

Project: High Pointe
65th St./ Old Dixie Hwy Subgrade water main
crossing utility improvements

**CONTRACT FOR CONSTRUCTION OF
UTILITY IMPROVEMENTS ON FLORIDA EAST COAST RAILWAY, LLC
PROPERTY
AND
AGREEMENT TO WARRANTY AND GUARANTY UTILITY
IMPROVEMENTS AT COMPLETION AND TO PROVIDE A BILL OF
SALE**

**(RE: 65th St./ Old Dixie Hwy
Subgrade water main crossing)**

THIS CONTRACT, made and entered into this ____ day of March, 2020 (the "Effective Date") by and between **GRBK GHO High Pointe, LLC, a Florida limited liability company**, having a mailing address of 590 NW Mercantile Place, Port St. Lucie, FL 34986, hereinafter referred to as "Developer," and **INDIAN RIVER COUNTY, a political subdivision of the State of Florida, by and through its Board of County Commissioners**, hereinafter referred to as "County".

WITNESSETH:

WHEREAS, the undersigned Developer desires to construct certain off-site improvements, consisting of a subgrade water main (the "Improvements") within the Florida East Coast Railway, LLC property located at 65th Street and Old Dixie Highway (the "Crossing"); and

WHEREAS, plans for such Improvements have already been approved by the Florida East Coast Railway, LLC; and

WHEREAS, in order for the County to modify the Blanket License Agreement between Indian River County and Florida East Coast Railway, LLC, dated September 26, 1996, to include the Improvements the County will require Developer to post acceptable security in either the form of cash or a letter of credit from a lending institution acceptable to the County, in the amount of 115 % of the estimated costs of the proposed Improvements, submitted under seal by an engineer registered in the State of Florida to practice professional engineering, and approved by County, to guaranty installation and completion of the Improvements to the satisfaction of County; and

WHEREAS, said Improvements are to be completed within twelve (12) months of the date of the security provided to the County herein referred to as the Effective Date; and

WHEREAS, upon completion of the Improvements by Developer and upon approval of same by the County Utility Director, seventy-five (75%) percent of the security will be released by County with the remaining twenty-five (25%) percent to be held as warranty security for one (1) year from the date of approval by the County Utilities Director. Additionally, if security is posted in the form of a letter of credit, that letter of credit must remain valid for 90 days beyond the 1-year warranty period; and

WHEREAS, at the completion of the Improvements, Developer agrees to execute a Warranty and Guaranty Agreement and Bill of Sale to warranty the Improvements for a period of one year against defects due to faulty field engineering, workmanship, or materials, secured with the remainder twenty five (25%) percent security mentioned above; and

WHEREAS, nearing the end of the 1-year warranty period, or sooner if the need arises, County will cause inspections to be performed to determine if the Improvements remain free from defects due to faulty field engineering, workmanship, or materials. If the Improvements are determined to be acceptable, then the remaining twenty-five (25%) percent security will be released by the County Utilities Director at the end of the warranty period. In the alternative, if the Improvements are found to be defective, County will notify Developer of such defect(s) and Developer must immediately cure the defect(s). Failure to cure any defects will result in the Developer, as principal, and the escrowed cash or letter of credit being jointly and severally liable to pay for the repairs; and

WHEREAS, failure by Developer to construct the Improvements within the 12-month period from the date the security is provided will cause Developer to be in default under this Contract, and Developer and the underlying security shall be jointly and severally liable to pay for the cost of construction and installment or removal of the Improvements to the final total cost including warranty;

NOW, THEREFORE, IN CONSIDERATION OF THE MUTUAL COVENANTS AND PROMISES HEREIN CONTAINED, the parties agree as follows:

1. Developer agrees to construct on or before one year after the Effective Date herein described, in a good and workmanlike manner, the Improvements, which are described as follows:

See Exhibit "A" attached hereto

2. Developer agrees to construct said Improvements strictly in accordance with the conditions of project approval and requirements of any applicable Florida East Coast Railway, LLC requirements, all of which are hereby incorporated by reference and made a part hereof.

3. In order to guarantee performance of this Contract, Developer shall simultaneously herewith furnish either cash or an irrevocable letter of credit, having an expiration date of not less than 27 months from the Effective Date of this Contract, provided by a banking institution acceptable to the County, in a form to be approved by the County, naming Developer or Developer's contractor as customer and the underwriting bank, in the amount of One Hundred Sixteen Thousand, Six Hundred Fifteen and 1/100 Dollars **\$116,615.01** which amount is not less than one hundred and fifteen percent (115%) of the estimated total cost of

Improvements to be constructed. It is understood that the full amount of the letter of credit shall remain available to the County. If cash is posted, a Cash Deposit and Escrow Agreement will be entered into between the posting party and the County.

4. Developer shall procure and keep in effect comprehensive general liability insurance in the limits of \$2,000,000.00 each occurrence for bodily injury or death and \$2,000,000.00 property damage each occurrence, covering all obligations of Developer to indemnify the Florida East Coast Railway, LLC by Contractual Assumed Liability Endorsement. Alternatively, Developer may procure and keep in effect until the end of the 1-year warranty period, Railroad Protective Liability Policies insuring the Florida East Coast Railway, LLC directly as insured against losses and damages with the limits specified in this paragraph. All such insurance, directly or indirectly for the benefit of the Florida East Coast Railway, LLC, shall be in a form satisfactory to the Florida East Coast Railway, LLC's Manager of Insurance and issued by a casualty company/insurance company authorized to do business in the State of Florida that has a "Best's" rating of A or A+ and a financial category of Class XII or higher. The Developer shall also, at its cost and expenses, maintain a Workman's Compensation Insurance Policy as required in the State of Florida. All such insurance, directly or indirectly for the benefit of the Florida East Coast Railway, LLC, shall be in a form satisfactory to the Florida East Coast Railway, LLC's Manager of Insurance and issued by a casualty company/insurance company authorized to do business in the State of Florida that has a "Best's" rating of A or A+ and a financial category of Class XII or higher. Indian River County shall be listed as an additional insured under this policy. Developer, Developer's contractors or Developer's subcontractors shall not begin construction, installation or any other work associated with the Improvements on Florida East Coast Railway, LLC property until the Developer presents satisfactory proof of meeting these requirements to the County.

Developer agrees that it shall and will at all times hereafter indemnify, defend and save harmless the Florida East Coast Railway, LLC from and against all judgements, and all loss, claims, damages, costs, charges, and expenses ("Costs") which it may suffer, sustain or in anywise be subjected to on account of or occasioned by the operations of the Developer, or any of Developer's contractors or Developer's subcontractors, or some or all of them, whether directly or indirectly under, or pursuant to, this Contract, including any such Costs arising from the death, bodily injury or personal injury of, as follows:

Of any person, including without limitation upon the generality of the foregoing description, employees and officers of Florida East Coast Railway, LLC, employees and officers or materialmen, employees and officers of Developer, employees and officers or all Developer subcontractors, and from loss, damage, injury and loss of use of any real or personal property (a) in which Florida East Coast Railway, LLC has any ownership interest, and (b) personal property in the custody of Florida East Coast Railway, LLC under any transportation contracts, including without limitation upon the generality of the two foregoing enumerations, all railroad equipment commonly described as rolling stock and the contents of the same.

Developer agrees to indemnify, hold harmless, and defend the County against any and all claims, damages, losses, and expenses, including attorney's fees, for property damage, personal or bodily injury, or loss of life, arising from the negligent acts or omissions of the Developer, its officers, employees, agents, or contractors, subcontractors, laborers, or suppliers, relating to the construction of the Improvements.

Satisfactory completion in accordance with the approved project and Florida East Coast Railway, LLC permit shall be determined by the County Utilities Director and shall be indicated by specific written approval of the County Utilities Director or his designated representative, after receipt of a signed and sealed Certificate of Completion from the project engineer of record.

5. At least 72 hours prior to the Developer, or Developer's contractors or Developer's subcontractors entering upon the Florida East Coast Railway, LLC property, the Developer shall schedule with Florida East Coast Railway, LLC a FEC flagman/watchman. Developer shall also locate Florida East Coast Railway, LLC's, signal and train control cables by calling the Florida East Coast Railway, LLC Engineering and Signal Department at (800) 342-1131 ext. 2377. In addition, and also prior to any entry onto Florida East Coast Railway, LLC property by Developer, Developer's contractors or Developer's subcontractors, a Certificate of Insurance naming FDG Flagler Station II, LLC and Florida East Coast Railway, LLC as an additional insured must be submitted by the Developer to the Director – Corridor Management and Marketing for Florida East Coast Railway, LLC. Developer, Developer's contractors or Developer's subcontractors shall not begin construction, installation or any other work associated with the Improvements on Florida East Coast Railway, LLC property until the Developer presents satisfactory proof of meeting these requirements to the County.

6. All persons entering upon the Florida East Coast Railway, LLC property must take a Roadway Worker Training Course with Railroad Protective Services, Inc. and be certified yearly with a Roadway card through the on line training course at their website: www.RRTrainers.com. Developer, Developer's contractors or Developer's subcontractors shall not enter upon the Florida East Coast Railway, LLC property until the Developer presents satisfactory proof of meeting these requirements to the County.

7. Prior to any digging or subgrade work on Florida East Coast Railway, LLC, property, Developer, Developer's contractors or Developer's subcontractors shall call "SUNSHINE" at 1-800-432-4770.

8. Subgrade crossing installation shall be marked by the erection of a suitable monument located on each side of the Florida East Coast Railway, LLC's property.

9. All crossing work shall be of the usual strength and fitness for the purpose intended to be done in good and workman-like manner by the Developer, Developer's contractors or Developer's subcontractors, at its sole cost and expense and in a manner satisfactory to the Florida East Coast Railway, LLC. Within 30 days after completion of construction or installation, Developer shall certify to the Florida East Coast Railway, LLC in writing that the fixture has been installed in substantial conformance with the plans attached as Exhibit "B". Developer shall submit such certification to the County Utilities Director at the same time as submitted to Florida East Coast Railway, LLC.

10. Developer shall pay all costs of supervision, labor and material incurred by the Florida East Coast Railway, LLC in supervising, protecting and restoring the Florida East Coast Railway, LLC property related to the Improvements.

11. If the Improvements consist of a pipe or conduit to extend under the tracks of the Florida East Coast Railway, LLC, the same shall be located not less than 5.5 feet

below the bottom of ties in such tracks, and properly safe-guarded as may be necessary or as required by the Florida East Coast Railway, LLC.

12. In addition to the requirements set forth in this Contract, the Developer, its successors or assigns shall comply with all requirements set forth in Exhibit "B" and the Blanket License Agreement between the County and Florida East Coast Railway Company, dated September 26, 1996 attached hereto as Exhibit "C".

13. Developer shall construct and maintain until such time as the utilities are accepted by the County all appliances or fixtures crossing over, under or across the Florida East Coast Railway, LLC's tracks and property in conformity with Florida East Coast Railway, LLC's specifications, together with such other laws and regulations as may be applicable.

14. Any subgrade or above grade crossings of the Florida East Coast Railway, LLC's property shall be subject to the terms of the "GENERAL SPECIFICATIONS FOR SUBGRADE AND ABOVE GRADE CROSSINGS OF THE RAILWAY'S RIGHT OF WAY" issued by the Chief Engineer, Florida East Coast Railway, LLC, the terms and conditions of which are incorporated herein by reference.

15. Developer shall obtain and maintain all necessary permits, licenses and franchises required by law until such time as the utilities are accepted by the County. Whenever Developer's appliances, fixtures or facilities are located near or adjacent to any communication or signal lines of the Florida East Coast Railway, LLC or any licensed communication utility on the property of the Florida East Coast Railway, LLC, Developer shall at all times prevent interference in any way with the construction, maintenance, or operation of such crossed or adjacent signal lines or communication lines, and in such event, Developer shall adopt, use and maintain the best known and most effective methods to protect the aforesaid communication lines from physical hazard and inductive interference.

16. Developer's appliances, fixtures, facilities or crossings shall not at any time interfere with or endanger the track, roadbed, or other property of the Florida East Coast Railway, LLC, or the operations, maintenance or improvements of the Florida East Coast Railway, LLC, or any other party thereon; and Developer shall at its own expense, on notice from the Florida East Coast Railway, LLC, forthwith change, improve or repair such appliances or fixtures as may be prescribed by the Florida East Coast Railway, LLC.

17. Should the Improvements cause any change or alterations in the location or arrangement of the wires, poles, appliances, fixtures or facilities of the Florida East Coast Railway, LLC or the wires, poles, appliances, fixtures or facilities of any licensed communication utility on the Florida East Coast Railway, LLC property, the cost of such alternations or re-arrangements shall be paid by the Developer.

18. Developer agrees that if by any reason of any changes or additions made at the time by the Florida East Coast Railway, LLC in its tracks, right-of-way or property, structures, and appliances thereon, or property, it becomes necessary to change the location of all or any part of the crossing, such changes as are necessary shall be made by the Developer promptly at the request of Florida East Coast Railway, LLC and at the sole cost and expense of the Developer.

19. In the event the Developer shall fail or neglect to fulfill its obligations under this Contract, the Developer, as principal, and the escrowed cash or letter of credit shall be jointly and severally liable to pay for the cost of construction and installment or removal of the Improvements to the final total cost, plus the warranty, including but not limited to engineering, construction, legal and contingent costs, including reasonable attorney's fees incurred by the County, together with any damages, either direct or consequential, which the County may sustain as a result of the failure of Developer to carry out and execute all provisions of this contract and applicable ordinances of the County. If this Contract is secured by a letter of credit, then in no event, shall the liability of the underwriting bank under this paragraph exceed the total amount of the original obligation stated in the letter of credit. Additionally, in the event the Developer shall fail or neglect to fulfill its obligations under this Contract, County shall have the right to immediately terminate this Contract and the Developer's right to construct or install the Improvements under this Contract.

20. The parties agree that the County at its option shall have the right, but not the obligation, to construct and install or remove or, pursuant to receipt of competitive bids, cause to be constructed and installed or removed the Improvements in the event Developer shall fail or refuse to do so in accordance with the terms of this Contract. Developer expressly agrees that the County may demand and draw upon the existing cash escrow or letter of credit for the final total cost of the Improvements, including the warranty. Developer shall remain wholly liable for any resulting deficiency, should the cash or letter of credit be exhausted prior to completion of the Improvements. In no event shall the County be obligated to expend public funds, or any funds other than those provided by the Developer, or the underwriting bank to construct the Improvements.

21. At the completion of the Improvements, Developer agrees to execute a Warranty and Guaranty Agreement and Bill of Sale to transfer all its right, title and interest to the County in and to all the Improvements constructed within the Florida East Coast Railway, LLC property, free and clear of encumbrances, together with the assignment of all existing warranties, and Developer's agreement to warranty and guaranty the Improvements for a 1- year period and, on each occasion, and at Developer's expense, immediately correct any defect due to faulty field engineering, workmanship, or materials upon notice by County. Said warranty will be secured with the twenty five (25%) percent security mentioned above; and

22. Any cash or letter of credit provided to the County by Developer or Developer's contractor with respect to this contract shall exist solely for the use and benefit of the County and shall not be construed or intended in any way, expressly or impliedly, to benefit or secure payment to any subcontractor, laborer, materialman or other party providing labor, material, supplies, or services for construction of the Improvements, unless the County shall agree otherwise in writing.

23. This Contract is the full and complete understanding of the parties and shall not be construed or amplified by reference to any other agreement, discussion, or understanding, whether written or oral, except as specifically mentioned herein. This Contract shall not be assigned without the express written approval of the County. Any amendment, deletion, modification, extension, or revision hereof or hereto shall be in writing, executed by authorized representatives of both parties.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals on the day and year first above written.

GRBK GHO HIGH POINTE, LLC, a Florida limited liability company, Developer

By _____
William Handler, Manager

INDIAN RIVER COUNTY, a political Subdivision of the State of Florida

ATTEST: Jeffrey R. Smith, Clerk of Court and Comptroller By: _____
Susan Adams, Chairman

By: _____
Deputy Clerk

BCC approved: _____

Approved as to form and legal sufficiency:

By: _____
Dylan Reingold
County Attorney

Approved :

By: _____
Jason E. Brown
County Administrator

"EXHIBIT A"

**65th Street Water Main FEC Railway Construction Estimate
Utility Cost Estimate
UCP # 3480**

WATER SYSTEM	UNIT	QUANTITY	UNIT PRICE	TOTAL
12" HDPE / Directional Bore Under R/R	LS	1	\$ 101,404.36	\$ 101,404.36
			Subtotal	\$ 101,404.36

Water System	\$ 101,404.36
TOTAL	\$ 101,404.36

Surety Amount (115%)	\$ 116,615.01
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CERTIFICATE OF COST ESTIMATE

I, Jodah B. Bittle, A Florida registered engineer, License No. 57396, do hereby certify to Indian River County that a cost estimate has been prepared under my responsible direction for those improvements itemized in this exhibit and that the total cost estimate for said improvements is shown above.

_____(Signature)

_____(Date)

Jodah B. Bittle, P.E., Florida Registered Engineer License No. 57396