

RESOLUTION NUMBER 23-03

A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA APPROVING THE PROFESSIONAL SERVICES AGREEMENT BETWEEN THE TOWN AND H² SOLUTIONS, LLC TO PROVIDE INTERIM TOWN MANAGER PROFESSIONAL SERVICES AUTHORIZING THE TOWN MAYOR TO EXECUTE THE AGREEMENT ON BEHALF OF THE TOWN; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, Florida Statutes provide that municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal service, and exercise any power for municipal purposes, except when expressly prohibited by law; and

WHEREAS, Article X of the Town Charter of the Town of Fort Myers Beach (“Town”) empowers the Town to adopt, amend, or repeal such ordinances and resolutions as may be required for the proper governing of the Town; and

WHEREAS, the Town wishes to provide enter into a Professional Services Agreement with H² Solutions, LLC to provide Interim Town Manager Professional Services (the “Agreement”); and

WHEREAS, the Town believes it is in the best interest of the business owners, residents, and visitors to enter into the Agreement with H² Solutions, LLC.

NOW, THEREFORE, BE IT HEREBY RESOLVED, BY THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA AS FOLLOWS:

Section 1. The above recitals are true and correct, and incorporated herein by this reference and are hereby adopted as the legislative and administrative findings of the Town Council.

Section 2. The Agreement between the Town and H² Solutions, LLC, attached as Exhibit “A”, is approved and the Mayor is authorized to execute the Agreement on behalf of the Town.

Section 3. If any section or portion of a section of this Resolution proves to be invalid, unlawful, or unconstitutional, it shall not be held to invalidate or impair the validity, force, or effect of any other section or part of this Resolution.

Section 4. This resolution shall take effect immediately upon its adoption.

The foregoing Resolution was adopted by the Town Council upon a motion by Council Member Woodson and seconded by Council Member Veach, and upon being put to a vote, the result was as follows:

Dan Aller, Mayor	Aye
Jim Atterholt, Vice Mayor	Aye
John R. King, Council Member	Aye
Karen Woodson, Council Member	Aye
Bill Veach, Council Member	Aye

ADOPTED this 9th day of January 2023 by the Town Council of the Town of Fort Myers Beach, Florida.

TOWN OF FORT MYERS BEACH



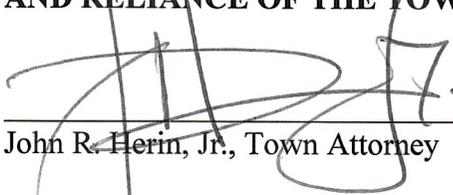
Dan Allers, Mayor

ATTEST:



Amy Baker, Town Clerk

APPROVED AS TO FORM AND LEGAL SUFFICIENCY FOR THE USE AND RELIANCE OF THE TOWN OF FORT MYERS BEACH ONLY:



John R. Herin, Jr., Town Attorney

This Resolution was filed in the Office of the Town Clerk on this 9 day of January 2023.

**AGREEMENT FOR PROFESSIONAL SERVICES
BETWEEN
TOWN OF FORT MYERS BEACH, FLORIDA
AND
H² SOLUTIONS, LLC**

THIS AGREEMENT is made *nunc pro tunc* to the 15th day of November 2022, by and between the Town of Fort Myers Beach, Florida, a Florida municipal corporation, with a business address of 2525 Estero Blvd., Fort Myers Beach, FL 33931 (hereinafter referred to as the "Town") and H² Solutions, LLC, a Florida limited liability corporation, with a business address of 2480 State Road 30A, Port St Joe, FL 32456 (hereinafter referred to as the "Contractor"). Town and Consultant may hereinafter be referred to collectively as the "Parties".

WITNESSETH:

In consideration of the mutual terms and conditions, promises, covenants and payments hereinafter set forth, Town and Consultant agree as follows:

ARTICLE 1 – PREAMBLE

In order to establish the background, context and form of reference for this Agreement and to generally express the objectives, and intentions of the respective Parties herein, the following statements, representations and explanations shall be accepted as predicates for the undertakings and commitments included within the provisions which follow and may be relied upon by the Parties as essential elements of the mutual considerations upon which this Agreement is based.

1.1 The Town is in need of the services of an interim Town Manager to provide the professional governmental management powers and duties as set forth in Section 6.03 of the Town Charter, the Fort Myers Beach Code and this Agreement (the "Professional Services").

1.2 Consultant is duly experienced in the field of Florida government administration, management and finance, and is ready and willing to provide the Professional Services to the Town.

1.3 On November 14, 2022, the Town Council discussed entering into an agreement with Consultant and directed Town staff to prepare an agreement between the Town and Consultant to render the Professional Services more particularly described herein.

ARTICLE 2 – SERVICES AND RESPONSIBILITIES

2.1 Consultant hereby agrees to perform the services of Interim Town Manager, as more particularly described herein and Consultant agrees to do everything required by this Agreement.

2.2 Consultant shall furnish all services and labor required in the performance of this Agreement.

2.3 Consultant hereby represents to Town, with full knowledge that Town is relying upon these representations when entering into this Agreement, that Consultant has the professional expertise, experience, and manpower to perform the Professional Services to be provided by Consultant pursuant to the terms of this Agreement.

2.4 Consultant assumes professional and technical responsibility for performance of the Professional Services in accordance with recognized professional standards for city/county managers as promulgated by the International City/County Management Association. This includes, but is not limited to:

- 2.4.1. Assisting the Town in the development of management strategies; and
- 2.4.2. Assisting the Town with development of strategies regarding regulatory issues, administrative agencies, or other similar issues; and
- 2.4.3. Attend all Town Council meetings and such other meetings as directed by the Town Council, and conferences, meetings, telephone conference calls and webinars, and such other tasks as the Town Council may direct in furtherance of the Consultant's duties under this Agreement.

2.5 Consultant shall not utilize the services of any sub-consultant without the prior written approval of Town.

2.6 It is specifically contemplated that Consultant will make every effort to notify the Mayor and Town Council in advance of any meetings scheduled by Consultant with local, state, or federal public officials or others regarding the provision of the Professional Services under this Agreement, so that the Town Council may have a representative present at such meetings if desired.

ARTICLE 3 - TERM AND TERMINATION

3.1 This Agreement shall take effect nunc pro tunc as of November 15, 2022, and shall terminate on May 15, 2023, unless otherwise extended or terminated as provided herein.

3.2 This Agreement may be extended by mutual written agreement of the Parties.

3.3 If, through any cause, the Consultant fails to fulfill in a timely and proper manner its obligations under this Agreement, or if Consultant violates the terms and conditions of this Agreement, the Town shall have the right to terminate this Agreement by giving written notice to the Consultant of such termination and specifying the effective date thereof, at least fifteen (15) days before the effective date of such termination. In such event, all finished or unfinished documents, data, studies, surveys, drawings, maps, models, photographs, and reports prepared by the Consultant shall, at the option of the Town, become the Town's property and the Consultant shall be entitled to such compensation and reimbursement of expenses for all Professional Services accrued and provided through and including the day of termination.

3.4 This Agreement shall be deemed automatically terminated and of no further force and effect if either Party has filed or consented to the filing of a petition for reorganization or bankruptcy or is otherwise adjudicated insolvent.

ARTICLE 4 – COMPENSATION AND METHOD OF PAYMENT

4.1 Consultant shall invoice the Town monthly for services performed. The invoice shall not exceed \$20,000.00, plus approved travel expenses which includes up to \$5,000.00 of housing and expenses.

4.2 The Town will make its best efforts to pay Consultant within fifteen (15) days of receipt of proper invoice (date of receipt being one business day after the date on which the electronic invoice was sent).

4.3 All payments shall be governed by the Florida Prompt Payment Act, as set forth in Part VII, Chapter 218, *Fla. Stat.*

4.4 Payment will be made to Consultant at:

H2 Solutions, LLC
2480 State Road 30A
Port St. Joe, Florida 32456

ARTICLE 5 – OFFICES, EQUIPMENT, AND TRAVEL EXPENSES

5.1 Consultant shall have access to and use of office space, computer access, a landline telephone (if available), and other miscellaneous office equipment, during the regular business hours of the Town of Fort Myers Beach, at the Town's expense to be used to provide the Professional Services provided for in this Agreement.

5.2 Town shall reimburse Consultant for the cost of travel expenses incurred in providing the Professional Services, such as attending out-of-town meetings with federal or state officials, Florida League of Cities events or seminars, or similar type events. Reimbursable travel expenses include hotel, airfare, rental cars, and incidental travel expenses, like meals, taxi fares, parking, and mileage (at the standard State of Florida mileage rate). All travel must be approved in advance by the Town Council and will be paid at the established rates in the Town's adopted policies and procedures for travel expenses.

ARTICLE 6 - CHANGES TO SCOPE OF SERVICES AND ADDITIONAL WORK

6.1 Town or Consultant may request changes to this Agreement that would increase, decrease, or otherwise modify the Professional Services to be provided under 5 this Agreement. These changes may affect the monthly compensation accordingly. Such changes or additional services must be in accordance with the provisions of the Town Charter and the Fort Myers Beach Code, and must be contained in a written amendment, executed by the Parties with the same formality, equality, and dignity herewith prior to any deviation from the terms of this Agreement, including the initiation of any additional or extra work.

6.2 In no event will the Consultant be compensated for any work which has not been described either herein or in a separate written agreement executed by the Parties.

ARTICLE 7 - INDEMNIFICATION

7.1 Each Party agrees to indemnify and hold harmless the other Party, its affiliates, its licensees, its licensors, and its and their officers, directors, employees, consultants, contractors and agents from and against all claims, damages, liabilities or suits of any nature whatsoever (including reasonable outside attorneys' fees) arising out of, because of, or due to the breach of this Agreement by either Party, its delegates, agents or employees, or due to any negligent act or occurrence of omission or commission of either Party. Each Party may, at its sole option, defend itself or allow the other party to provide the defense, but each party agrees in either case to make itself reasonably available and fully cooperate with the other party in the defense of any such claim. The Parties recognize that various provisions of this Agreement, including but not necessarily limited to this Section, provide for indemnification by the Consultant and that Section 725.06, *Fla. Stat.* requires a specific consideration be given therefor. Accordingly, the Parties agree that the sum of Ten Dollars and 00/100 (\$10.00), receipt of which is hereby acknowledged, is the specific consideration for such indemnities, and the providing of such indemnities is deemed to be part of the scope of services with respect to the Professional Services to be provided by Consultant.

ARTICLE 8 – INDEPENDENT CONTRACTOR

8.1 The Parties intend that Consultant in performing the services specified in this Agreement, shall receive direction from Town as to strategies and goals of Consultant's duties under this Agreement, and may receive specific requests from the Town regarding actions which should be made in furtherance of Consultant's duties under this Agreement. However, Consultant is an independent contractor and shall have control of its business, and the work and the manner it is performed. Consultant is not an employee of the Town for all purposes, including but not limited to, the application of the Fair Labor Standards Act minimum wage and overtime payments, Federal Insurance Contribution Act, the Social Security Act, the Federal Unemployment Tax Act, the provisions of the Internal Revenue Code, the State Workers' Compensation Act, and the State unemployment insurance law; and is not entitled to participate in any pension plan, health or other insurance, bonus, or similar benefits the Town may provide to its employees. Consultant shall have no power to bind the Town to any contract or other obligation without the Town Council's written permission or as provided for in the Town Code, and Consultant is not authorized to represent that it is not an employee of the Town to any third party entering into an agreement or contract with the Town.

8.2 Consultant's means and methods of providing the Professional Services under this Agreement shall not conflict with Town, State, or Federal laws, policies, rules, or regulations. The Consultant agrees that it is a separate and independent enterprise from the Town, that it has full opportunity to find other business, that it has made its own investment in its business, and that it will utilize a high level of skill necessary to perform the Professional Services under this Agreement, and shall not be construed as creating any joint employment relationship between the

Consultant and the Town; and the Town will not be liable for any obligation incurred by Consultant, including but not limited to unpaid minimum wages and/or overtime premiums.

ARTICLE 9 – JURISDICTION AND VENUE

9.1 This Agreement shall be governed by and construed in accordance with the laws of the State of Florida. The venue for all claims or actions arising out of or related to this Agreement shall be in Lee County, Florida.

ARTICLE 10 - PUBLIC RECORDS

10.1 The Town is a public agency subject to Chapter 119, *Florida Statutes*. The Consultant shall comply with Florida's Public Records Law. Specifically, the Consultant shall:

10.1.1 Keep and maintain public records required by the CITY to perform the service;

10.1.2 Upon request from the Town's custodian of public records, provide the Town with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Chapter 119, *Florida Statutes*, or as otherwise provided by law;

10.1.3 Ensure that public records that are exempt or that are confidential and exempt from public record disclosure requirements are not disclosed except as authorized by law for the duration of the term of this Agreement and, following completion of the Agreement, Consultant shall destroy all copies of such confidential and exempt records remaining in its possession after the Consultant transfers the records in its possession to the Town; and

10.1.4 Upon completion of this Agreement, Consultant shall transfer to the Town, at no cost to the Town, all public records in Consultant's possession. All records stored electronically by the Consultant must be provided to the Town, upon request from the Town's custodian of public records, in a format that is compatible with the information technology systems of the Town.

10.2 The failure of Consultant to comply with the provisions set forth in this Article shall constitute a default and breach of this Agreement, for which, the Town may terminate the Agreement.

IF THE CONSULTANT HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, *FLORIDA STATUTES*, TO THE CONSULTANT'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS AGREEMENT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT:

**TOWN CLERK
2525 ESTERO BLVD., FORT MYERS BEACH, FL 33931
(239) 765-0202
AMY@FMBGOV.COM**

ARTICLE 11 - MISCELLANEOUS

11.1 **Ownership of Documents.** Reports, surveys, plans, studies, and other data provided in connection with this Agreement are and shall remain the property of Town.

11.2 **Non-Discrimination.** Consultant shall comply with all applicable federal, state, and local laws, rules, and regulations in regard to non-discrimination in employment because of race, color, ancestry, national origin, religion, sex, age, marital status, medical condition, or physical or mental disability.

11.3 **Notices.** Whenever any party desires to give notice to any other party, it must be given by written notice, sent by courier, overnight delivery service (e.g., Fed Ex), or certified United States mail, with return receipt requested, addressed to the party for whom it is intended and the remaining party, at the places last specified, and the places for giving of notice shall remain such until they shall have been changed by written notice in compliance with the provisions of this section. For the present, Consultant and Town designate the following as the respective places for giving of notice:

Consultant:

H2 Solutions, LLC
2480 State Road 30A
Port St. Joe, Florida 32456
(850) 519-3887^T

Town:

Town of Fort Myers Beach
c/o Town Clerk
2525 Estero Blvd.
Fort Myers Beach, Florida 33931

With a copy to:
Town Attorney
2525 Estero Blvd.
Fort Myers Beach, Florida 33931

11.4 **Conflict of Interest.** Consultant is aware of the conflict-of-interest laws of the State of Florida, set forth in Chapter 112, *Florida Statutes*, as amended, and agrees that it will fully comply in all respects with the terms of Chapter 112, *Florida Statutes*. During the term of this Agreement, Consultant shall not undertake any actions or representation or work on behalf of third parties which would give the appearance of any impropriety. Conflict of interest includes, but is not limited to, the appearance of any conflict of interest with any position of Town or any Town interests on any subject matter, whether any such conflict of interest be on behalf of any client or on behalf of Consultant. The Consultant represents that it has disclosed, prior to executing this Agreement, all potential conflicts of interest between the interests of Town and any existing clients

of Consultant. If Consultant wishes to be retained by clients other than Town and said representation may present a potential conflict of interest with Town, the full scope of such representation and conflicts must be disclosed to the Town by Consultant in advance, so that Town may determine if the potential conflict of interest is one that it wishes to waive, or if the potential conflict may otherwise be resolved.

11.5 Availability/Time. It is specifically acknowledged by Consultant and contemplated by this Agreement that Consultant will be sufficiently available to Town to fulfill its duties under this. In the event that Consultant wishes to be retained by clients other than the Town and Consultant's representation of other clients will require substantial portions of Consultant's professional availability during the term of this Agreement, Consultant shall advise the Town in advance of being retained by such other clients so that Town may determine the potential for conflict between Consultant's availability to perform the Professional Services under this Agreement and the duties requested by other clients, and the Parties shall use their best efforts to resolve any concerns regarding Consultant's availability to perform the Professional Services under the Agreement. In the event such availability conflicts cannot be resolved by the Parties, either Party may terminate this Agreement as provided herein.

11.6 Authority to Bind. Each person signing this Agreement on behalf of either Party individually warrants that he or she has full legal power to execute this Agreement on behalf of the party for whom he or she is signing, and to bind and obligate such party with respect to all provisions contained in this Agreement.

11.7 Headings. Headings herein are for convenience of reference only and shall not be considered on any interpretation of this Agreement.

11.8 Exhibits. Any exhibit referred to in this Agreement forms an essential part of this Agreement. The exhibits if not physically attached should be treated as part of this Agreement and are incorporated herein by reference.

11.9 Severability. If any provision of this Agreement or application thereof to any person or situation shall to any extent, be held invalid or unenforceable, the remainder of this Agreement, and the application of such provisions to persons or situations other than those as to which it shall have been held invalid or unenforceable shall not be affected thereby, and shall continue in full force and effect, and be enforced to the fullest extent permitted by law.

11.10 Entire Agreement. This Agreement represents the entire and integrated agreement between the Town and the Consultant and supersedes all prior negotiations, representations, or agreements, either written or oral.

11.11 Legal Representation. It is acknowledged that each party had the opportunity to consult with counsel in the preparation of and contributed equally to the terms and conditions of this Agreement and, accordingly, the rule that a contract shall be interpreted strictly against the party preparing same shall not apply herein due to the joint contributions of both Parties.

11.12 Counterparts and Execution. This Agreement may be executed in multiple originals or counterparts, each of which shall be deemed to be an original and together shall constitute one and the same Agreement. Execution and delivery of this Agreement by the Parties shall be legally binding, valid, and effective upon delivery of the executed documents to the other party through facsimile transmission, email, or other electronic delivery.

11.13 Scrutinized Companies. Consultant, by execution of this Agreement, and in accordance with the requirements of Sections 287.135 and 215.473, *Fla. Stat.*, Consultant certifies that it is not participating in a boycott of Israel. Consultant further certifies that it is not on the Scrutinized Companies that Boycott Israel list, not on the Scrutinized Companies with Activities in Sudan List, and not on the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, or has Consultant been engaged in business operations in Syria. Subject to limited exceptions provided in state law, the Town will not contract for the provision of goods or services with any scrutinized company referred to above. Submitting a false certification shall be deemed a material breach of this Agreement. The Town shall provide notice, in writing, to Consultant of the Town's determination concerning the false certification. Consultant shall have five (5) days from receipt of notice to refute the false certification allegation. If such false certification is discovered during the active Agreement term, Consultant shall have ninety (90) days following receipt of the notice to respond in writing and demonstrate that the determination of false certification was made in error. If Consultant does not demonstrate that the Town's determination of false certification was made in error then the Town shall have the right to terminate the Agreement and seek civil remedies pursuant to Section 287.135, *Fla. Stat.*, as amended from time to time.

11.14 Waiver. Failure of Town to insist upon strict performance of any provision or condition of this Agreement, or to execute any right contained herein, shall not be construed as a waiver or relinquishment for the future of any such provision, condition, or right, but the same shall remain in full force and effect.

11.15. Attorneys' Fees. If either party sues for enforcement of this Agreement, each party shall bear its own attorney's fees and court costs, except as otherwise provided under the indemnification provisions set forth herein.

11.16 E-Verify. Consultant (and its subconsultants) have an obligation to utilize the U.S. Department of Homeland Security's (DHS) E-Verify system for all newly hired employees. By executing this Agreement, the Consultant certifies that it is registered with, and uses, the E-Verify system for all newly hired employees. The Consultant must obtain an affidavit from its subconsultants in accordance with paragraph (2)(b) of Section 448.095, *Fla. Stat.*, and maintain a copy of such affidavit for the duration of the Agreement. This section serves as notice to the Consultant regarding the requirements of Section 448.095, *Fla. Stat.*, specifically sub-paragraph (2)(c)1, and the Town's obligation to terminate the Agreement if it has a good faith belief that Consultant has knowingly violated Section 448.09(1), *Fla. Stat.* If terminated for such reason, the Consultant will not be eligible for award of a public contract for at least one year after the date of such termination. The Town reserves the right to order the immediate termination of any agreement between the Consultant and a sub-consultant performing work on its behalf should the Town develop a good faith belief that the sub-consultant has knowingly violated Section 448.095(1), *Fla. Stat.*

11.17 **Protection of Town Property.** At all times during the performance of this Agreement, Consultant shall protect Town's property from all damage whatsoever on account of the work being carried on under this Agreement.

11.18 **Compliance with Statutes.** It shall be the Consultant's responsibility to be aware of and comply with all statutes, ordinances, rules regulations and requirements of all local, Town, state, and federal agencies as applicable.

11.19 **Bankruptcy.** It is agreed that if Consultant is adjudged bankrupt, either voluntarily or involuntarily, then this Agreement shall terminate effective on the date and at the time the bankruptcy petition is filed.

11.20 **Agreement Subject to Funding.** This Agreement shall remain in full force and effect only as long as the expenditures provided for in the Agreement have been appropriated by the Town Council of the Town of Fort Myers Beach in the annual budget for each fiscal year of this Agreement, and is subject to termination based on lack of funding.

11.21 **Uncontrollable Forces.** Neither Town nor Consultant shall be considered to be in default of this Agreement if delays in or failure of performance shall be due to Uncontrollable Forces, the effect of which, by the exercise of reasonable diligence, the non-performing party could not avoid. The term "Uncontrollable Forces" shall mean any event which results in the prevention or delay of performance by a Party of its obligations under this Agreement and which is beyond the reasonable control of the nonperforming Party. It includes, but is not limited to fire, flood, earthquakes, storms, lightning, epidemic, war, riot, civil disturbance, sabotage, and governmental actions. Neither Party shall, however, be excused from performance if nonperformance is due to forces, which are preventable, removable, or remediable, and which the nonperforming Party could have, with the exercise of reasonable diligence, prevented, removed, or remedied with reasonable dispatch. The nonperforming Party shall, within a reasonable time of being prevented or delayed from performance by an uncontrollable force, give written notice to the other Party describing the circumstances and uncontrollable forces preventing continued performance of the obligations of this Agreement.

11.22 **Non-Discrimination & Equal Opportunity Employment.** During the performance of this Agreement, the Consultant shall not discriminate against any person in its operations, activities or delivery of services. The Consultant shall affirmatively comply with all applicable provisions of federal, state and local equal opportunity employment laws and shall not engage in or commit any discriminatory practices against any person based on race, age, religion, color, gender, pregnancy, sexual orientation, gender identity and expression, national origin, marital status, physical or mental disability, political affiliation or any other factor which cannot be lawfully used as a bases for service delivery.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the date below.

TOWN OF FORT MYERS BEACH:

CONSULTANT:

By: 

Dan Allers, Mayor



Chris Holley

Date Signed: 12/20/2022

Date Signed: 12/19/2022