waiver of lien, and an unconditional final waiver of lien in form and substance satisfactory to the City, from Architect or each subcontractor who, as of the most recent payment, had completed the work covered by its subcontract or design agreement, covering the full amount due Architect or each subcontractor, and a consent of surety where applicable;

(2) with respect to construction costs only, (1) a certificate from the Architect certifying that to the best of its knowledge, information and belief, the Work performed through the last day of the calendar month for which the Requisition has been made has been completed as indicated, and the quality of the Work is in accordance with the approved Plans and Specifications, (2) consent of surety relative to the Work which is the subject of the Requisition, (3) an updated Bridge Project Schedule and (4) progress photographs showing the progress of the Work; and

(3) if at any time the City reasonably believes that the Bridge Project will not be completed in accordance with the then-current CPM Schedule, a certificate from the Contractor certifying to the best of its knowledge that substantial completion of the Work will occur on or prior to the Substantial Completion Date, final completion of the Work will occur on or prior to the Final Completion Date and the Bridge Project may be constructed in accordance with the Final Bridge Project Budget.

(4) Developer shall also furnish such other supporting evidence as the City may reasonably require to establish the cost or value of the improvements and equipment for which each Progress Payment is to be and has been made.

(D) Each Requisition for hard costs shall be based upon and be in accordance with the Schedule of Values. The Schedule of Values shall be the basis for reviewing the hard costs incurred in each Requisition. Each Requisition shall show the percentage completion of each portion of the Work as of the end of the period covered by such Requisition and that the unfunded amount of the Maximum City Contribution is sufficient to fund the remaining costs of completion of the Work.

(E) Within thirty (30) days after receipt of a Requisition, the City will pay an approved Requisition to the Developer for such amount as the City determines to be properly due, and if it objects to and withholds funding for any item or amount, shall state in writing the reasons for such action. The Developer, after receipt of an objection to funding, shall disprove or cure such objection or the Parties shall otherwise work in good faith to resolve such objection. Each claim, question, difficulty or dispute which cannot be resolved by mutual agreement of the City and Developer shall be resolved in accordance with the procedure set forth in **Exhibit "C"** attached hereto.

(f) Retainage. The City shall withhold, from each Progress Payment (excluding Bridge Project Design Costs, insurance premiums, and premiums for the Performance Bond and Payment Bond), retainage in the amount of ten percent (10%) of each such payment until fifty percent (50%) of the Work has been completed and certified by the Architect and the City. The Work shall be considered 50% complete at the point at which 50% of the Work covered by the approved Schedule of Values has been satisfactorily performed and completed.

(i) After fifty percent (50%) completion of the Work, the Developer may present to the City Manager a request for release of up to one-half of the retainage then held by the City. The City Manager shall, within thirty (30) days after receipt of the Developer's request, authorize the City to, and the City shall make payment to the Developer, unless the City Manager has grounds for withholding payment pursuant to this First Amendment. If the City makes payment of retainage, Developer shall promptly remit payment of such retainage to Contractor and obtain waivers of lien therefor from the Contractor and all subcontractors.

(ii) After fifty percent (50%) completion of the Work, the City shall reduce to five percent (5%) the amount of retainage withheld from each subsequent Progress Payment made to the Developer, until Substantial Completion as provided in Section 9(a) herein. The City shall have no obligation to release or disburse the remaining retainage until Substantial Completion of the Bridge Project. Any such request shall be made independently of and separately from any Progress Payment or other document required by the Contract Documents. Following Substantial Completion and completion of all items on the Substantial Completion Punch List and all other remaining Work, the Developer may submit a Requisition for all remaining retainage. The City shall release the retainage solely with respect to those portions of the Work that the City determines, based on the Architect's certification and confirmation by Owner's Consultant, have been completed in accordance with the Contract Documents. For any items not to be complete, the City may withhold retainage up to one hundred fifty percent

(150%) of the total estimated cost to complete such items. In the event that all or any of the Substantial Completion Punch List items have not been completed on or before the scheduled date of Final Completion, then the City, in its sole discretion, may elect to complete some or all of such Substantial Completion 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 Substantial Completion Punch List items, Developer shall promptly pay to or reimburse the City for the amount of any deficiency. Any interest earned on retainage shall accrue to the benefit of the City. The City shall disburse the retainage amounts withheld upon the City's acceptance of the completion of the items for which they were withheld, subject to completion of the Work in accordance with the Contract Documents.

(g) Additional Withholding. In addition to the City's right to withhold payments otherwise set forth herein, the City may withhold payments to the Developer in the following circumstances:

(i) correction or re-execution of Work which is defective or has not been performed in accordance with the Contract Documents, or which the Developer or Contractor has failed to correct in accordance with the terms of the Contract Documents, as applicable;

(ii) past due payments owed to subcontractors for which Developer or Contractor has not been provided an appropriate release of lien/claim (whether or not the Work in question is the subject of any dispute);

(iii) Developer's failure to perform pursuant to this First Amendment or the Construction Contract;

(iv) Contractor's failure to perform under the Construction Contract after the expiration of any applicable notice and cure period;

(v) damage to another contractor or third-party (including, without limitation, any property in the area surrounding the Bridge Project Site) which has not been remedied in a reasonable period of time, or damage to City property which has not been remedied in a reasonable period of time, in each instance giving deference to Developer's right to seek insurers' participation in remedying such damage and, in each instance, provided that Developer proceeds in good faith and with diligence to remedy any such damage;

(vi) failure of Developer or Contractor to provide any and all material documents required by this First Amendment or the Construction Contract, as applicable, including, without limitation, the failure to turn over "as-built" drawings prior to Final Completion; and

(vii) pending or imminent Claims of the City or others including, without limitation, Claims which are subject to Developer's or Contractor's indemnity obligations pursuant to Section 8 and Section 12, as applicable, of this First Amendment,

for which the Developer or Contractor has not posted bonds or other additional security reasonably satisfactory to the City.

When the reasons for the above-withholdings have been remedied by Developer, City shall promptly release such payment(s).

(h) In no event shall any interest be due and payable by the City to the Developer or any other party on any of the sums retained or withheld by the City pursuant to any of the terms or provisions herein.

## **7. Construction of the Bridge Project.**

(a) Conditions Precedent to Commencement of Construction. Prior to Commencement of Construction, all conditions to the City's issuance of the NTP set forth in Section 4(d)(iii) shall have been satisfied and the City shall have issued the NTP.

(b) City's Assistance with Obtaining Permits and Approvals. The City (solely in its proprietary capacity as the owner of the Bridge Project and not in its governmental capacity) shall reasonably cooperate with Developer in facilitating Developer's obtaining the Permits and Approvals required for the Bridge Project and any necessary utility access agreements, shall sign any application reasonably made by Developer which is required in order to obtain such Permits and Approvals and utility access agreements and shall provide Developer with any information and/or documentation not otherwise reasonably available to Developer (if available to the City) which is necessary to procure such Permits and Approvals and utility access agreements. Any such accommodation by the City shall be without prejudice to, and shall not constitute a waiver of, the City's rights to exercise its discretion in connection with its governmental functions.

(c) Commencement of Construction. Developer shall (a) Commence Construction on or before fifteen (15) days after the issuance of all Permits and Approvals necessary for the Commencement of Construction and the City's issuance of the NTP for the Construction Phase (the "Construction Commencement Date") and (b) thereafter continue to prosecute Construction of the Bridge Project with diligence and continuity to achieve Final Completion on or before the Final Completion Date. If, after Developer has Commenced Construction, Developer fails to diligently prosecute Construction of the Bridge Project (subject to Unavoidable Delays and the City not being in default of its funding obligations hereunder), and such failure continues (subject to Unavoidable Delays and the City not being in default of its funding obligations hereunder) for thirty (30) consecutive days after Developer's receipt of notice of such failure, the City shall, in addition to all of its other remedies under this First Amendment, have the right to seek such equitable relief (either mandatory or injunctive in nature) as may be necessary to cause diligent and continuous prosecution of Construction of the Bridge Project (subject to Unavoidable Delays) by Developer.

(d) Prosecution of the Work. All Work shall be performed and completed in a good and workmanlike manner by duly qualified, licensed, insured and reputable contractors and in accordance with the approved Plans and Specifications, the Construction Contract and the approved Final Bridge Project Budget and otherwise in accordance with the terms of this First

Amendment. Construction of the Bridge Project shall be carried out with controlled inspections conducted by a licensed architect or professional engineer as required by applicable Requirements.

(e) Target Substantial Completion Date. Developer shall endeavor to achieve Substantial Completion of the Bridge Project by \_\_\_\_\_ (the “Target Substantial Completion Date”); provided, however, that failure to achieve the Target Substantial Completion Date shall not constitute an event of default under this First Amendment. [***Note: Developer to propose date***]

(f) Substantial Completion Date. Developer shall achieve Substantial Completion of the Bridge Project within five hundred forty (540) days after the Commencement of Construction (the “Substantial Completion Date”), and failure to do so shall constitute a Default under this First Amendment.

(g) Final Completion Date. Developer shall achieve Final Completion of the Bridge Project within six hundred (600) days after the Commencement of Construction (the “Final Completion Date”), and failure to do so shall constitute a Default under this First Amendment.

(h) Liquidated Damages. Developer acknowledges that the City will sustain damages, the exact amount of which are difficult to ascertain at this time, if Developer fails to achieve Final Completion on or before the Final Completion Date. Developer and the City therefore agree that if Developer fails to achieve Final Completion by the Final Completion Date, the City shall be entitled to retain or recover from Developer, as liquidated damages solely for the delayed completion of the Bridge Project and not as a penalty, liquidated damages in the amount of One Thousand Five Hundred and No/100 Dollars (\$1,500.00) for each day that Developer fails to achieve Final Completion after the Final Completion Date. Such liquidated damages are hereby agreed to be a reasonable pre-estimate of damages the City will incur as a result of delayed completion of the Bridge Project for City’s extended construction administration costs. Such liquidated damages are not intended to cover, and shall not limit the City’s remedies against the Developer attributable to, any cause other than delayed completion of the Bridge Project. [***Note: Per Eric Carpenter, the above amounts would represent city’s extended construction administration costs in the event of unexcused delays. LDs for delay are standard in all city construction contracts, and commissioners will likely expect the same for this project.***]

(i) Bridge Project Staging/Maintenance of Traffic. Developer shall cause the Contractor to prepare logistics, access staging and maintenance of traffic plans for the Bridge Project, which plans shall be subject to the City Manager’s approval, which may be granted or withheld in the City Manager’s sole discretion. The plans shall contain specific procedures for minimizing any lane closures or other disruption of surrounding operations and inconvenience to the public and residents in the surrounding areas, such as residents and visitors who must traverse the area in and around the Bridge Project site to access their residences, hotels or other businesses. Developer shall schedule the progress of the Work so as to minimize any lane closures, and in coordination with and as approved by FDOT and the City, shall schedule any required lane closures at night and/or during low impact periods.

(j) Owner's Consultant.

(i) The City reserves the right, at its sole cost and expense, to maintain on-site representatives (collectively, "Owner's Consultant") at the Bridge Project Site at any time and from time to time to conduct inspections of the Bridge Project Site. Developer agrees to provide safe access to the Bridge Project Site, including access to inspect the progress of the Work, wherever located, subject to Owner's Consultant's compliance with all Project site safety requirements. No inspection by Owner's Consultant shall impose upon the City any responsibility or liability for the performance of Developer's obligations hereunder or any failure by Developer to observe any Requirements or safety practices in connection with the Work, or constitute an acceptance of any Work which does not comply with the provisions of this First Amendment.

(ii) Owner's Consultant shall not interfere with any Work being performed at the Bridge Project Site and shall comply with all safety standards and other job-site rules and regulations of Developer and Contractor. Owner's Consultant is an inspector only, and shall make only such communications with Developer's construction manager(s), the Contractor, the other contractors, subcontractors, consultants and any other Person involved in the Construction of the Bridge Project, as reasonably necessary to enable Owner's Consultant to conduct its inspections, and in no event shall the Owner's Consultant give directions to such Persons. Developer shall provide a reasonable work area and services for Owner's Consultant as is customarily provided at similar construction sites. All expenses incurred by Owner's Consultant shall be paid by the City.

(iii) Developer agrees to cooperate fully with Owner's Consultant and to provide Owner's Consultant with such rights of notice, access and review with respect to the Bridge Project and the Construction Agreements as is reasonably necessary to achieve the foregoing (including, but not limited to verifying on Owner's behalf that the construction of the Bridge Project is being conducted in accordance with the terms hereof), including, without limitation, the following:

(A) the opportunity for attendance by Owner's Consultant at regularly scheduled construction Work meetings (which are anticipated to be scheduled not less frequently than twice each month) and at any special meetings which Developer deems necessary in its reasonable discretion as to Change Orders, delays and other material issues concerning the Project;

(B) the inspection by Owner's Consultant of all Work;

(C) the delivery by Developer to Owner's Consultant of electronic versions of:

(1) a monthly construction cost report;

(2) as and when delivered to the City, copies of all Requisitions together with all applicable supporting documentation;

(3) all periodic (but not less than monthly) proposed updates to the Final Bridge Project Budget, which updates shall show all variances and which updates shall be subject to the City's prior approval to the extent such updates contemplate any increase in the Final Bridge Project Budget except to the extent such increase is funded by the Developer, which approval may be granted or withheld in the sole discretion of the City; and

(4) access to Bridge Project records in accordance with Section 18(b).

(iv) To the extent the exercise of the City's rights hereunder requires the opportunity to review any documents or participate in any meetings, Developer agrees, without request therefor by the City, to promptly provide copies of such documents or notice of such meetings to the City and Owner's Consultant after receipt of the same by Developer and reasonably in advance of any meetings to allow for appropriate travel arrangements to the extent practical under the circumstances.

(k) Rejection of Non-Conforming or Defective Work. The City shall have the authority to reject or disapprove Work which either Owner's Consultant or the City Manager find to be defective. If required by Owner's Consultant or the City Manager, Developer shall promptly cause Contractor to either correct all defective work or remove such defective work and replace it with non-defective work at no additional cost to the City. Developer shall bear any direct, indirect and consequential costs of such removal or corrections including cost of testing laboratories and personnel.

(i) Should Developer fail or refuse to cause Contractor to remove or correct any defective work or to make any necessary repairs in accordance with the requirements of the Construction Contract within the time indicated in writing by Owner's Consultant, which time shall in no event be less than one hundred twenty (120) calendar days and may be longer (to the extent necessary to comply with the terms of Contractor's Payment and Performance Bond), the City shall have the authority to cause the defective work to be removed or corrected, or make such repairs as may be necessary, all at Developer's expense and subject to the City's right to pursue damages. Any expense incurred by the City in making such removals, corrections or repairs, shall be paid for out of any monies due or which may become due to Developer, or may be charged against the Performance Bond. In the event of failure of Developer to cause Contractor to make all necessary repairs promptly and fully, the City may declare Developer in Default under this First Amendment.

(ii) If, within one (1) year after the date of Substantial Completion or such longer period of time as may be prescribed by the terms of any applicable

special warranty required by the Construction Contract, any of the Work is found to be defective or not in accordance with the Contract Documents, the Developer, after receipt of written notice from the City, shall promptly correct or cause to be corrected such defective or nonconforming Work within the time specified by the City without cost to the City. Nothing contained herein shall be construed to establish a period of limitation with respect to any other obligation which Developer or Contractor might have under the applicable Construction Agreements, including Contractor's warranty obligations hereof and thereof and any claim regarding latent defects.

(iii) Failure to reject any defective work or material shall not in any way prevent later rejection when such defect is discovered or obligate the City to final acceptance.

(l) **Bridge Project Schedule Requirements.** Developer shall promptly provide to Owner's Consultant information copies of the CPM Schedule. The CPM Schedule shall (1) be revised pursuant to the Construction Contract, in no event less frequently than monthly, and in each case subject to the City's prior written approval to the extent such revisions are reasonably likely to extend the Final Completion Date, which approval may be granted or withheld in the City's sole discretion and (2) provide for expeditious and practicable execution of the Work.

(i) A copy of the CPM network diagram highlighting the completed and partially completed activities and manpower schedule shall be obtained by Developer from Contractor on a monthly basis. Monthly updates shall be provided to Owner's Consultant upon receipt from Contractor.

(ii) Developer shall keep Owner's Consultant informed on a periodic basis, unless circumstances dictate the need to do so more frequently, as to actual progress of the Work. Developer shall provide Owner's Consultant with reasonable access to the reports, logs and other Project management systems in which Developer tracks the progress of the construction Work. Developer shall inform the Owner's Consultant of any deviation from the CPM Schedule which, in Developer's good faith determination, is likely to cause a material delay in the Substantial Completion of the Project (as shown on the current CPM Schedule), within five (5) Business Days after such deviation becomes apparent to Developer.

**8. Construction Agreements; Required Clauses.** All Construction Agreements shall include the following provisions (or language substantially similar thereto which is approved in advance by the City); provided, however, that any Construction Agreement having aggregate payments of Five Hundred Thousand Dollars (\$500,000) or less shall not be required to include the provisions set forth in paragraph (i) below; provided further all references to "Contractor" in this Section 8 shall refer to any contractor, subcontractor, consultant or other similar Person party to a Construction Agreement:

(a) "Contractor shall provide, prior to the commencement of its portion of the work, and maintain during the performance thereof, the insurance set forth on Exhibit "\_\_\_"



attached hereto and incorporated by reference herein. Contractor shall procure an appropriate clause in, or endorsement on, any policy of insurance carried by it pursuant to which the insurance company waives subrogation or consents to a waiver of right of recovery consistent with the release, discharge, exoneration and covenants not to sue contained herein. Original Certificates of Insurance, in quadruplicate (all of which shall be original signed counterparts) and including the City of Miami Beach, Florida (and any successor Owner), as additional insureds (the "Certificate of Insurance"), shall be furnished to Developer by Contractor prior to commencement of work, denoting all insurance required of Contractor pursuant to the terms of the Contract. The Contractor shall secure a Certificate of Insurance from each of its sub-contractors and/or suppliers with limits of liability equal to those carried by the Contractor, or as otherwise approved in advance by the City."

(b) "(1) Developer shall have the right to assign the Construction Agreement to the City, at the City's request, without the consent of the Contractor, (2) the City shall have the right to enforce the full and prompt performance by the Contractor of such Contractor's obligations under the Construction Agreement without the necessity of such assignment and without thereby assuming any of the obligations of Developer under the Construction Agreement occurring prior to such assignment, except for Developer's payment obligations, (3) the City is a third party beneficiary of the Construction Agreement and (4) the parties to the Construction Agreement waive a trial by jury."

(c) "Contractor hereby waives all rights of recovery, claims, actions or causes of action against the City of Miami Beach, Florida (and any successor Owner), and their respective elected and appointed officials (including, without limitation, the City's Mayor and City Commissioners), directors, officials, officers, shareholders, members, employees, successors, assigns, agents, contractors, subcontractors, experts, licensees, lessees, mortgagees, trustees, partners, principals, invitees and affiliates, for any loss or damage to property of Contractor which may occur at any time in connection with the Bridge Project."

(d) "To the fullest extent permitted by law, Contractor shall and does hereby indemnify and hold harmless the City of Miami Beach, Florida, and its respective officers and employees, from liabilities, damages, losses and costs including, but not limited to, reasonable attorneys' fees, to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of Contractor and persons employed or utilized by Contractor in the performance of this Agreement. Sums otherwise due to Contractor may be retained by Developer and/or 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 shall not be subject to payment of interest by City. The indemnification obligations set forth in this Section 14 shall survive the termination and/or expiration of this Agreement." [*Note: The foregoing tracks the indemnity expressly permitted in Section 725.06(2) of the Florida Statutes for public construction projects*]

(e) "Contractor agrees to comply with all laws and requirements applicable to Contractor and the Bridge Project."

(f) "Upon an Event of Default by Developer resulting in a termination of that certain Development Agreement between the City and Developer dated as of January 9, 2019 or

that certain First Amendment to Development Agreement between the City and Developer dated as of \_\_\_\_\_, 2019, at the option of the City of Miami Beach, Florida, this agreement shall be terminated or Contractor will honor this agreement as if this agreement had been originally entered into with the City of Miami Beach, Florida.”

(g) “Nothing contained in this contract is in any way intended to be a waiver of the prohibition on Contractor’s ability to file liens against property of the City of Miami Beach, Florida, or of any other constitutional, statutory, common law or other protections afforded to public bodies or governments.”

(h) “Upon an Event of Default by Developer resulting in a termination of that certain Development Agreement between the City and Developer dated as of January 9, 2019 or that certain First Amendment to Development Agreement between the City and Developer dated as of \_\_\_\_\_, 2019, all covenants, representations, guarantees and warranties of Contractor hereunder shall be deemed to be made for the benefit of the City of Miami Beach, Florida and shall be enforceable by the City of Miami Beach, Florida.”

(i) “Unless and until the City of Miami Beach, Florida, expressly assumes the obligations of Developer under this contract (and then only to the extent the same arise from and after such assumption), the City of Miami Beach, Florida, shall not be a party to this contract and will in no way be responsible to any party for any claims of any nature whatsoever arising or which may arise in connection with such contract.”

(j) “Contractor hereby agrees that notwithstanding that Contractor performed work at the Bridge Project Site or any part thereof, the City of Miami Beach, Florida shall not be liable in any manner for payment or otherwise to Contractor in connection with the work performed at the Bridge Project Site, except to the extent the City of Miami Beach, Florida, expressly assumes the obligations of Developer hereunder (and then only to the extent such obligations arise from and after such assumption)”

(k) “Contractor 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, Contractor further agrees to correct all Work found by Developer or the City of Miami Beach, Florida to be defective in material and workmanship or not in conformance with the Contract Documents for a period of one year from Substantial Completion of the Work or for such longer periods of time as may be set forth with respect to specific warranties contained in the trade sections of the Plans and Specifications or other Contract Documents, as well as any damage to the Work resulting from defective design, materials, equipment, or workmanship which develop during construction or during the applicable warranty period. Contractor shall collect and deliver to Developer and the City of Miami Beach, Florida any specific written warranties given by subcontractors or others as required by the Contract Documents (and such warranties shall be in addition to, and not substitutes for, those warranties mandated to be obtained pursuant to 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.”

(l) “The City of Miami Beach, Florida shall have the right to inspect and copy, at the City's expense, all books and records and accounts of Contractor which relate in any way to the Bridge Project or to any claim for additional compensation made by Contractor, and to conduct an audit, either through its Internal Audit Department, Office of Inspector General, or an independent accounting firm selected by the City, of the financial and accounting records of Contractor which relate to the Bridge Project. Contractor shall retain and make available to the City all such books and records and accounts, financial or otherwise, which relate to the Bridge Project and to any claim for a period of five (5) years following Final Completion of the Bridge Project. During the Bridge Project and the five (5) year period following Final Completion of the Bridge Project, Contractor shall provide the City (or its authorized representatives) access to its books and records upon seventy-two (72) hours written notice.”

(m) “Contractor’s records 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 Bridge Project or the Contract Documents (all the foregoing hereinafter referred to as "records"). All records shall be open to inspection, and subject to audit and/or reproduction at any time during or after the Bridge Project, during normal working hours, by the City's agents or its authorized representatives, to the extent necessary to adequately permit evaluation and verification of any invoices, Progress Payments or Claims submitted by the Contractor or any of its payees pursuant to the execution of this contract. 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.”

(n) “To the extent permitted by law, no claim for damages or any claim, other than for an extension of time, shall be made or asserted against the City by reason of any delay including, without limitation, Unavoidable Delays or any delays in the design, development and construction of the Project which may arise as a result of the City’s election not to proceed with the Bridge Project. To the extent permitted by law, Contractor or its respective agents, employees, contractors, consultants or professionals shall not be entitled to claim, nor shall the City have any obligation to fund, a Change Order, and/or other claims(s) or request(s) for an increase to the Final Bridge Project Budget, or other payment or compensation of any kind from the City, for direct, indirect, consequential, impact or other costs, expenses or damages, arising because of delay, disruption, interference or hindrance from any cause whatsoever, including but not limited to Unavoidable Delays and/or any delays in the design, development and construction of the Project which may arise as a result of the City’s election not to proceed with the Bridge Project.”

## **9. Substantial Completion and Final Completion of the Bridge Project.**

(a) Conditions Precedent to Substantial Completion. As conditions of Substantial Completion, the following must occur:

(i) A temporary certificate of occupancy (“TCO”) or temporary certificate of completion (“TCC”) has been duly issued by the applicable governmental authority having jurisdiction and a copy thereof delivered to the City;

(ii) Developer has applied to FDOT for a final inspection to close out the FDOT Permits and Approvals and evidence thereof delivered to the City, which evidence shall be in form and substance reasonably acceptable to the City;

(iii) All Work, including with respect to operability of the Bridge Project and safety, has been substantially completed in accordance with the Contract Documents, such that all conditions of Permits and Approvals and Governmental Authorities have been satisfied and the Bridge Project is ready for occupancy, utilization and continuous operation for the uses and purposes intended by the City, without material interference from incomplete or improperly completed Work and with only approved Substantial Completion Punch List items remaining to be completed, all as reasonably determined by the City and certified in writing by the Architect;

(iv) All Work may be operated within manufacturers’ recommended limits (with all installation instructions, operations and maintenance manuals or instructions for equipment furnished by Developer, catalogs, product data sheets for all materials furnished by Developer and similar information provided), in compliance with all applicable Requirements, and without damage to the Work or to the Bridge Project, as reasonably determined by the City; and

(v) The most recent updated set of “as-built” drawings reflecting the progress of the Work through Substantial Completion (in native file format, such as autoCAD, as same may be modified by shop drawing or other submittal) have been delivered to the City.

(b) Substantial Completion Punch List. When Developer believes it has achieved Substantial Completion, Developer shall have prepared a preliminary punch list for review and approval by the City and the Architect, request an inspection by the City and the Architect and deliver to the City evidence supporting its assessment of Substantial Completion, including any specific documents or information requested by the City in advance to assist in its evaluation thereof. Following the inspection, Developer shall provide the City with the list of all remaining items of Work to be completed or corrected for Final Completion, which list incorporates items and comments identified or provided by the City and Architect (“Substantial Completion Punch List”); provided, however, that failure to include any items on the Substantial Completion Punch List does not alter the responsibility of the Developer to complete all Work in accordance with the Contract Documents.

(c) Final Completion. As conditions of Final Completion, the following must occur or Developer shall deliver or cause to be delivered to the City, as applicable:

(i) Substantial Completion of the Bridge Project shall have occurred in accordance herewith;

(ii) Written notice from the Contractor that the Work is ready for final inspection and acceptance;

(iii) A final certificate of occupancy (“CO”) or final certificate of completion (“CC”), as applicable, for the Work duly issued by the governmental authority having jurisdiction thereof;

(iv) Evidence of the closure of the FDOT Permits and Approvals, as reasonably approved by the City Manager;

(v) The Architect shall have delivered a certificate of final completion (the “Certificate of Final Completion”), in form and substance reasonably acceptable to the City, stating that on the basis of its observations and inspections, the referenced Work for the Bridge Project has been fully performed, all Substantial Completion Punch List items have been fully corrected and all such Work has been finally completed in accordance with the Contract Documents, and that the remaining balance found to be due to the Developer and certified in the Certificate of Final Completion is due and payable;

(vi) If applicable, a final Requisition for payment in the amount set forth in the Certificate of Final Completion, as reasonably approved by the City Manager;

(vii) A final contractor’s payment affidavit from the Contractor;

(viii) Final lien waivers from all subcontractors in accordance with Chapter 713, Florida Statutes;

(ix) Consent of surety to final payment;

(x) Copies of all agreements, Permits and Approvals, and all insurance policies or certificates, if any, pertaining to the completed Work, not previously provided;

(xi) Copies of the final “as-built” drawings reflecting final completion of the Work in accordance with the approved Plans and Specifications (in native file format, such as autoCAD, as modified by shop drawings or other submittals); and

(xii) All manufacturers,’ suppliers’ and subcontractors’ warranties and guarantees (collectively, the “Warranties”) duly assigned to the City and all maintenance and operating instructions, if any, pertaining to the completed Work.

(d) Payment of Final Requisition. Upon receipt of the foregoing, and the City’s approval of the Certificate of Final Completion, the City shall pay the final Requisition not to exceed, together with all prior payments by the City, the Maximum City Contribution, all

in accordance with the provisions of this First Amendment. Developer's acceptance of final payment from the City shall constitute a waiver of all claims by Developer against the City, except those previously made in strict accordance with the applicable provisions of the Development Agreement and this First Amendment and identified by Developer as unsettled at the time of acceptance of final payment.

(e) No Waiver; Correction of Defects. Notwithstanding anything to the contrary contained in the Development Agreement or this First Amendment, the making of final payment shall not constitute a waiver of claims by the City for: (i) faulty or defective Work; (b) failure of the Work to be in strict accordance with the requirements of the Contract Documents; and (c) terms of all Warranties required by the applicable Construction Agreements. Developer shall fully cooperate with and assist the City in resolution of any issues with regard to the City's claims for defects, Warranty issues, and/or other post-construction issues contemplated herein, as they may arise.

(f) Commencement of Warranties. All Warranties shall commence on the date of Substantial Completion of the Work or designated portion thereof, unless otherwise provided in the CO or CC.

**10. Change Orders; City Consent.** The Parties understand that during the Construction Phase, situations may arise that would require changes to the Work. Changes shall be addressed as follows:

(a) Changes to the Work. As material site issues and/or Unavoidable Delays may arise, the Developer shall coordinate the processing of Change Orders and will negotiate all Change Orders with the Contractor, for final approval thereof by the City if such Change Order involves a Change Requiring City Approval. In such event, Developer shall submit a proposed Change Order to the City within a reasonable period of time prior to commencement of Work relating to any proposed Change Requiring City Approval. Requests for any such Change Order shall be signed by Developer and the Contractor, and shall include a written description of the proposed change, the justification therefore, a certification in accordance with the City's False Claims Ordinance, and supporting documentation. At its option, the City may require Developer to provide additional evidence satisfactory to the City of the cost and time necessary to complete the proposed Change Requiring City Approval. The then-approved Final Bridge Project Budget and/or CPM Schedule, as applicable, will be revised, as necessary, to reflect approved Change Orders. Change Orders submitted to the City in accordance with this Section 10 shall be reviewed by the City in a timely and reasonable manner. Notwithstanding the City's disapproval of any proposed Change Order, the City has the right to require the Work to be performed in accordance with the Contract Documents subject to the City's reservation of its rights to dispute the amounts set forth in any proposed Change Order, which disputes shall be resolved in accordance with **Exhibit "C"** attached hereto.

- (i) Except for Change Orders involving a Change Requiring City Approval, City approval shall not be required for any other Change Orders, including Change Orders funded by the Contractor Contingency or otherwise funded by the Developer, provided, however, that Developer shall provide City with a copy of all Change Orders on a monthly basis.

- (ii) Developer may utilize the Contractor Contingency to fund Change Orders to address unforeseen circumstances relating to construction of Work not directly or indirectly attributable to Contractor's (or subcontractors') noncompliance with the Contract Documents, or Change Orders resulting from questions of conflicts, clarity or coordination of the Contract Documents.
- (iii) Upon making a draw against the Contractor Contingency, Developer shall increase the relevant line items in the Schedule of Values by the amount of the draw, and decrease the Contractor Contingency line item accordingly. City shall have the authority to verify all actual costs charged to the Contractor Contingency. The City may at any time dispute the legitimacy or reasonableness of any draws made or costs charged to the Contractor Contingency, and the City may withhold such disputed amounts from any other amounts otherwise due to Developer. Any dispute with regard to the legitimacy or reasonableness of such expenditures (or City's withholding thereof) may be the subject of a Claim.
- (iv) In no event shall the use of the Contractor Contingency cause the Maximum City Contribution to be exceeded. Developer shall be responsible for all costs that exceed the Maximum City Contribution, without any reimbursement from the City.
- (v) Developer shall provide City with a monthly report on the use of the Contractor Contingency reconciling the Contractor Contingency to the Guaranteed Maximum Price or stipulated sum, as applicable.

(b) Scope Changes. In the event, by reason of Unavoidable Delays or otherwise, the City requests a change to the scope of Work or systems, kinds or quality of materials, finishes or equipment or the City requires scope changes to be made to the Bridge Project after the Guaranteed Maximum Price has been established (all of the foregoing, individually or collectively, "Scope Changes"), all costs pertaining to or associated with making such Scope Changes shall be the sole responsibility of the City. Scope Changes may not and shall not be funded from the Contractor Contingency, but shall be funded by the City from other funds of the City. The City's obligation to fund such costs in accordance with this Section 10(c) shall be in addition to and not part of its obligation to fund the Maximum City Contribution, which otherwise would remain in full force and effect.

(c) No Damages for Delay. No claim for damages or any claim, other than for an extension of time, shall be made or asserted against the City by reason of any delay including, without limitation, Unavoidable Delays or any delays in the design, development and construction of the Project which may arise as a result of the City's election not to proceed with the Bridge Project. None of Developer, Contractor, Architect or their respective agents, employees, contractors, consultants or professionals shall be entitled to claim, nor shall the City have any obligation to fund, a Change Order, and/or other claims(s) or request(s) for an increase to the Final Bridge Project Budget, or other payment or compensation of any kind from the City, for direct, indirect, consequential, impact or other costs, expenses or damages, arising because of delay, disruption, interference or hindrance from any cause whatsoever, including but not limited to Unavoidable Delays and/or any delays in the design, development and construction of the

Project which may arise as a result of the City's election not to proceed with the Bridge Project. Provided, however, that this subsection shall not preclude recovery of damages by Developer for actual delays due solely to fraud, bad faith or active interference on the part of the City. Otherwise, Developer shall be entitled only to extensions of time for performance as the sole and exclusive remedy for delay(s), in accordance with and to the extent specifically provided above.

(d) *[Parties to discuss insurance in lieu of waiver of consequential damages]*

**11. Risk of Loss.** The risk of loss to any of the Work and to any goods, materials and equipment provided or to be provided under this First Amendment, shall remain with the Developer 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 Developer shall repair or replace the same at its sole cost. The Performance Bond and Payment Bond or other security or insurance protection required by this First Amendment or otherwise provided by the Developer or the Contractor shall in no way limit the responsibility of the Developer under this Section.

**12. Insurance and Indemnity.**

(a) Insurance. Developer shall obtain and maintain all insurance coverage and otherwise satisfy all requirements set forth on **Exhibit "E"** attached hereto and made a part hereof. Prior to entering upon the Bridge Project Site and in any event not less than fifteen (15) days after the execution of this First Amendment, Developer shall furnish to the City at the City's Department of Procurement Management, City of Miami Beach, 1700 Convention Center Drive, 3<sup>rd</sup> Floor, Miami Beach, Florida 33139, certificate(s) of insurance evidencing that Developer has obtained all insurance coverage satisfying the requirements set forth on **Exhibit "E"**. At the request of the City, Developer shall also provide copies of such insurance policies.

(b) Indemnification by Developer. To the fullest extent permitted by law, Developer shall and does hereby indemnify and hold harmless the City and its respective officers and employees, from liabilities, damages, losses and costs including, but not limited to, reasonable attorneys' fees, to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of Developer and persons employed or utilized by Developer in the performance of this First Amendment. Sums otherwise due to Developer under this First Amendment may be retained by City until all of City's Claims for indemnification under this First Amendment have been settled or otherwise resolved. Any amount withheld pursuant to this Section 12(b) shall not be subject to payment of interest by City. The indemnification obligations set forth in this Section 12(b) shall survive the termination and/or expiration of this First Amendment.

**13. No Liens; Discharge of Liens.**

(a) No Liens. Developer shall not create, cause to be created, or suffer or permit to exist (1) any lien, encumbrance or charge upon the Bridge Project Site or any part thereof or appurtenance thereto, or any lien, encumbrance or charge upon any assets of, or funds



appropriated to, the City, or (2) any other matter or thing whereby any owner of any portion of the Bridge Project Site or any part thereof or appurtenance thereto might be materially impaired.

(b) **Discharge of Liens.** If any mechanic's, laborer's, vendor's, materialman's or similar statutory lien (including tax liens, provided the underlying tax is an obligation of Developer by the Requirements or by a provision of this Development Agreement) is filed against the Bridge Project Site or any part thereof, or if any public improvement lien created, or caused or suffered to be created by Developer shall be filed against any assets of, or funds appropriated to, Developer or the City, Developer shall, within thirty (30) days after Developer receives notice of the filing of such mechanic's, laborer's, vendor's, materialman's or similar statutory lien or public improvement lien, cause it to be discharged of record by payment, deposit, bond, order of a court of competent jurisdiction or otherwise. However, Developer shall not be required to discharge any such lien if Developer shall have (i) furnished the City with, at Developer's option, a cash deposit, bond, letter of credit from an Institutional Lender (in form reasonably satisfactory to the City) or other security (such as a personal guaranty or title company indemnity) reasonably satisfactory to the City, in an amount sufficient to pay the lien with interest and penalties; and (ii) brought an appropriate proceeding to discharge such lien and is prosecuting such proceeding with diligence and continuity; except that if, despite Developer's efforts to seek discharge of the lien, the City reasonably believes that a court judgment or order foreclosing such lien is about to be entered or granted and so notifies Developer, Developer shall, within twenty (20) days of notice to such effect from the City (but not later than three (3) Business Days prior to the entry or granting of such judgment or order of foreclosure), cause such lien to be discharged of record or the City may thereafter discharge the lien and look to the security furnished by Developer for reimbursement of its cost in so doing. Notwithstanding anything to the contrary contained in this Section 13(b), in the case of a public improvement lien which provides for installment payments as a means of satisfying such lien, Developer shall be required only to pay, on a timely basis, all installments when due.

**14. No Authority to Contract in Name of the City.** Nothing contained in this First Amendment shall be deemed or construed to constitute the consent or request of the City, express or implied, by implication or otherwise, to any contractor, subcontractor, laborer or materialman for the performance of any labor or the furnishing of any materials for any specific improvement of, alteration to, or repair of, the Bridge Project Site or any part thereof, nor as giving Developer any right, power or authority to contract for, or permit the rendering of, any services or the furnishing of materials that would give rise to the filing of any lien, mortgage or other encumbrance against any portion of the Bridge Project Site or against any assets of the City. Notice is hereby given, and Developer shall cause all Construction Agreements to provide, that to the extent enforceable under Florida law, the City shall not be liable for any work performed or to be performed at the Bridge Project Site or any part thereof for Developer or for any materials furnished or to be furnished to the Bridge Project Site or any part thereof for any of the foregoing, and no mechanic's, laborer's, vendor's, materialman's or other similar statutory lien for such work or materials shall attach to or affect the Bridge Project Site or any part thereof or any assets of the City. The foregoing shall not require Developer to request advance waivers of lien from contractors or subcontractors.

**15. Compliance with Requirements.** In performing the Work, Developer shall comply with all Requirements. No consent to, approval of or acquiescence in any plans or

actions of Developer by the City, in its proprietary capacity as the owner of the Bridge Project, Owner's Consultant or any other designee of the City shall be relied upon or construed as being a determination that such are in compliance with the Requirements, or, in the case of construction plans, are structurally sufficient, prudent or in compliance with the Requirements. Failure of this First Amendment to address a particular permit, condition, term or restriction shall not relieve the Developer of the necessity of complying with the law governing said permitting requirements, conditions, term or restriction.

**16. Events of Default; Termination for Default.**

(a) Defaults and Events of Default. The following shall each be considered a default here under (a "Default"):

(i) Failing to make properly due and owing payments to the Contractor, Architect, or any other contractors, subcontractors or suppliers for materials or labor in accordance with the respective Construction Agreements (a "Monetary Default");

(ii) The occurrence of a "Default" as expressly set forth in this First Amendment;

(iii) Failing to perform any portion of the Work in a manner consistent with the requirements of this First Amendment; or failing to use the Contractor and the Architect as identified, and to the degree specified, in the Construction Agreements, unless otherwise agreed upon in advance by the Parties;

(iv) Failing, for reasons other than an Unavoidable Delay, to begin the Work required for either the Design Phase or the Construction Phase following the issuance of a Notice to Proceed therefor within a reasonable period of time;

(v) [Failing to perform the Work with sufficient manpower, workmen and equipment or with sufficient materials, to cause Final Completion to be achieved on or before the Final Completion Date;]

(vi) Failing, for reasons other than an Unavoidable Delay, to achieve Final Completion on or before the Final Completion Date;

(vii) 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;

(viii) Discontinuing the prosecution of the Work for a period of thirty (30) consecutive days, except in the event of: 1) the issuance of a stop-work order by the City; or 2) the inability of Developer to prosecute the Work because of an event giving rise to an Unavoidable Delay as set forth in this First Amendment for which Developer has provided timely written notice of same in accordance with the definition thereof;

(ix) A custodian, trustee or receiver is appointed for Developer, or Developer becomes insolvent or bankrupt, is generally not paying its debts as they become

due or makes an assignment for the benefit of creditors, or Developer 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 Developer, 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 Developer;

(x) Failing to provide sufficient evidence upon request that, in the City's sole opinion, demonstrates Developer's financial ability to contribute any amounts in excess of the Maximum City Contribution, if required hereunder;

(xi) An indictment is issued against Developer;

(xii) Persistently disregarding laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction;

(xiii) Fraud, misrepresentation or material misstatement by Developer in the course of obtaining the Development Agreement or this First Amendment;

(xiv) Failing to comply in any material respect with any of the terms of the Development Agreement, this First Amendment, the Construction Contract or the other Construction Agreements.

(b) Non-Monetary Defaults; No Extensions. The Defaults listed in Section 16(a)(ii) through Section 16(a)(xiv) shall each be considered a "Non-Monetary Default." In no event shall the time period for curing a Default constitute an extension of the Substantial Completion Date or the Final Completion Date or any milestone set forth in the CPM Schedule or a waiver of any of the City's rights or remedies hereunder for a Default which is not cured as aforesaid.

(c) Cure Periods. If, after delivery of written notice from the City to Developer specifying a Default, Developer 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, such default is not capable of being cured within such fifteen (15) day period, Developer 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 (unless the default cannot be cured as a direct result of the commercial unavailability of materials or equipment, in which event Developer must continually proceed in good faith and with diligence to promptly effect a cure), it shall be deemed an event of default ("Event of Default"), which constitutes sufficient grounds for the City to terminate Developer for cause.

(d) Termination for Default. Upon the occurrence of an Event of Default, and without prejudice to any other rights or remedies of the City, whether provided by the Development Agreement, this First Amendment, the other Contract Documents or as otherwise provided at law or in equity, the City may terminate this First Amendment by written notice to Developer ("Notice of Termination for Default"), rendering termination effective immediately or as the date specified in the Notice of Termination for Default, at the City's option, and may:

(i) Take possession of the Bridge Project Site and of all materials, equipment, tools, construction equipment and machinery thereon owned by Developer;

(ii) Exercise and enforce the City's rights pursuant to each of the Assignment of Plans, Permits and Approvals and the Assignment of Construction Agreements and take possession of native files (CAD, BIM, Revit and the like);

(iii) Direct Developer to transfer or cause the Contractor to transfer title and deliver or cause the Contractor to 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 Bridge Project records that, if this First Amendment had been completed, would be required to be furnished to the City;

(iv) Finish the Work by whatever reasonable method the City may deem expedient; and

(v) Upon the issuance of a Notice of Termination for Default, Developer shall:

(A) Immediately deliver to the City all submittals and Bridge 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 for Work, equipment or materials already installed or purchased;

(B) As directed by the City, transfer or cause the Contractor to transfer title and deliver or cause the Contractor to 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; and (2) the completed or partially completed Project records that, if this First Amendment had been completed, would be required to be furnished to the City; and

(C) Take any action that may be necessary, or that the City may direct, for the protection and preservation of the property related to this First Amendment that is in Developer's possession and in which the City has or may acquire an interest.

(D) The rights and remedies of the City this Section 16 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.

## **17. Termination For Convenience.**

(a) Termination for Convenience by Developer. Notwithstanding anything to the contrary contained in this First Amendment or in the Development Agreement, Developer shall have the right to be released from its liability and to terminate this First Amendment prior to the Commencement of Construction because (i) changes to the Project Design required by the

DRB, or any other governmental authority (including the City, acting solely in its regulatory capacity), render the Bridge Project economically unfeasible in the reasonable business judgment of Developer, or (ii) Developer, after diligent, good faith efforts, has been unable to obtain a Building Permit for the Bridge Project pursuant to the approved Plans and Specifications, or (iii) the City and Developer cannot come to a mutual agreement regarding the Parties' respective shares of costs and other obligations relative to the Bridge Project, or (iv) the City Commission, acting on behalf of the City solely in its proprietary capacity (and not in its regulatory capacity or on behalf of any other governmental authority), imposes requirements or restrictions upon the Bridge Project which, in Developer's reasonable business judgment, impose an undue burden on Developer or render the Bridge Project economically unfeasible. In the event of termination by Developer of this First Amendment for convenience under this section, Developer shall reimburse the City for the City's share of Bridge Project Costs incurred through the termination date and, following the City's receipt of payment in cleared funds of all sums due hereunder, each Party shall bear its own costs and expenses incurred in connection with this First Amendment, and neither Party shall have any further liability to the other. Notwithstanding the preceding sentence, Developer shall have no duty to reimburse the City for the City's share of Bridge Project Costs, as referenced above, in the event Developer terminates the Development Agreement pursuant to subsections (iii) or (iv) hereof.

(b) Termination for Convenience by the City. Notwithstanding anything to the contrary contained in this First Amendment or in the Development Agreement, and in addition to other rights the City may have under this First Amendment (including pursuant to Sections 5 and 6 hereof) or at law or equity with respect to cancellation and termination of this First Amendment, the City may, in its sole discretion, terminate for the City's convenience the performance of Work, in whole or in part, at any time upon written notice to Developer ("Termination for Convenience"). The City shall effectuate such Termination for Convenience by delivering to Developer a written notice of Termination for Convenience ("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 First Amendment, and may be issued by the City with or without cause. If the City terminates this First Amendment other than pursuant to Section 16(d), the City shall reimburse Developer for any Bridge Project Costs due it and approved by the City Manager in accordance with this Section 17(b). The City shall also pay to Developer fair compensation, either by purchase or rental at the election of the City, for any equipment retained, as well as third party, out-of-pocket move-out and demobilization costs incurred by Contractor. In case of such termination of this First Amendment, at the sole discretion of the City Manager, the City may require Developer 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 City Manager, properly documented. Developer shall, as a condition of receiving the payments referred to in this Section 17(b), execute and deliver all such documents and take all such steps including the 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 Developer under such obligations or commitments. The payments to Developer pursuant to this Section 17(b) and Sections 5 and 6 hereof shall be the sole right and remedy of Developer upon any such termination and Developer shall have no Claims for damages, including loss of anticipated profits on account of termination.

(i) Upon receipt of a Notice of Termination for Convenience, Developer shall, and shall cause the Contractor and all other contractors and subcontractors to, unless the Notice of Termination for Convenience requires otherwise, and regardless of any delay in determining or adjusting any amounts due under this Section 17(b):

(A) Immediately discontinue and cause the Contractor to 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 of Termination for Convenience;

(B) Cancel and cause the Contractor to 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. Developer shall notify the City of any commitment that cannot be canceled without undue cost and the City shall have the right to accept delivery or to reject delivery and pay the agreed upon costs;

(C) Immediately deliver to the City all submittals and Bridge Project-related documents in their original/native electronic format (i.e. CAD, Word, Excel, etc.), any and all unfinished documents, and any and all Warranties for Work, equipment or materials already installed or purchased;

(D) Place and cause the Contractor to 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;

(E) As directed by the City, transfer or cause the Contractor to transfer title and deliver or cause the Contractor to 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; and (2) the completed or partially completed Bridge Project records that, if this First Amendment had been completed, would be required to be furnished to the City;

(F) Settle all outstanding liabilities and termination settlement proposals from the termination of the Construction Contract, any subcontracts or purchase orders, with the prior approval or ratification to the extent required by the City (if any);

(G) Take any action that may be necessary, or that the City may direct, for the protection and preservation of the property related to this First Amendment that is in Developer's possession and in which the City has or may acquire an interest; and

(H) Complete performance of the Work not terminated (if any).

(ii) Upon issuance of such Notice of Termination for Convenience, Developer shall only be entitled to payment for the Work satisfactorily performed up until the date of termination set forth in the Notice of Termination for Convenience, but no later than the effective date specified therein, plus all design costs not previously reimbursed by City and due to Developer hereunder for preparation of the Plans and Specifications; it being the express intent of the parties that in the event of the City's Notice of Termination for Convenience under this First Amendment, Developer shall be made whole by the City for all costs incurred in pursuing the Bridge Project, subject to the Maximum City Contribution. Payment for the Work satisfactorily performed shall be determined by the City in good faith, in accordance with the approved Final Bridge Project Budget, the reasonable costs of demobilization and reasonable costs, if any, for canceling contracts and purchase orders with the Contractor and subcontractors to the extent such costs are not reasonably avoidable by Developer.

(iii) Developer 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 after 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 Developer and absent such agreement, the City shall, no less than fifteen (15) days prior to making final payment, provide Developer with written notice of the amount the City intends to pay to Developer. Such final payment so made to Developer shall be in full and final settlement for Work performed under this First Amendment, except to the extent Developer disputes such amount in a written notice delivered to and received by the City prior to the City's tendering such final payment.

## **18. Audit Rights.**

(a) City's Right to Inspect. The City shall have the right to inspect and copy, at the City's expense, the portion(s) of the books and records and accounts of Developer which relate to the Bridge Project, and to any claim for additional compensation made by Developer, and to conduct an audit, either through its Internal Audit Department, Office of Inspector General, or an independent accounting firm selected by the City, those portions of the financial and accounting records of Developer which relate to the Bridge Project. Developer shall retain and make available to the City all such portions of its books and records and accounts, financial or otherwise, which relate to the Bridge Project and to any claim for a period of five (5) years following Final Completion of the Bridge Project. During the Bridge Project and the five (5) year period following Final Completion of the Bridge Project, Developer shall provide the City (or its authorized representatives) access to such portions of its books and records upon seventy-two (72) hours written notice.

(b) Bridge Project Records. Developer's Bridge Project records may include, 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), original estimates, estimating worksheets, material correspondence, Change Order files (including documentation covering negotiated settlements), and any other supporting evidence necessary to substantiate charges

related to the Bridge Project or the Contract Documents (all the foregoing hereinafter referred to as "records"). All such records shall be open to inspection, and subject to audit and/or reproduction at any time during or after the Bridge Project, during normal working hours, by the City's agents or its authorized representatives, to the extent necessary to adequately permit evaluation and verification of any invoices, Progress Payments or Claims submitted by the Developer or any of its payees pursuant to the execution of this First Amendment. 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.

(c) Florida Public Records Act. Developer shall keep all records subject to the provisions of the Florida Public Records Act, Chapter 119, Florida Statutes, 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 date of execution of this First Amendment, for the duration of the Work, and until five (5) years after the date of final payment by the City to Developer pursuant to this First Amendment.

(d) Access. The City's agent or its authorized representative shall have access to Developer'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 Bridge Project or the application of Bridge Project funds. The City or its authorized representative shall give reasonable advance notice of intended audits.

(e) Remittances to the City. If an audit inspection or examination in accordance with this Section discloses contract billing or charges to which Developer is not contractually entitled, Developer 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 Developer shall pay for the cost of the audit, at its sole cost and expense.

(f) Incorporation into Construction Agreements. Developer shall cause the City's audit rights under this First Amendment to be made a part of all Construction Agreements and shall cause each counterparty thereto to agree to maintain its books, records and accounts relating to the Bridge Project strictly in accordance with the requirements of this Section. Developer shall be deemed compliant with this section by inclusion of the relevant language set forth in Sections 8(l) and 8(m) in all Construction Contracts.

**19. City Manager's Delegated Authority.** Notwithstanding any provision to the contrary in this First Amendment, nothing herein shall preclude the City Manager from seeking direction from or electing to have the City Commission determine any matter arising out of or related to the Bridge Project, including, without limitation, any approval contemplated under this First Amendment (within the timeframe specified therefor as if the Approval was being determined by the City Manager).

**20. Miscellaneous.**

(a) Compliance with Comprehensive Plan. The City has adopted and implemented the Comprehensive Plan. The City hereby finds and declares that the provisions of



this First Amendment and the Development Agreement relating to the Bridge Project Site and the approval of any Bridge Project Design shall be consistent with the City's adopted Comprehensive Plan and Land Development Regulations, subject to all applicable Requirements, Permits and Approvals.

(b) Counterparts. To facilitate execution, the Parties hereto agree that this First Amendment may be executed in counterparts as may be required and it shall not be necessary that the signature of, or on behalf of, each Party, or that the signatures of all persons required to bind any Party, appear on each counterpart; it shall be sufficient that the signature of, or on behalf of, each Party, or that the signatures of the persons required to bind any Party, appear on one or more of such counterparts. All counterparts shall collectively constitute a single First Amendment. Facsimile or electronic copies of signatures appearing hereon shall be deemed an original.

(c) No Joint Venture. It is mutually understood and agreed that nothing contained in the Development Agreement or this First Amendment is intended or shall be construed in any manner or under any circumstances whatsoever as creating or establishing the relationship of co-partners, or creating or establishing the relationship of a joint venture between the City and Developer.

(d) References; Effect. All references in the Development Agreement to the "Agreement" shall hereafter mean and refer to the Development Agreement as amended by this First Amendment. If there is a contradiction, conflict or ambiguity between the terms of the Development Agreement and this First Amendment, then the terms of this First Amendment shall control. Facsimile signatures appearing hereon shall be deemed an original. Except as modified herein, the Development Agreement remains in full force and effect.

(e) Section References. All Section references herein are intended to refer to this First Amendment unless otherwise expressly set forth herein.

**21. Exhibits.** The exhibits attached to this First Amendment and listed on the page immediately following the signature page(s) are hereby expressly incorporated into this First Amendment and made a part hereof.

**22. Third Party Beneficiary.** Developer and the City agree and acknowledge that with respect to the design, development and construction of the Bridge Project, the City is an intended third party beneficiary in any contract entered into between (a) Developer and Architect, (b) Developer and Contractors, including the Construction Contract or any contracts entered into with any respective subcontractors or subconsultants of Architect and Contractors. Accordingly, Developer herein represents to the City that its agreement(s) with (x) Architect, (y) Contractor, and (z) with any respective subcontractors or subconsultants of Architect and Contractor shall incorporate the terms and conditions of this First Amendment, and Developer shall assume sole and absolute responsibility for binding Architect, Contractor, and their applicable respective subconsultants and subcontractors to same as if the City were a party to those agreements.

*[Signatures commence on following page]*

DRAFT

**EXECUTION BY THE CITY**

IN WITNESS WHEREOF, the City and Developer intending to be legally bound have executed this First Amendment to Development Agreement as of the day and year first above written.

WITNESSES:

**CITY OF MIAMI BEACH, FLORIDA,** a  
municipal corporation of the State of Florida

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

By:\_\_\_\_\_

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

ATTEST:

By:\_\_\_\_\_ [SEAL]

STATE OF FLORIDA                    )  
  )ss:  
COUNTY OF MIAMI-DADE        )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ by \_\_\_\_\_, as Mayor, and \_\_\_\_\_, as City Clerk of the CITY OF MIAMI BEACH, FLORIDA, a municipal corporation of the State of Florida, on behalf of such municipal corporation. They are personally known to me or produced valid Florida driver's licenses as identification

My commission expires:

\_\_\_\_\_  
Notary Public, State of Florida  
Print Name:\_\_\_\_\_

**EXECUTION BY DEVELOPER**

WITNESSES: \_\_\_\_\_, a \_\_\_\_\_

\_\_\_\_\_  
Print Name: \_\_\_\_\_ By: \_\_\_\_\_  
Name/Title

\_\_\_\_\_  
Print Name: \_\_\_\_\_ ATTEST:  
By: \_\_\_\_\_  
\_\_\_\_\_, Secretary

[CORPORATE SEAL]

STATE OF FLORIDA                    )  
  )ss:  
COUNTY OF MIAMI-DADE        )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_,  
\_\_\_\_\_, by \_\_\_\_\_, as \_\_\_\_\_, and \_\_\_\_\_, as Secretary, of  
\_\_\_\_\_, a \_\_\_\_\_, on behalf of such  
\_\_\_\_\_. They are personally known to me or produced valid Florida driver's  
licenses as identification.

My commission expires:

\_\_\_\_\_  
Notary Public, State of Florida  
Print Name: \_\_\_\_\_

### **List of Exhibits**

- Exhibit “A” Bridge Project Concept Plan
- Exhibit “B” Legal Description of Bridge Project Site
- Exhibit “C” Dispute Resolution Procedures
- Exhibit “D” Forms of Payment and Performance Bond
- Exhibit “E” Insurance and Bonding Requirements

## Exhibit "C"

### Resolution of Disputes:

If disputes arise between the Parties or involving the Contractor or any other contractor or subcontractor as to the interpretation of the Construction Agreements, Developer and the 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.

Claims shall first be submitted to Owner's Consultant for administrative determination by the City within fifteen (15) days of the events giving rise to the Claim, unless otherwise specified in the Construction Agreements. The City shall render its administrative 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 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.

In order to preserve for review the City's administrative determination 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 after such administrative determination by the City or, if no determination was rendered, within fifteen (15) days after the date on which the Claim is denied as a result of inaction by the City. Failure to timely preserve review of the City's administrative determination or denial by inaction shall constitute a waiver of such Claim or entitlement to such objection and the administrative determination of the City (whether by affirmative written determination or denial by inaction) shall be deemed final and binding solely for purposes of continuation of construction of the Project, but subject to each Party's reservation of rights to mediate and litigate (as applicable) such Claim.

If the City agrees to pay a portion of the Claim, the Developer 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 Change Order is executed, 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.

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 after the

date of Substantial Completion, unless the City terminates this First Amendment, 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.

Duty to Continue Performance. Pending resolution of any dispute, the Developer shall proceed and shall cause the Contractors and all other contractors and subcontractors to proceed diligently with the performance of its duties and obligations under the Contract Documents, and shall continue to make payments of undisputed amounts in accordance with the applicable Contract Documents, provided the City continues to fund undisputed amounts otherwise due and owing to Developer in accordance with the terms of this First Amendment. The failure of the Developer to continue prosecution of the Work, or to cause for the Contractor to continue the prosecution of the Work in the event of a pending dispute, shall be deemed a Default pursuant to this First Amendment.

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 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 Construction Agreement, including subcontracts and purchase orders, executed by the Contractor in connection with its Work on the Bridge Project.**

## Exhibit "D"

### Forms of Payment and Performance Bond

***[Note: the bond forms comply with requirements of 255.05 Fla. Stat. for performance and payment bonds for public projects]***

#### FORM OF PERFORMANCE BOND

By this Bond, We \_\_\_\_\_ as Principal, whose principal business address is \_\_\_\_\_, as the [Contractor] under the agreement dated \_\_\_\_\_, 20\_\_\_\_, between Principal and the [Developer Entity] (hereinafter referred to as "Developer") for the construction of the 5<sup>th</sup> Street Pedestrian Bridge Project on behalf of the City of Miami Beach, Florida ("City") (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 Developer, as co-obligee, and City, as co-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 Developer and City all losses, damages, expenses, costs and attorney's fees, including appellate proceedings, that Developer and 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 Developer to be, in default under the Contract, Developer having performed Developer'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 Developer elects, upon determination by City, Developer and Surety jointly of the lowest responsible bidder, arrange for a contract between such bidder and Developer, 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 Developer to Principal under the Contract and any amendments thereto, less the amount properly paid by Developer 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 the Developer and 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: \_\_\_\_\_  
(CORPORATE SEAL) (Signature)  
\_\_\_\_\_  
(Print Name and Title)

Countersigned by Resident  
Florida Agent of Surety

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
[attach copy of Agent's ID card]

INSURANCE COMPANY:

By: \_\_\_\_\_  
Attorney-in-Fact  
Address: \_\_\_\_\_  
(Street)

Issued by Fla. Ins. Commissioner]

\_\_\_\_\_  
(City/State/Zip Code)

[Atty in fact power of atty must be attached]

Telephone No.: \_\_\_\_\_

DRAFT

### **FORM OF PAYMENT BOND**

By this Bond, We \_\_\_\_\_ as Principal, whose principal business address is \_\_\_\_\_, and whose telephone number is \_\_\_\_\_, as the [Contractor] under the agreement dated \_\_\_\_\_, 20\_\_\_\_, between Principal and the [Developer entity] (hereinafter referred to as "Developer") for the construction of the 5<sup>th</sup> Street Pedestrian Bridge Project on behalf of the City of Miami Beach, Florida ("City") (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 Developer, as co-obligee, and City, as co-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 Developer and City all losses, damages, expenses, costs and attorney's fees including appellate proceedings, that Developer and City sustain 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 Developer or 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:

\_\_\_\_\_  
(Secretary)

(Corporate Seal)

\_\_\_\_\_  
(Name of Corporation)

By: \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Print Name and Title)

\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Countersigned by Resident  
Florida Agent of Surety

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
[attach copy of Agent's ID card  
Issued by Fla. Ins. Commissioner]

INSURANCE COMPANY:

By: \_\_\_\_\_  
Attorney-in-Fact

Address: \_\_\_\_\_  
(Street)

\_\_\_\_\_  
(City/State/Zip Code)

[Atty in fact power of atty must be attached]

Telephone No.: \_\_\_\_\_

Exhibit “E”

**INSURANCE AND BONDING REQUIREMENTS**

**I. BONDING REQUIREMENTS**

1. Developer shall submit all supporting documentation and detailed invoices with respect to insurance and bond premiums required for the Bridge Project. City’s reimbursement of insurance and bond premiums shall be for the portion of insurance and bond premiums directly attributable to this First Amendment. Premiums shall be net of trade discounts, volume discounts, dividends and other adjustments.

2. The Performance Bond and the Payment Bond must each be executed by a surety company in good standing with the Florida Office of Insurance Regulation and an adequate rating from A.M. Best indicated in this Exhibit, which surety is authorized to do business in the State of Florida as a 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 Contractor’s acceptable performance of the Work under Construction Contract for the Bridge Project, 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 an acceptable surety on federal bonds in accordance with United States Department of Treasury Circular 570, Current Revisions. If the amount of the Performance Bond and Payment 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 acceptable 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

## **II. INSURANCE REQUIREMENTS**

Developer, Contractor and Architect shall provide, pay for and maintain in force at all times (unless otherwise provided) and any extensions thereof, the following insurance policies:

- A. **Worker's Compensation Insurance** for all employees as required by Florida Statute 440, and Employer Liability Insurance with a limit in an amount not less than \$1,000,000 per accident for bodily injury or disease.
- B. **Project-Specific Commercial General Liability Insurance** on an occurrence basis, including products and completed operations, property damage, bodily injury and personal & advertising injury with limits in an amount not less than \$5,000,000 per occurrence.
- C. **As to Developer and Contractor only: Project-Specific Umbrella Liability Insurance** with limits in an amount not less than \$20,000,000 per occurrence. The umbrella coverage must be as broad as the primary General Liability coverage.

The total limits for the Commercial General Liability and Umbrella Liability Insurance (set forth in Sections II.B and II.C above) shall be in an amount not less than \$25,000,000, and may be provided through a combination of primary and excess/umbrella liability policies.

- D. **Automobile Liability Insurance** covering any automobile, if vendor has no owned automobiles, then coverage for hired and non-owned automobiles, with limits in an amount not less than \$2,000,000 combined per accident for bodily injury and property damage.
- E. **As to Developer and Architect only: Project-Specific Design Professional Liability (Errors & Omissions) Insurance** with limits in an amount not less than \$5,000,000 per occurrence or claim, and \$20,000,000 policy aggregate, subject to a maximum deductible acceptable to the City, and not-to-exceed \$100,000. Developer and Architect shall maintain the claims made form coverage with a minimum of 10 years extended reporting following Final Completion and shall annually provide City with evidence of renewal coverage. Developer and Architect are responsible for all deductibles in the event of a claim. Developer and Architect shall indicate the deductible for this coverage on its Certificate of Insurance. Developer and Architect shall notify City in writing within thirty (30) days of any claims filed or made against the Design Project-Specific Professional Liability Insurance Policy(ies). Consultant and Design Subconsultants shall each maintain the same Errors & Omissions Liability coverages required herein.
- F. **As to Contractor only: Builders Risk Insurance** utilizing an “All Risk” coverage form, with limits equal to the completed value of the project and no coinsurance penalty. *(City of Miami Beach shall be named as a Loss Payee on this policy, as its interest may appear. This policy shall remain in force until acceptance of the Bridge Project by the City.)*
- G. **As to Contractor: Contractors’ Pollution Legal Liability** with limits in an amount not less than \$1,000,000 per occurrence or claim, and \$2,000,000 policy aggregate, subject to a maximum deductible acceptable to the City.
- H. **As to Contractor only: Installation Floater Insurance** including coverage for material & equipment to be installed during the course of this Project. City shall be included as a Named Insured on this policy, as its insurable interest may appear. This policy shall remain in force until acceptance of the Project by the City.

### III. **ADDITIONAL TERMS AND CONDITIONS:**

1. **Notice to City.** If the initial insurance expires prior to the completion of the Work, renewal copies of insurance policies shall be furnished to the City at least fourteen (14) days prior to the date of their expiration. The insurance policy(ies) must be endorsed to provide the City with at least thirty (30) days' notice of cancellation and/or restriction.

2. **Certificates of Insurance.** Developer shall furnish to the City Certificates of Insurance or endorsements evidencing the insurance coverage specified herein prior to entering upon the Bridge Project Site and in any event not less than fifteen (15) days after execution of this First Amendment, and shall also furnish to the City a copy of each insurance policy required by this First Amendment. The required Certificates of Insurance shall name the types of policies provided, refer specifically to this First Amendment, and state that such insurance is as required by this First Amendment. The Certificates of Insurance shall be in form acceptable to, and subject to, approval by City. Developer's failure to timely provide the Certificates of Insurance as required by this paragraph shall be the basis for the rescission of this First Amendment by the City, without any liability to Developer. The official title of the certificate holder is City of Miami Beach, Florida. This official title shall be used in all insurance documentation.

3. **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 insurance contract renewal and/or any amendments, not limited to 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 scope and applicability of coverage.

4. **Additional Insured.** City shall be expressly included as an Additional Insured on all policies (except Professional Liability and Workers' Compensation), 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, 3<sup>rd</sup> Floor.

5. **Notice of Cancellation and/or Restriction.** The policy(ies) must be endorsed to provide City with at least thirty (30) days' notice of cancellation or non-renewal and/or restriction. A copy of the endorsement(s) shall be provided with the Certificates of Insurance.

6. **Duty of Care.** Developer's furnishing insurance coverage shall in no way relieve or limit, or be construed to relieve or limit, Developer or any of its contractors of any responsibility, liability, or obligation imposed under this First Amendment or the applicable contract documents relating to the Bridge Project, or by Applicable Laws, including, without limitation, any indemnification obligations which Developer or any of its contractors have to City thereunder.

7. **Developer's Failure to Procure.** Developer's failure to procure or maintain the insurance required by this Exhibit "E" during the entire term of the Work shall constitute a material breach and automatic Default of this First Amendment. 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 this First Amendment without any further notice to or liability to Developer 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 by the City from the Developer.



8. **Waiver of Subrogation.** Where permitted by law, Developer hereby waives and shall cause the Contractor to waive all rights of recovery by subrogation or otherwise (including, without limitation, 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. Certificates 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.