

**CONTINUING SERVICES AGREEMENT  
FOR MARINE CONSTRUCTION SERVICES AGREEMENT**

**THIS CONTINUING SERVICES AGREEMENT** ("Agreement") is made and entered into this 5<sup>th</sup> day of July 2018, by and between the **City of Cocoa**, a Florida municipal corporation ("City"), located at 65 Stone Street, Cocoa, Florida 32922, and **RUSH Marine, LLC**, a Florida Limited Liability Company ("Contractor"), whose principal address 6285 Riverfront Center Boulevard, Titusville, Florida 32780.

**WITNESSETH:**

**WHEREAS**, City desires to obtain specialized marine construction services and related services on facilities and property owned or operated by the City, from time to time, on a project or task based basis subject to deadlines mutually agreed to by the parties; and

**WHEREAS**, the City issued its Request for Qualifications RFQ #Q-18-15-COC on April 23, 2018, to solicit submissions of qualified respondents for the City's desired marine construction services; and

**WHEREAS**, Contractor participated in the selection and negotiation process; and

**WHEREAS**, Contractor is willing to provide such marine construction services to the City under the terms and conditions stated herein; and

**WHEREAS**, the City is willing to place Contractor on its list of pre-approved marine construction contractors for the potential of providing marine construction services to the City in the future; and

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties covenant and agree as follows:

**1.0 TERM AND DEFINITIONS**

**1.1** Unless sooner terminated by either Party pursuant to the terms and conditions herein, this Agreement shall terminate on the third (3rd) anniversary of the Effective Date. The Parties shall have the option to extend the term of this Agreement for two (2) additional one (1) year terms. Any such extension shall only be by written amendment to this Agreement executed by both parties hereto.

**1.2** The terms and conditions of any Task Order, as described in Section 2.0 hereof, shall be as set forth in such Task Order. Any Task in effect at the termination of this Agreement shall remain in effect until completion of said Task Order, and all of the terms and conditions of this Agreement shall survive until completion of all Task Orders.

**1.3 Definitions.** The following words and phrases used in this Agreement shall have the following meaning ascribed to them unless the context clearly indicates otherwise:

a. "Agreement" or "Contract" shall be used interchangeably and shall refer to this Continuing Services Agreement, as may be amended from time to time, which shall constitute authorization for the Contractor to provide the marine construction services approved by Task Order by the City and is also sometimes referred to herein to include all Task Orders approved hereunder.

b. "Effective Date" shall be the date on which the last signatory hereto shall execute this Agreement, and it shall be the date on which this Agreement shall go into effect. The Agreement shall not go into effect until said date.

c. "Contractor" shall mean RUSH Marine, LLC, a Florida Limited Liability Company, and its principals, employees, resident project representatives (and assistants).

d. "Public Record" shall have the meaning given in Chapter 119, Florida Statutes.

e. "Reimbursable Expenses" shall mean the actual expenses incurred by Contractor or Contractor's independent contractors and subcontractors which are directly related to travel and subsistence at the rates, and under the requirements of, Section 112.061, Florida Statutes, or any other actual and direct expenses the City agrees to reimburse by Task Order.

f. "Work" or "Services" shall be used interchangeably and shall include the performance of the work agreed to by the parties in a Task Order.

g. "Task Order" shall mean a written document approved by the parties pursuant to the procedure outlined in Section 2.0 of this Agreement, and any amendments thereto approved pursuant to the procedures outlined in Section 3.0 herein, which sets forth the Work to be performed by Contractor under this Agreement, and shall include, without the necessity of a cross-reference, the terms and conditions of this Agreement.

## **2.0 DESCRIPTION OF SERVICES**

**2.1** The City shall make request of Contractor to perform marine construction services on a "task" basis. The City will communicate with Contractor, verbally or in writing, a general description of the task to be performed. If a site visit by the Contractor is needed to generate the scope of document, the Contractor shall request approval prior to visiting the site. The Contractor will generate a detailed Scope of Work document, prepare a Schedule, add a Not-to-Exceed-Budget or Lump Sum Fee to accomplish the task, and send the thus developed "Task Proposal" to the City. The detailed cost breakdown of the Lump Sum Fee shall consist of a list of major tasks and sub-tasks as well as a breakdown as to the anticipated hours for all work to be performed. The Task Proposal shall include a detailed breakdown of hourly rates and fees for all Contractor work. The Task Proposal shall include names and dollar value of work provided by sub-contractors. The City reserves the right, at its discretion, to consider the Task Proposal as part of a formal or

informal competitive bid process before approving or disapproving any Task Proposal. The detailed cost breakdown shall include a line item for Reimbursable Expenses and the list of the expenses proposed to be eligible for reimbursement.

The City will review the Task Proposal, along with any other task proposals submitted to the City for the proposed by other contractors, and if the description, cost and other details of the Task Proposal are deemed by the City to be in the City's best interests, the parties will enter into a mutually agreeable written "Task Order." The Scope of Services generally to be provided by the Contractor through a Task Order may include a variety of specialized marine services. Services to be provided will include, but are not limited to, the services described in the Scope of Services in the attached Exhibit "A." The Contractor shall appoint one of its employees as the key contact for the project and the related Task Proposal.

The City will issue a notice to proceed to the Contractor in the form of a letter and an executed City purchase order. Upon receipt of the signed Task Order and the written notice to proceed from the City, the Contractor shall perform the services set forth in the Task Order.

2.2 The City reserves the right, at its discretion, to perform any services related to this Agreement or to retain the services of other marine construction services firms to provide professional marine construction services. The City does not guarantee that work will be assigned to the Contractor under this Agreement. The Contractor and other selected marine construction services providers shall be notified of and compete for work tasks associated with maintenance activities as well as for construction of elements of the City's future Riverfront Master Plan.

2.3 Individual construction projects under this Agreement shall not exceed \$2 Million.

### 3.0 CHANGES IN THE SCOPE OF WORK

3.1 The City may make changes in the Services at any time by giving written notice to Contractor. If such changes increase (additional services) or decrease or eliminate any amount of Work, City and Contractor will negotiate any change in total cost or schedule modifications. If the City and the Contractor approve any change, the Task Order will be modified in writing to reflect the changes; and Contractor shall be compensated for said services in accordance with the terms of Section 5.0 herein. All change orders shall be authorized in writing by City's and Contractor's designated representative.

3.2 All of City's said Task Orders and amendments thereto shall be performed in strict accordance with the terms of this Agreement insofar as they are applicable.

### 4.0 SCHEDULE

4.1 Contractor shall perform services in conformance with the mutually agreed schedule set forth in the negotiated Task Order. Contractor shall complete all of said services in a timely manner and will keep City apprised of the status of work on at least a weekly basis or as otherwise reasonably requested by the City. Should Contractor fall behind the agreed upon

schedule, it shall employ such resources so as to comply with the agreed-upon schedule.

**4.2** No extension for completion of services shall be granted to Contractor without City's prior written consent, except as provided in Sections 3.1 and 19.1 herein.

**4.3** Any cost caused by defective or ill-timed services shall be borne by the party responsible therefore.

## **5.0 METHODS OF PAYMENT FOR SERVICES AND EXPENSES OF CONTRACTOR**

**5.1 General Services.** For basic and additional Services performed by Contractor's principals, employees, and resident project representatives (and assistants) pursuant to paragraphs 2.0 and 3.0, the City agrees to pay the Contractor an amount equal to that agreed upon by the parties for a particular Task Order. However, payment terms must be consistent with the terms and conditions in this Agreement. To the extent that the payment terms in any Task Order conflict with the payment terms set forth in this Agreement, the conflicting provisions of this Agreement shall prevail.

**5.2 Witness Services.** For witness or expert services rendered by Contractor's principals, employees, resident project representatives (and assistants), and independent professional associates and consultants on behalf of the City in any litigation, arbitration, or other legal or interested administrative proceeding in which the City is a named interested party, City agrees to pay the Contractor or independent professional associate or consultant, which is used as a witness or expert, an amount equal to that agreed upon by the party for a particular Task Order.

**5.3 Reimbursable Expenses.** In addition to payments provided in paragraphs 5.1 and 5.2 above, City agrees to pay Contractor the actual cost of all Reimbursable Expenses incurred in connection with any Task Order.

**5.4 Miscellaneous.** Under no circumstances shall actual or direct costs under this Agreement include costs associated with inefficiency, offsite or home office overhead, loss of productivity, consequential damages, legal or consulting costs, or costs associated with delays caused in whole or in part by the Contractor.

**5.5 Additional fees not allowable.** The Parties agree that the Services required are adequately described herein and shall be adequately described in all Task Orders. This Agreement includes, and all Task Orders must include, the entire effort required of the Contractor to provide the Services described. Thus, no additional fees shall be allowed for any additional services performed for any reasons whatsoever except those directly attributable to the City's errors or omissions. No out-of-scope Services or expenses shall be provided in the absence of prior, written authorization in the form of a written supplemental agreement and issuance of an appropriate amendment to the Agreement. Additionally, the City shall not pay a retainer or similar fee.

**5.6 Local Government Prompt Payment Act.** The City shall make payments due

and payable in accordance with the Local Government Prompt Payment Act, Section 218.70 et seq., Florida Statutes. The City reserves the right, with justification, to partially pay any invoice submitted by the Contractor when requested to do so by the using City department.

**5.7 Errors and Deficiencies.** Contractor shall not invoice the City or seek any compensation from the City to correct or revise any errors or deficiencies in Contractor's services provided under this Agreement.

**5.8 Payment Offsets.** To the extent that Contractor owes the City any money under this or any other Agreement with the City, the City shall have the right to withhold payment and otherwise back charge the Contractor for any money owed to the City by Contractor.

**5.9 Payment not Waiver.** The City's payment of any invoice under this Agreement shall not be construed or operate as a waiver of any rights under this Agreement or any cause of action arising out of the performance of this Agreement and Contractor shall remain liable to the City in accordance with applicable law for all damages to the City caused by Contractor's performance of any services provided under this Agreement.

**5.10 Delay Remedy.** The risk of any monetary damages caused by any delays in performing the Services under this Agreement and any Task Order are accepted and assumed entirely by the Contractor, and in no event shall any claim relating thereto for an increase in compensation be made or recognized. Contractor shall not make any claim nor seek any damages of any kind against the City for any delays, impacts, disruption or interruption caused by any delay. Contractor's remedy for a delay shall be an equitable extension of time to perform the Services for each day of such delay that impacts the critical path of the schedule established under this Agreement or specific Task Order.

**5.11 Acceptance of Payment.** Acceptance of final payment by the Contractor for a specific Task Order shall constitute a release of all claims for payment which the Contractor may have against the City for that Task Order unless such claims are specifically reserved in writing and transmitted to the City by the Contractor prior to its acceptance. Said final payment shall not, however, be a bar to any claims that the City may have against the Contractor or to any remedies the City may pursue with respect to such claims.

**5.12 Payment Adjustments.** It is agreed that payment by the City of any billing will not constitute agreement as to the appropriateness of any item and that at the time of any final audit, all required adjustments will be made and reflected in a final payment. In the event that such final audit reveals an overpayment to the Contractor, the Contractor agrees to refund such overpayment to the City within ninety (90) days of notice of any such overpayment. Such refund shall not constitute a waiver by the Contractor for any claims relating to the validity of a finding by the City of overpayment.

**5.13 Partial Payments.** Payment made to the Contractor shall not constitute acceptance of the work or any portion thereof which is not in accordance with this Agreement. The City retains the right to pay only that percentage of the total contract amount that equals the

same percentage that work completed bears to the total amount of work required to be performed under this Agreement. If the City objects to all or any portion of any invoice, it shall notify the Contractor of the same within five (5) days from the date of receipt and shall pay that portion of the invoice not in dispute. The parties shall immediately make every effort to settle the disputed portion.

**5.14 Invoices to include City Purchase Order Number.** All invoices shall clearly indicate the city purchase order number.

**5.15 Invoices to be sent to Accounts Payable.** All invoices shall be directed to the Accounts Payable Section, City of Cocoa, 65 Stone St., Cocoa, FL 32922, with a copy directed to the City department using the services.

## **6.0 RIGHT TO INSPECTION**

**6.1** City or its affiliates shall at all times have the right to review or observe the Services performed by Contractor.

**6.2** No inspection, review, or observation shall relieve Contractor of its responsibility under this Agreement.

## **7.0 PROGRESS MEETING**

**7.1** City's designated Project Manager may hold periodic progress meetings on a monthly basis, or more frequently if required by the City, during the term of any Task Order entered into under this Agreement. Contractor's Project Manager and all other appropriate personnel shall attend such meetings as designated by City's Project Manager.

## **8.0 SAFETY**

**8.1** Contractor shall be solely and absolutely responsible and assume all liability for the safety and supervision of its principals, employees, resident project representatives (and assistants) while performing Services provided hereunder.

## **9.0 REASONABLE ACCESS**

**9.1** During the term of this Agreement, City shall grant Contractor reasonable access to the City's premises, records, and files for purposes of fulfilling its obligations under this Agreement.

## **10.0 INSURANCE**

**10.1 Liability Amounts.** During the term of this Agreement, Contractor shall be responsible for providing the types of insurance and limits of liability as set forth below.

a. **General Liability.** The Contractor shall maintain comprehensive general liability insurance in the minimum amount of \$1,000,000.00 as the combined single limit for each occurrence, with a deductible no greater than \$5,000.00 unless a higher deductible is pre-approved by the City Manager, to protect the Contractor from claims of property damages and personal injury which may arise from any Services performed under this Agreement, whether such Services are performed by the Contractor or by anyone directly employed by or contracting with the Contractor.

b. **Automobile Liability.** The Contractor shall maintain comprehensive automobile liability insurance in the minimum amount of \$1,000,000.00 combined single limit bodily injury and minimum \$50,000.00 property damage as the combined single limit for each occurrence to protect the Contractor from claims for damages for bodily injury, including wrongful death, as well as from claims from property damage, which may arise from the ownership, use, or maintenance of owned and non-owned automobiles, including rented automobiles whether such operations be by the Contractor or by anyone directly or indirectly employed by the Contractor.

c. **Environmental Impairment Insurance Minimum Requirements.** To the extent applicable to the Contractor, the Contractor shall maintain Environmental Impairment Insurance or "Pollution Insurance" if the Contractor may provide excavation or construction type services and will be locating portable fuel or lubricant storage tanks at the job site or will be storing or using hazardous chemicals on the job site, with a limit of not less than \$1,000,000.00 per occurrence and submit proof of same in the form of a certificate of insurance or an endorsement to their General Liability policy showing a pollution exclusion exception for each specific work product or storage container before work is begun.

Contractor shall work in compliance with the OSHA Hazardous Communication Standard and Florida Department of Environmental Protection guidelines and supply all information about hazardous chemicals being brought onto City property as required by the City's Safety and Loss Control Program.

d. **Workers' Compensation.** The Contractor shall maintain, during the life of this Agreement, adequate Workers' Compensation Insurance and Employers' Liability Insurance in at least such amounts as are required by law for all of its employees performing Work for the City pursuant to this Agreement.

e. **Federal Longshore and Harbor Workers' Compensation Act, and Jones Act.** To the extent applicable to the Contractor, the Contractor shall maintain coverage in accordance with both the federal Longshore and Harbor Worker's Compensation Act (LHWCA), and the federal Jones Act, on behalf of all employees who are to provide a service under this Agreement. Longshore and Harbor Worker's Compensation Act coverage addresses and includes all personnel subject to the provisions of the U.S. Longshore and Harbor Worker's Compensation Act. Contractor shall provide USH&L (U.S. Longshore and Harbor Worker's Compensation Act) insurance as is applicable. Jones Act insurance addresses and includes all personnel subject to the provisions of the federal Jones Act. Contractor shall provide such insurance coverage as is applicable. It is the responsibility of the Contractor to ensure that appropriate coverage and limits

of insurance are purchased to provide for all personnel subject to these acts and shall carry coverage in accordance with statutory limits.

**10.2 Special Requirements.** Current, valid insurance policies meeting the requirements herein identified shall be maintained during the term of this Agreement. All Certificates of Insurance shall be approved by the City prior to the commencement of any work. Renewal certificates shall be sent to the City thirty (30) days prior to any expiration date. There shall also be a thirty (30) day advance written notification to the City prior to the renewal, non-renewal, cancellation or modification of any stipulated insurance coverage. **The City shall be an additional named insured on stipulated insurance policies included in section 10.1.a., 10.1.b and 10.1.c herein, as its interest may appear, from time to time.**

**10.3 Subcontractors.** All subcontractors employed by Contractor to perform any services hereunder shall fully comply with the insurance provisions contained in this paragraph.

## **11.0 COMPLIANCE WITH LAWS AND REGULATIONS**

**11.1** Contractor shall comply with all requirements of federal, state, and local laws, rules, regulations, standards, and/or ordinances applicable to the performance of Services under this Agreement.

## **12.0 REPRESENTATIONS**

**12.1** Contractor represents that the Services provided hereunder shall conform to all requirements of this Agreement and any Task Order, shall be consistent with recognized and sound marine construction practices and procedures; and shall conform to the customary standards of care, skill, and diligence appropriate to the nature of the Services rendered. Contractor shall perform as expeditiously as is consistent with professional skill and care and the orderly progress of the Services performed hereunder. Contractor's services shall be consistent with the time periods established under this Agreement or the applicable Task Order. Contractor shall provide City with a written schedule for services performed under each Task Order and such schedule shall provide for ample time for the City to review, for the performance of subcontractors or consultants (if any), and for the approval of submissions by authorities having jurisdiction over the services. The Contractor's designated representative shall have the authority to act on Contractor's behalf with respect to the Services. In addition, Contractor's representative shall render decisions in a timely manner in order to avoid unreasonable delay in the orderly and sequential progress of the Services. Except with the City's knowledge and consent, the Contractor shall not engage in any activity, or accept any employment, interest or contribution that would reasonably appear to compromise the Contractor's professional judgment with respect to the Services. The Contractor shall review laws, codes, and regulations applicable to Contractor's Services. The Contractor's services and design shall comply with all applicable requirements imposed by all public authorities. The Contractor represents and warrants that it is familiar with, and accepts that it will perform the Services hereunder in a manner that complies with all applicable requirements of law, codes, and regulations. Contractor shall be responsible for the professional quality, technical accuracy and the coordination of all plans, studies, reports and other services furnished to the City



under this Agreement. Unless this Agreement is terminated by the City, or terminated by Contractor for nonpayment of any proper invoices, or the City exercises its rights to perform the Services pursuant to Section 2.2 herein, Contractor shall be responsible for the satisfactory and complete execution of the Services described in this Agreement and any Task Order. The Contractor represents that it will carefully examine the scope of services required by the City in and Task Order, that it will investigate the essential requirements of the services required by the Task Order, and that it will have sufficient personnel, equipment, and material at its disposal to complete the services set forth in the Task Order in a good professional and workmanlike manner in conformance with the requirements of this Agreement.

**12.2** Contractor represents that all principals, employees, and other personnel furnishing such Services shall be qualified and competent to perform the Services assigned to them and that such guidance given by and the recommendations and performance of such personnel shall reflect their best professional knowledge and judgment.

### **13.0 GUARANTEE AGAINST INFRINGEMENT**

**13.1** Contractor guarantees that all Services performed under this Agreement shall be free from claims of patent, copyright, and trademark infringement. Notwithstanding any other provision of this Agreement, Contractor shall indemnify, hold harmless, and defend City, its officers, directors, employees, agents assigns, and servants from and against any and all liability, including expenses, legal or otherwise, for actual or alleged infringement of any patent, copyright, or trademark resulting from the use of any goods, Services, or other item provided under this Agreement. Notwithstanding the foregoing, Contractor may elect to provide non-infringing services.

### **14.0 DOCUMENTS**

**14.1 Public Records.** Pursuant to Section 119.0701, Florida Statutes and other applicable public records laws, Contractor agrees that any records, documents, transactions, writings, papers, letters, computerized information and programs, maps, books, audio or video tapes, films, photographs, data processing software, writings or other material(s), regardless of the physical form, characteristics, or means of transmission, of Contractor related, directly or indirectly, to the services provided to the City under this Agreement and made or received pursuant to law or ordinance or in connection with the transaction of official business by the City, may be deemed to be a public record, whether in the possession or control of the City or the Contractor. Said records, documents, transactions, writings, papers, letters, computerized information and programs, maps, books, audio or video tapes, films, photographs, data processing software, writings or other material(s), regardless of the physical form, characteristics, or means of transmission of Contractor are subject to the provisions of Chapter 119, Florida Statutes, and may not be destroyed without the specific written approval of the City's designated custodian of public records.

IF THE CONTRACTOR HAS QUESTIONS REGARDING THE APPLICATION OF  
CHAPTER 119, FLORIDA STATUTES, TO THE CONTRACTOR'S DUTY TO PROVIDE

PUBLIC RECORDS RELATING TO THIS AGREEMENT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS, THE CITY CLERK, AT (321) 433-8484, cshealy@cocoafl.org, City Clerk's Office, 65 Stone Street, Cocoa, FL 32922.

Contractor is required to and agrees to comply with public records laws. Contractor shall keep and maintain all public records required by the City to perform the services as agreed to herein. Contractor shall provide the City, upon request from the City Clerk, copies of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided by law. Contractor shall ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the Agreement term. Upon completion of the Agreement, Contractor shall transfer to the City, at no cost, all public records in possession of the Contractor, provided the transfer is requested in writing by the City Clerk. Upon such transfer, Contractor shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. However, if the City Clerk does not request that the public records be transferred, the Contractor shall continue to keep and maintain the public records upon completion of the Agreement and shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the City, upon request from the City Clerk, in a format that is compatible with the information technology systems of the City. Should the City not possess public records relating to this Agreement which are requested to be inspected or copied by the City or any other person, the City shall immediately notify Contractor of the request and the Contractor shall then provide such records to the City or allow the records to be inspected or copied within a reasonable time. If the Contractor does not comply with a public records request, the City may enforce this Section to the extent permitted by law. Contractor acknowledges that if the Contractor does not provide the public records to the City within a reasonable time, the Contractor may be subject to penalties under Section 119.10, Florida Statutes. The Contractor acknowledges that if a civil action is filed against the Contractor to compel production of public records relating to this Agreement, the court may assess and award against Contractor the reasonable costs of enforcement, including reasonable attorney fees. All public records in connection with this Agreement shall, at any and all reasonable times during the normal business hours of the Contractor, be open and freely exhibited to the City for the purpose of examination, audit, or otherwise. Failure by Contractor to grant such public access and comply with public records laws and/or requests shall be grounds for immediate unilateral cancellation of this Agreement by the City upon delivery of a written notice of cancellation. If the Contractor fails to comply with this Section, and the City must enforce this Section, or the City suffers a third party award of attorney's fees and/or damages for violating Chapter 119, Florida Statutes, due to Contractor's failure to comply with this Section, the City shall collect from Contractor prevailing party attorney's fees and costs, and any damages incurred by the City, for enforcing this Section against Contractor. And, if applicable, the City shall also be entitled to reimbursement of all attorneys' fees and damages which the City had to pay a third party because of the Contractor's failure to comply with this Section. The terms and conditions set forth in this Section shall survive the termination of this Agreement.

**14.2 Reuse of Documents.** All documents, including but not limited to, drawings, specifications, and data, or programs stored electronically or otherwise, prepared by the Contractor

and its independent contractors or subcontractors pursuant to this Agreement or related exclusively to the Services described herein shall be owned by the City and may be reused by the City for any reason or purpose at any time. However, the City agrees that the aforesaid documents are not intended or represented to be suitable for reuse by the City or others on any undertaking other than the Work outlined in this Agreement. Any reuse for an undertaking other than for the Work without verification or adaptation by the Contractor, or its independent contractors and associates if necessary, to specific purposes intended will be at the City's sole risk and without liability or legal exposure to the Contractor.

#### **15.0 ASSIGNMENT**

**15.1** Contractor shall not assign or subcontract this Agreement, any Task Order hereunder, or any rights or any monies due or to become due hereunder without the prior, written consent of City. Any subcontractors employed by Contractor for any Work required under this Agreement shall require prior written approval from the City. Any attempt to assign or subcontract the responsibilities and payments under this Agreement without the express prior written consent of the City shall be grounds for termination of the Agreement.

**15.2** If, upon receiving written approval from City, any part of this Agreement is subcontracted by Contractor, Contractor shall be fully responsible to City for all acts and/or omissions performed by the subcontractor as if no subcontract had been made.

**15.3** If City determines that any subcontractor is not performing in accordance with this Agreement, City shall so notify Contractor, which shall take immediate steps to remedy the situation.

**15.4** If any part of this Agreement is subcontracted by Contractor, prior to the commencement of any Work by the subcontractor, Contractor shall require the subcontractor to provide City and its affiliates with insurance coverage as set forth by the City.

#### **16.0 INDEPENDENT CONTRACTOR**

**16.1** At all times during the term of this Agreement, Contractor, and any approved subcontractors, shall be considered an independent contractor(s) and not an employee(s) of the City.

#### **17.0 DEFAULT BY CONTRACTOR AND CITY'S REMEDIES**

**17.1** In addition to the City's right to terminate this Agreement for convenience under Section 18.0 of this Agreement, the City also reserves the right to revoke and terminate this Agreement for a default and rescind or suspend all rights and privileges associated with this Agreement, without penalty, based on a default including, but not limited to, any of the following circumstances, each of which shall represent a default and breach of this Agreement:

**a.** Contractor defaults in the performance of any material convenient or condition of this Agreement and does not cure such other default within thirty (30) calendar days after written

notice from the City specifying the default complained of, unless, however, the nature of the default is such that it cannot, in the exercise of reasonable diligence, be remedied within thirty (30) calendar days, in which case the Contractor shall have such time as is reasonably necessary to remedy the default, provided the Contractor promptly takes and diligently pursues such actions as are necessary therefor.

b. Contractor is adjudicated bankrupt or makes any assignment for the benefit of its creditors or Contractor becomes insolvent, or is unable or unwilling to pay its debts.

c. Contractor has acted grossly negligent, as defined by general and applicable law, in performing the services hereunder.

d. Contractor has committed any act of fraud upon or any unlawful act against the City or another party.

e. Contractor has made a material misrepresentation of fact to the City while performing its obligations under this Agreement.

f. Notwithstanding the aforementioned, in the event of a default by Contractor, the City shall have the right to exercise any other remedy the City may have by operation of law, without limitation, and without any further demand or notice.

## **18.0 TERMINATION**

18.1 Notwithstanding any other provision of this Agreement, the City reserves the right, in its best interest as determined by the City, to terminate the Agreement, without penalty, for convenience by providing the Contractor with thirty (30) days' written notice thereof.

18.2 In addition, the City shall have the right to terminate this Agreement, without penalty, if: (a) Contractor is in default pursuant to Section 17.0; (b) Contractor fails to comply with any condition or provision of this Agreement; or (c) Contractor is experiencing a labor dispute which threatens to have a substantial, adverse impact upon performance of this Agreement, without prejudice to any other right or remedy City may have under this Agreement.

18.3 In the event of termination of this Agreement, City shall be liable only for the payment of all unpaid charges, determined in accordance with the provisions of this Agreement, for work completed to the satisfaction of the City prior to the effective date of termination. The City may, upon written notice to the Contractor, terminate the right of the Contractor to proceed under the Agreement, and may hold the Contractor liable for any damages caused to the City by reason of such default and termination. In the event of termination, any completed Services performed by the Contractor under the Agreement shall, at the option of the City, become the City's property and the Contractor shall be entitled to receive equitable compensation for any work completed to the satisfaction of the City. The Contractor, however, shall not be relieved of liability to the City for damages sustained by the City by reason of any breach of the Agreement by the

Contractor, and the City may withhold any payments to the Contractor for the purpose of setoff until such time as the amount of damages due to the City from the Contractor can be determined.

#### **19.0 FORCE MAJEURE**

19.1 Any delay or failure of either party in the performance of its required obligations hereunder shall be excused if and to the extent caused by acts of God; fire; flood; windstorm; explosion; riot; war; sabotage; strikes (with the exception of Contractor's workforce); extraordinary breakdown of or damage to City's affiliates' generating plants, their equipment, or facilities; court injunction or order; federal and/or state law or regulation; order by any regulatory agency; or cause or causes beyond the reasonable control of the party affected; provided that prompt notice of such delay is given by such party to the other and each of the parties hereunto shall be diligent in attempting to remove such cause or causes. If any circumstance of Force Majeure remains in effect for sixty days, either party may terminate this Agreement.

#### **20.0 TRADE SECRETS**

20.1 Contractor should not send or provide trade secrets to the City. If, however, trade secrets are claimed by Contractors, they will not be considered as trade secrets until the City is presented with the alleged trade secrets together with proof that they are legally trade secrets. The City will then determine whether it agrees and consents that they are in fact trade secrets. If Contractors fails to submit a claim of trade secrets to the City before obtaining the City's agreement, any subsequently-claimed trade secrets will be treated as public records and will be provided to any person or entity making a public records request for the information.

#### **21.0 GOVERNING LAW & VENUE**

21.1 This Agreement is made and shall be interpreted, construed, governed, and enforced in accordance with the laws of the State of Florida. Venue for any state action or litigation shall be Brevard County, Florida. Venue for any federal action or litigation shall be Orlando, Florida.

#### **22.0 HEADINGS**

22.1 Paragraph headings are for the convenience of the parties only and are not to be construed as part of this Agreement.

#### **23.0 SEVERABILITY**

23.1 In the event any portion or part of thereof this Agreement is deemed invalid, against public policy, void, or otherwise unenforceable by a court of law, the parties shall negotiate an equitable adjustment in the affected provision of this Agreement. The validity and enforceability of the remaining parts of this Agreement shall otherwise be fully enforceable.

#### **24.0 WAIVER AND ELECTION OF REMEDIES**

24.1 Waiver by either party of any term, condition or provision of this Agreement shall not be considered a waiver of that term, condition, or provision in the future.

24.2 No waiver, consent, or modification of any of the provisions of this Agreement shall be binding unless in writing and signed by a duly authorized representative of each party hereto.

#### **25.0 THIRD PARTY RIGHTS**

25.1 Nothing in this Agreement shall be construed to give any rights or benefits to anyone other than City and Contractor.

#### **26.0 PROHIBITION AGAINST CONTINGENT FEES**

26.1 Contractor warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for the Contractor, to solicit or secure this Agreement, and that it has not paid or agreed to pay any person, company, corporation, individual, or firm, other than a bona fide employee working solely for the Contractor, any fee, commission, percentage, gift, or other consideration contingent upon or resulting from the award or making of this Agreement. For the breach or violation of this provision, the City shall have the right to terminate the agreement without liability and, at its discretion, to deduct from the contract price, or otherwise recover, the full amount of such fee, commission, percentage, gift, or consideration.

#### **27.0 ENTIRE AGREEMENT**

27.1 This Agreement, including any Task Orders and Schedules, Attachments, Appendix's and Exhibits attached hereto, constitute the entire agreement between City and Contractor with respect to the Services specified and all previous representations relative thereto, either written or oral, are hereby annulled and superseded.

#### **28.0 NO JOINT VENTURE**

28.1 Nothing herein shall be deemed to create a joint venture or principal-agent relationship between the parties and neither party is authorized to, nor shall either party act toward third persons or the public in any manner which would indicate any such relationship with the other.

#### **29.0 ATTORNEY'S FEES**

29.1 Should any litigation arise concerning this Agreement between the parties, the parties agree to bear their own costs and attorney's fees, whether at settlement, trial or on appeal.

### **30.0 COUNTERPARTS**

**30.1** This Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be considered an original agreement; but such counterparts shall together constitute but one and the same instrument.

### **31.0 DRAFTING**

**31.1** City and Contractor each represent that they have both shared equally in drafting this Agreement and no party shall be favored or disfavored regarding the interpretation of this Agreement in the event of a dispute between the parties.

### **32.0 NOTICE**

**32.1** Any notices required to be given by the terms of this Agreement shall be delivered by hand or mailed, postage prepaid to:

For Contractor:

RUSH Marine, LLC  
Attention: Anthony Landry  
6285 Riverfront Center Blvd.  
Titusville, Florida 32780  
Phone: 321-267-8100  
Fax: 321-267-9944

For City:

City of Cocoa  
Attention: City Manager  
65 Stone Street  
Cocoa, Florida 32922  
Phone: 321-433-8688  
Fax: 321-433-8698

**32.2** Either party may change the notice address by providing the other party written notice of the change.

### **33.0 SOVEREIGN IMMUNITY.**

**33.1** The City intends to avail itself of the benefits of Section 768.28, Florida Statutes and any other statutes and common law governing sovereign immunity to the fullest extent possible. Neither this provision nor any other provision of this Agreement shall be construed as a waiver of the City's right to sovereign immunity under Section 768.28, Florida Statutes, or other limitations imposed on the City's potential liability under state or federal law. Contractor agrees

that City shall not be liable under this Agreement for punitive damages or interest for the period before judgment. Further, City shall not be liable for any claim or judgment, or portion thereof, to any one person for over two hundred thousand dollars (\$200,000.00), or any claim or judgment, or portion thereof, which, when totaled with all other claims or judgments paid by the State or its agencies and subdivisions arising out of the same incident or occurrence, exceeds three hundred thousand dollars (\$300,000.00). Nothing in this Agreement is intended to inure to the benefit of any third party for the purpose of allowing any claim which would otherwise be barred under the doctrine of sovereign immunity or by operation of law. This paragraph shall survive termination of this Agreement.

#### **34.0 CORPORATE REPRESENTATIONS BY CONTRACTOR**

**34.1** Contractor hereby represents and warrants to the City the following:

a. Contractor is duly registered and licensed to do business in the State of Florida and is in good standing under the laws of Florida, and is duly qualified and authorized to carry on the functions and operations set forth in this Agreement.

b. The undersigned representative of Contractor has the power, authority, and legal right to execute and deliver this Agreement on behalf of Contractor.

#### **35.0 INDEMNIFICATION**

**35.1** Contractor shall defend, indemnify and hold the City, its officers, agents, officials, representatives, employees, volunteers, and city attorneys (individually and in their official capacity) (hereinafter the "City"), harmless from any and all liability, loss, damages, expenses, injuries (including death), costs, claims or actions, of any type, including, but not limited to, reasonable attorney's fees in any legal proceeding through trial or appeal, which the City may hereafter sustain, incur or be required to pay, arising out of or resulting from any acts, errors or omissions of the Contractor, its agents, vendors, contractors, subcontractors, representatives, servants, or employees and persons utilized by the Contractor in the execution, performance, or nonperformance or failure to adequately perform Contractor's obligations pursuant to this Agreement, or for breach of, this Agreement or any Task Order or any subsequent amendments thereto.

The indemnification provided above shall obligate the Contractor to defend at its own expense or to provide for such defense, at the option of the City, as the case may be, of any and all claims of liability and all suits and actions of every name and description that may be brought against the City or its officers, employees, and city attorneys which may be covered by this indemnification. In all events the City and its officers, employees, and city attorneys shall be permitted to choose legal counsel of its sole choice, the fees for which shall be reasonable and subject to and included with this indemnification provided herein.

**35.2** For other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Contractor expresses its willingness to enter into this Agreement with the



knowledge that the Contractor's recovery from the City to any action or claim arising from the Agreement is limited to a maximum amount of the sum of any Agreement amount that is owed by the City for services actually performed by the Contractor to the City's complete satisfaction, and in no case shall exceed the amount provided in Section 33.1 herein. Nothing contained in this paragraph or elsewhere in this Agreement is in any way intended either to be a waiver of the limitation placed upon the City's liability as set forth in Section 768.28 Florida Statutes, or to extend the City's liability beyond the limits established in said Section 768.28 Florida Statutes; and no claim or award against the City shall include attorney's fees, investigative costs, expert fees, suit costs or pre-judgment interest.

### 36.0 BONDS.


36.1 To the extent deemed necessary and required by the City or by law, Contractor shall supply a materials, performance and payment bond(s) in form approved by the City's City Attorney and in accordance with Florida law and in an amount specified in any Task Order.

IN WITNESS WHEREOF, the parties hereto caused this Agreement to be executed by their duly authorized representatives as of the date first written above.

CITY:

CITY OF COCOA, FLORIDA

By:

  
Henry U. Parrish, III, Mayor

CONTRACTOR:

RUSH MARINE, LLC

By:

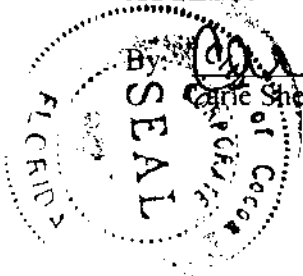


Print Name/Title: Anthony Landry / President

ATTEST:

By:

  
Carrie Shealy, City Clerk



## **EXHIBIT "A"**

### **SCOPE OF SERVICES**

#### **MARINE CONSTRUCTION SERVICES AGREEMENT**

The Scope of Services to be provided will include, but is not limited to, the following tasks and certain specific projects:

- Routine shoreline debris removal as needed
- Emergency Shoreline cleanup after storm event
- Shoreline restoration including placing Geotextile fabric, installation of filter and armoring stone
- Installation and maintenance of Living Shorelines
- Marine Dock Construction (Timber, Concrete, other)
- Dock Repair and Reconstruction
- Bulkhead and Seawall Repair and Construction
- Underwater inspection of marine structures
- Above-water inspection of marine structures
- Dredging, removal and disposal of underwater spoil and debris
- Derelict Vessel removal and storage
- Installation of Turbidity Measures and emergency spill response
- Associated environmental permitting and survey service

Continuing Services Agreement – Marine Construction Services  
RUSH MARINE, LLC