

This document has important legal consequences; consultation with an attorney is encouraged with respect to its use or modification. This document should be adapted to the particular circumstances of the contemplated Project and the controlling Laws and Regulations.

**AGREEMENT
BETWEEN OWNER AND CONTRACTOR FOR
CONSTRUCTION CONTRACT (STIPULATED PRICE)**

Prepared by



Issued and Published Jointly by



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FOR CONSTRUCTION CONTRACT (STIPULATED PRICE)

THIS AGREEMENT or CONTRACT is by and between Town of Nags Head (“Owner” OR “Town”) and
Hatchell Concrete, Inc. (“Contractor”).

Owner and Contractor hereby agree as follows:

ARTICLE 1 – WORK

1.01 Contractor shall complete all Work as specified or indicated in the Contract Documents. The Work is generally described as follows: *Project Area #1- Culvert replacement on upstream end of Red Drum Ocean Outfall, Project Area #2- Groundwater Lowering pump system and force main along W. Bridge Lane and Project Area #3- Infiltration trenches along S. Virginia Dare Trail between E. Mall Dr. and E. Epstein St.*

ARTICLE 2 – THE PROJECT

2.01 The Project, of which the Work under the Contract Documents is a part, is generally described as follows: Town of Nags Head FY 18/19 Drainage Infrastructure Improvements

ARTICLE 3 – ENGINEER/ARCHITECT

3.01 The part of the Project that pertains to the Work has been designed by WithersRavenel.

3.02 The Owner has retained Hunter Freeman, PE, WithersRavenel (“Engineer/Architect”) to act as Owner’s representative, and have the rights and authority assigned to Architect/Engineer in the Contract Documents in connection with the completion of the Work in accordance with the Contract Documents.

ARTICLE 4 – CONTRACT TIMES

4.01 *Time of the Essence*

A. All time limits for Milestones, if any, Substantial Completion, and completion and readiness for final payment as stated in the Contract Documents are of the essence.

4.02 *Contract Times: Dates*

A. The Work will be substantially completed on or before June 1, 2019, and completed and ready for final payment in accordance with Paragraph 15.06 of the General Conditions, as applicable, on or before July 16, 2019.

B. Parts of the Work shall be substantially completed on or before the following Milestone(s):

1. **Milestone 1** [N/A]

4.03 *Liquidated Damages*

- A. Contractor and Owner recognize that time is of the essence as stated in Paragraph 4.01 above and that Owner will suffer financial and other losses if the Work is not completed and Milestones, if any, not achieved within the times specified in Paragraph 4.02 above, plus any extensions thereof allowed in accordance with the Contract. The parties also recognize the delays, expense, and difficulties involved in proving in a legal or arbitration proceeding the actual loss suffered by Owner if the Work is not completed on time. Accordingly, instead of requiring any such proof, Owner and Contractor agree that as liquidated damages for delay (but not as a penalty):
1. Substantial Completion: Contractor shall pay Owner \$ 500 for each day that expires after the time (as duly adjusted pursuant to the Contract Documents) specified in Paragraph 4.02.A above for Substantial Completion until the Work is substantially complete.
 2. Completion of Remaining Work: After Substantial Completion, if Contractor shall neglect, refuse, or fail to complete the remaining Work within the Contract Times (as duly adjusted pursuant to the Contract Documents) specified in Paragraph 4.02A above for completion and readiness for final payment, Contractor shall pay Owner \$ 500 for each day that expires after such time until the Work is completed and ready for final payment.
 3. Liquidated damages for failing to timely attain Substantial Completion and final completion are not additive and will not be imposed concurrently.
 4. Milestones: Contractor shall pay Owner \$ N/A for each day that expires after the time (as duly adjusted pursuant to the Contract) specified above for achievement of Milestone 1, until Milestone 1 is achieved.

ARTICLE 5 – CONTRACT PRICE

5.01 Owner shall pay Contractor for completion of the Work in accordance with the Contract Documents the amounts that follow, subject to adjustment under the Contract Documents:

- A. For all Work, in the EJCDC C-410 Bid Form and Paragraph 1.01 above, including Alternates [1,2,3,4.1 and 4.2], as authorized by the Town of Nags Head, a lump sum of: **\$514,800.00**

All specific cash allowances are included in the above price in accordance with the General Conditions, or Supplemental General Conditions of the Project Manual as applicable.

ARTICLE 6 – PAYMENT PROCEDURES

6.01 *Submittal and Processing of Payments*

- A. Contractor shall submit Applications for Payment to the Owner at least **20 days** before the established date in Paragraph 6.02.A for each progress payment or as defined in the General Conditions or Supplemental General Conditions of the Project Manual as applicable. Contractor shall submit to Owner for review an Application for Payment completed and signed by Contractor covering the Work completed as of the date of the Application and accompanied by such supporting documentation as is required by the Contract Documents. If payment is requested on the basis of materials and equipment not incorporated in the Work but delivered and suitably stored at the Site or at another location agreed to in writing,

the Application for Payment shall also be accompanied by a bill of sale, invoice, or other documentation warranting that Owner has received the materials and equipment free and clear of all Liens and evidence that the materials and equipment are covered by appropriate property insurance or other arrangements to protect Owner's interest therein, all of which must be satisfactory to Owner. Owner will, within 10 days after receipt of each Application for Payment, either indicate in writing a recommendation of payment and present the Application to Owner or return the Application to Contractor indicating in writing Engineer's reasons for refusing to recommend payment. In the latter case, Contractor may make the necessary corrections and resubmit the Application.

6.02 *Progress Payments; Retainage*

- A. Owner shall make progress payments on account of the Contract Price on the basis of Contractor's Applications for Payment on or about the 10th day of each month during performance of the Work as provided in Paragraph 6.02.A.1 below, provided that such Applications for Payment have been submitted in a timely manner and otherwise meet the requirements of the Contract. All such payments will be measured by the Schedule of Values established as provided in the General Conditions, as applicable, (and in the case of Unit Price Work based on the number of units completed) or, in the event there is no Schedule of Values, as provided elsewhere in the Contract.
1. Prior to Substantial Completion, progress payments will be made in an amount equal to the percentage indicated below but, in each case, less the aggregate of payments previously made and less such amounts as Owner may withhold, including but not limited to liquidated damages, in accordance with the Contract
 - a. 95 percent of Work completed (with the balance being retainage as required by N.C. General Statutes). If the Work has been 50 percent completed as determined by Engineer, and if the character and progress of the Work have been satisfactory to Owner and Engineer, then as long as the character and progress of the Work remain satisfactory to Owner and Engineer, there will be no additional retainage; and
 - b. 95 percent of cost of materials and equipment not incorporated in the Work (with the balance being retainage as required by N.C. General Statutes).
 - B. Upon Substantial Completion, Owner shall pay an amount sufficient to increase total payments to Contractor to 100 percent of the Work completed, less such amounts set off by Owner pursuant to the General Conditions or Supplemental General Conditions of the Project Manual, as applicable, and less 200 percent of the value of Work to be completed or corrected as shown on the punch list of items to be completed or corrected prior to final payment.

6.03 *Final Payment*

- A. Upon final completion and acceptance of the Work in accordance with the General Conditions or Supplemental General Conditions of the Project Manual, as applicable, Owner shall pay the remainder of the Contract Price as recommended by Engineer/Architect or Project Manager as provided in said General Conditions, as applicable.

ARTICLE 7 – INTEREST

7.01 All amounts not paid when due shall bear interest at the rate of 1% percent per annum.

ARTICLE 8 – CONTRACTOR’S REPRESENTATIONS

- 8.01 In order to induce Owner to enter into this Contract, Contractor makes the following representations:
- A. Contractor has examined and carefully studied the Contract Documents, and any data and reference items identified in the Contract Documents.
 - B. Contractor has visited the Site, conducted a thorough, alert visual examination of the Site and adjacent areas, and become familiar with and is satisfied as to the general, local, and Site conditions that may affect cost, progress, and performance of the Work.
 - C. Contractor is familiar with and is satisfied as to all Laws and Regulations that may affect cost, progress, and performance of the Work.
 - D. Contractor has considered the information known to Contractor itself; information commonly known to contractors doing business in the locality of the Site; information and observations obtained from visits to the Site; the Contract Documents; and the Site-related reports and drawings identified in the Contract Documents, with respect to the effect of such information, observations, and documents on (1) the cost, progress, and performance of the Work; (2) the means, methods, techniques, sequences, and procedures of construction to be employed by Contractor; and (3) Contractor’s safety precautions and programs.
 - E. Based on the information and observations referred to in the preceding paragraph, Contractor agrees that no further examinations, investigations, explorations, tests, studies, or data are necessary for the performance of the Work at the Contract Price, within the Contract Times, and in accordance with the other terms and conditions of the Contract.
 - F. Contractor is aware of the general nature of work to be performed by Owner and others at the Site that relates to the Work as indicated in the Contract Documents.
 - G. Contractor has given Owner written notice of all conflicts, errors, ambiguities, or discrepancies that Contractor has discovered in the Contract Documents, and the written resolution thereof by Engineer is acceptable to Contractor.
 - H. The Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Work.
 - I. Contractor’s entry into this Contract constitutes an incontrovertible representation by Contractor that without exception all prices in the Agreement are premised upon performing and furnishing the Work required by the Contract Documents.

ARTICLE 9 – CONTRACT DOCUMENTS

9.01 *Contents*

- A. The Contract Documents consist of the following:
 - 1. This Agreement (pages 1 to 10, inclusive).
 - 2. Performance bond (pages 1 to 2, inclusive).
 - 3. Payment bond (pages 1 to 2, inclusive).
 - 4. Other bonds.
 - a. Bid Bond (pages 1 to 2, inclusive).

5. General Conditions (pages 1 to 66, inclusive).
 6. Supplementary Conditions (pages 1 to 11, inclusive).
 7. Specifications as listed in the table of contents of the Project Manual.[As noted on plans]
 8. Drawings (not attached but incorporated by reference) consisting of 20 sheets with each sheet bearing the following general title: Town of Nags Head – FY 18/19 Drainage Infrastructure Improvements .
 9. Addenda (numbers 1 to 6, inclusive).
 10. Exhibits to this Agreement (enumerated as follows):
 - a. Contractor’s Bid (pages 1 to 7, inclusive).
 - b. Nondiscrimination Clause (pages 1 to 1, inclusive).
 - c. Minority Business Participation Forms (pages 1 to 4 inclusive) .
 11. The following which may be delivered or issued on or after the Effective Date of the Contract and are not attached hereto:
 - a. Notice to Proceed.
 - b. Work Change Directives.
 - c. Change Orders.
 - d. Field Orders.
- B. The documents listed in Paragraph 9.01.A, to the extent not are attached to this Agreement are hereby incorporated by reference.
- C. There are no Contract Documents other than those listed above in this Article 9.
- D. The Contract Documents may only be amended, modified, or supplemented or as provided in the General Conditions, as applicable.

ARTICLE 10 – MISCELLANEOUS

10.01 Terms

- A. Capitalized Terms used in this Agreement, if not separately defined, will have the meanings stated in Paragraph 10.01.B, Paragraph 10.05 A, General Conditions or Supplemental General Conditions of the Project Manual as applicable..

10.02 Assignment of Contract

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

10.03 *Successors and Assigns*

- A. Owner and Contractor each binds itself, its successors, assigns, and legal representatives to the other party hereto, its successors, assigns, and legal representatives in respect to all covenants, agreements, and obligations contained in the Contract Documents.

10.04 *Severability*

- A. Any provision or part of the Contract Documents held to be void or unenforceable under any Law or Regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Owner and Contractor, who agree that the Contract Documents shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

10.05 *Contractor's Certifications*

- A. Contractor certifies that it has not engaged in corrupt, fraudulent, collusive, or coercive practices in competing for or in executing the Contract. For the purposes of this Paragraph 10.05:
 1. "corrupt practice" means the offering, giving, receiving, or soliciting of any thing of value likely to influence the action of a public official in the bidding process or in the Contract execution;
 2. "fraudulent practice" means an intentional misrepresentation of facts made (a) to influence the bidding process or the execution of the Contract to the detriment of Owner, (b) to establish Bid or Contract prices at artificial non-competitive levels, or (c) to deprive Owner of the benefits of free and open competition;
 3. "collusive practice" means a scheme or arrangement between two or more Bidders, with or without the knowledge of Owner, a purpose of which is to establish Bid prices at artificial, non-competitive levels; and
 4. "coercive practice" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the bidding process or affect the execution of the Contract.

10.06 *Town of Nags Head Provisions*

- A. Performance of Government Functions. Nothing contained in the Contract Documents, shall be deemed or construed so as to in any way estop, limit, or impair the Owner from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions.
- B. Independent Contractor. Both the Owner and Contractor and its subcontractors, if any, agree that each of the Contractor and its subcontractors, if any, shall act as an independent contractor and shall not represent itself as an agent or employee of the Owner for any purpose in the performance of their respective duties under this Agreement. Accordingly, the Contractor shall be responsible for, and shall ensure that its Subcontractors, if any, are responsible for payment of all Federal, State, and local taxes arising out of their respective activities in accordance with the Contract Documents, including by way of illustration but not limitation, Federal and State income tax, Social Security tax, Unemployment Insurance taxes, and any other taxes or business license fees as required.
- C. Insurance and Indemnity. The Contractor and its subcontractors, if any, shall indemnify and save harmless the Owner, its agents and employees from and against all actions, liability, claims, suits, damages, cost or expenses of any kind which may be brought or made against the Owner or which the Owner must pay and incur by reason of or in any manner resulting from injury, loss or damage

to persons or property resulting from negligent performance of or failure to perform any of its obligations under the terms of the Contract Documents.

1. The Contractor and its subcontractors, if any, shall be fully responsible to the Owner for the acts and omissions of its Subcontractors and of persons either directly or indirectly employed by it, as the Contractor is for the acts and omissions of persons directly employed by it.
 2. The Contractor shall comply with, and shall ensure all of its Subcontractors, if any, comply with, the North Carolina Worker's Compensation Act (the "Act") and shall provide for the payment of workers' compensation to their respective employees in the manner and to the extent required by such Act. In the event the Contractor and Subcontractors, if any, are excluded from the requirements of such Act and does not voluntarily carry workers' compensation coverage, the Contractor shall carry or cause its employees to carry, and the Contractor shall ensure that its Subcontractors carry or cause their respective Subcontractors to carry, adequate medical/accident insurance to cover any injuries sustained by their respective employees or agents during the performance of Work and in accordance with the limits specified in the Contract Documents.
 3. The Contractor shall furnish, and shall cause its subcontractors, if any, agrees to furnish the Owner proof of compliance with said Act or adequate medical/accident insurance coverage upon request and in accordance with the limits specified in the Contract Documents.
 4. Upon request by the Owner, the Contractor shall furnish, and shall cause its Subcontractors, if any, to furnish, a Certificate of Insurance from an insurance company, licensed to do business in the State of North Carolina and acceptable to the Owner verifying the existence of any insurance coverage required by the Owner and in accordance with the limits specified in the Contract Documents. The Certificate will provide for sixty (60) days advance notice in the event of termination, reduction, or cancellation of coverage
- D. *Health and Safety.* The Contractor and its subcontractors, if any, shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work. The Contractor shall take, and cause its Subcontractors, if any, to take, all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury or loss to all employees from the work and other persons who may be affected thereby.
- E. *Non-Discrimination in Employment.* The Contractor shall not, and shall ensure that its Subcontractors, if any, shall not discriminate on any basis prohibited by applicable Federal or State Law against any employee or applicant for employment. The Contractor shall take, and shall ensure that its Subcontractors, if any, shall take affirmative action to ensure that applicants are employed and that employees are treated during employment in accordance with applicable Federal or State Law. In the event the Contractor or its Subcontractors, if any, is determined by the final order of an appropriate agency or court to be in violation of any non-discrimination provision of federal, state or local law or this provision, this Agreement may be cancelled, terminated or suspended in whole or in part by the Owner, and the Contractor and/or the applicable Subcontractor may be declared ineligible for further contracts.
- F. *E-Verification of Employees:* The Contractor represents and warrants that it has ensured and will ensure for itself and each Subcontractor that it uses to perform obligations under this Agreement, that either:

1. The Contractor or subcontractor employs less than 25 employees for any period of 9 months or more during a 12-consecutive month period; or
 2. The Contractor or Subcontractor: (a) employs 25 or more employees who are employed for 9 months or more during a 12-consecutive-month period; and (b) has used the E-Verify program, which program is operated by the United States Department of Homeland Security and is defined in N.C. Gen. Stat. § 64-25 (5), to verify the work authorization of each employee.
- G. Governing Law: The Contract Documents shall be governed by and in accordance with the laws and State of North Carolina. All actions relating in any way to the Contract Documents shall be brought in the General Court of Justice of the State of North Carolina or in the Federal District Court for the Eastern District of North Carolina.
- H. Other Provisions. This Agreement is subject to such additional provisions as are set forth in any addendum executed separately by each party and attached hereto.
- I. Contract Documents/Amendments. The Contract Documents constitutes the entire agreement between the said two parties with regard to the subject matter hereof and may only be modified by a written mutual agreement signed by the parties and attached hereto. In the event of any conflict between this Agreement and any other provision of the Contract Documents, including the General Conditions and the Supplemental General Conditions and the General Requirement sections of the Project Manual, the Agreement language will prevail unless the conflicting provision found in the Contract Document provides that it expressly amends or expressly provides that it shall prevail over the Agreement.
- J. Preaudit Certification. This Agreement shall not become effective unless and until the Owner's Finance Officer has signed the Preaudit Certification.
- K. DISCLAIMER. THE TOWN EXPRESSLY DISCLAIMS ANY AND ALL IMPLIED WARRANTIES ASSOCIATED WITH THE CONTRACT DOCUMENTS AND IN PARTICULAR ANY SUCH WARRANTIES RELATED TO MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR THAT THE DESIGN SPECIFICATIONS AND PLANS PROVIDED FOR THE PROJECT ARE SUITABLE AND ADEQUATE TO PRODUCE THE INTENDED PRODUCT. BY BIDDING ON AND ENTERING INTO THIS AGREEMENT, CONTRACTOR EXPRESSLY WARRANTS THAT IT HAS CONSIDERED THE DESIGN SPECIFICATIONS AND PLANS FOR THE PROJECT, THAT THE CONTRACTOR CAN PERFORM THE PROJECT PURSUANT TO THE DESIGN SPECIFICATIONS AND PLANS IN A MANNER CONSISTENT WITH THE REQUIREMENTS OF THE CONTRACT DOCUMENTS, THAT THE DESIGN SPECIFICATIONS AND PLANS ARE SUITABLE AND ADEQUATE, AND THAT THE TOWN SHALL HAVE NO LIABILITY TO THE CONTRACTOR FOR ANY ALLEGED OR ACTUAL DEFECTS IN THE DESIGN SPECIFICATIONS OR PROJECT PLANS.

1.

1. IN WITNESS WHEREOF, Owner and Contractor have signed this Agreement.

This Agreement will be effective on February , 2019 (which is the Effective Date of the Contract).

OWNER:

CONTRACTOR:

By: _____

By: _____

Title: _____

Title: _____

(If Contractor is a corporation, a partnership, or a joint venture, attach evidence of authority to sign.)

Attest: _____

Attest: _____

Title: _____

Title: _____

Address for giving notices:

Address for giving notices:

License No.: _____

(where applicable)

“This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.”

Finance Officer

APPROVED AS TO FORM AND LEGAL SUFFICIENCY.

TOWN ATTORNEY