

RESOLUTION NO. ____

A RESOLUTION AUTHORIZING THE MAYOR AND CITY CLERK TO ENTER INTO AN AGREEMENT WITH MARLAR ENGINEERING CO., INC. TO PROVIDE ENGINEERING DESIGN AND CONSTRUCTION OBSERVATION SERVICES FOR THE BISHOP LINDSEY STREETScape PROJECT; AND FOR OTHER PURPOSES.

WHEREAS, on June 13, 2016, the North Little Rock City Council (“City Council”) passed Resolution No. 9012, expressing the willingness of the City of North Little Rock (“City”) to utilize Federal Aid Transportation Alternatives Program (“TAP”) funds at 80% federal participation and 20% local match to develop and improve the streetscape of Bishop Lindsey Avenue from Vine Street to Hickory Street; and

WHEREAS, on April 9, 2018, the City Council passed Resolution No. _____, expressing the willingness of the City to utilize TAP funds to develop and improve the streetscape of Bishop Lindsey Avenue from Locust Street to Vine Street; and

WHEREAS, pursuant to Ark. Code Ann. § 19-11-801 et seq., the City of North Little Rock annually issues a Request for Qualification seeking proposals from firms who wish to provide engineering services during the upcoming year; and

WHEREAS, Marlar Engineering Co., Inc. is a firm selected to provide engineering services to the City and has proposed to perform the Engineering Design and Construction Observation services for an amount not to exceed \$106,993.80.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF NORTH LITTLE ROCK, ARKANSAS:

SECTION 1: That the Mayor and City Clerk are hereby authorized and directed to enter into an Agreement for Engineering Services (substantially similar to Exhibit A attached hereto) with Marlar Engineering Co., Inc. for engineering design and construction observation services in an amount not to exceed \$106,993.80.

SECTION 2: That the funds for the engineering services in the amount of \$106,993.80 have previously been included in the Sales Tax Capital Improvement Fund in the 2018 budget.

SECTION 3: That this Resolution shall be in full force and effect from and after its passage and approval.

PASSED:

SPONSOR:

Linda Robinson
City Council Member Linda Robinson
ABF

APPROVED:

Mayor Joe A. Smith
ATTEST:

Diane Whitbey, City Clerk

APPROVED AS TO FORM:

Amy Beckman Fields
Amy Beckman Fields, City Attorney

PREPARED BY THE OFFICE OF THE CITY ATTORNEY/ABF

FILED	<u>11:35</u>	A.M.	_____	P.M.
By	<u>City Atty Amy Fields</u>			
DATE	<u>4-3-18</u>			
Diane Whitbey, City Clerk and Collector North Little Rock, Arkansas				
RECEIVED BY	<u>K. Thomas</u>			

CONTRACT
FOR
BISHOP LINDSEY IMPROVEMENTS
FROM LOCUST TO HICKORY STREETS

THIS CONTRACT is made this ____ day of _____, 2018, by and between THE CITY OF NORTH LITTLE ROCK, herein called the "City," acting herein through its Mayor, Joe A. Smith, and Marlar Engineering Co., Inc., herein called "Engineer" or "Consultant."

In consideration of the mutual covenants herein, the parties agree as follows:

ARTICLE 1. SCOPE OF ENGINEER'S BASIC SERVICES

The Engineer will provide all professional services necessary for the complete design and construction documentation of the Project ("Services"), as generally identified below:

1.01 Consultant shall conduct preliminary meetings with City to determine improvements to be implemented along Bishop Lindsey (7th Street) from Locust to Hickory (refer to Attachment A) in accordance with AHTD TAP funding application.

1.02 Consultant shall prepare construction plans and bid documents in accordance with TAP application procedures and submit to City and the AHTD for review and approval.

1.03 Consultant shall prepare all required submittals and advise City regarding appropriate AHTD TAP procedures in accordance with TAP checklist attached to this agreement as "ATTACHMENT B."

1.04 Consultant shall assist City in advertisement and receipt of construction bids.

1.05 Consultant shall provide construction observation during construction of project including:

- .1 conducting preconstruction conference;
- .2 providing construction observer during project;
- .3 conducting final inspection and preparation of close out documents in accordance with TAP procedures.

1.06 Construction observation shall include one (1) daily site visit consisting of one (1) hour per day during construction and conducting one (1) construction progress meeting each month during construction.



ARTICLE 2. DELIVERABLES

2.01 Engineer shall provide to the City the following:

- .1 Three (3) hard copies of plans and bid documents to City;
- .2 Electronic file of item 1 shall be provided to City.

ARTICLE 3. BASIC AGREEMENT AND PERIOD OF SERVICE

3.01 Engineer shall provide or furnish *all professional services necessary for the complete design and construction documentation of the Project*. If authorized by City, or if required because of changes in the Project, Engineer shall furnish services in addition to those set forth above (“Additional Services”).

ARTICLE 4. PAYMENT PROCEDURES

4.01 Engineer shall prepare invoices in accordance with its standard invoicing practices and submit the invoices to City on a monthly basis. Invoices are due and payable within 15 days of receipt.

4.02 As compensation for Engineer providing or furnish Services and, if applicable, Additional Services, City shall pay Engineer as set forth in Paragraphs 4.01 and ____. If City disputes an invoice, either as to amount or entitlement, then City shall promptly advise Engineer in writing or the specific basis of the dispute, may withhold only that portion so disputed, and must pay the undisputed portion.

4.03 City shall pay Engineer for Services as follows:

- .1 An amount equal to the cumulative hours charged to the Project by each class of Engineer’s employees times standard hourly rates for each applicable billing class, plus reimbursement of expenses incurred in connection with providing the Services and Engineer’s consultants’ charges, if any.
- .2 Engineer’s standard Hourly Rates are attached as ATTACHMENT “C”.
- .3 The maximum total compensation for Services and reimbursable expenses is estimated to be: \$ 106,993.80. Title I (Design) Services Fee = \$ 82,000.00; Title II (Construction Observation Services Fee = \$ 24,993.80.

4.04 For Additional Services, City shall pay Engineer an amount equal to the cumulative hours charged in providing the Additional Services by each class of Engineer’s employees, times standard hourly rates for each applicable billing class; plus reimbursement of expenses incurred in connection with providing the Additional Services and Engineer’s consultants’ charges, if any. Engineer’s standard hourly rates are attached as Appendix 1. Additional Services will only be if approved in writing by the City and Engineer.

ARTICLE 5. ENGINEER DISCLAIMERS

5.01 Engineer shall not at any time supervise, direct, control, or have authority over any Constructor's work, nor shall Engineer have authority over or be responsible for the means, methods, techniques, sequences, or , or procedures of construction selected or used by any Constructor, or the safety precautions and programs incident thereto, for security or safety at the Project site, nor for any failure of a Constructor to comply with laws and regulations applicable to such Constructor's furnishing and performing of its work. Engineer shall not be responsible for the acts or omissions of any Constructor.

5.02 Engineer neither guarantees the performance of any Constructor nor assumes responsibility for any Constructor's failure to furnish and perform its work.

5.03 Engineer's opinions (if any) of probably construction cost are to be made on the basis of Engineer's experience, qualifications, and general familiarity with the construction industry. However, because Engineer has no control over the cost of labor, materials, equipment, or services furnished by others, or over contractors' methods of determining prices, or over competitive bidding or market conditions, Engineer cannot and does not guarantee that proposals, bids, or actual construction cost will not vary from opinions of probable construction cost prepared by Engineer. If City requires greater assurance as to probable construction cost, then City agrees to obtain an independent cost estimate.

5.04 Engineer shall not be responsible for any decision made regarding the construction contract requirements, or any application, interpretation, clarification, or modification of the construction contract documents other than those made by Engineer or its consultants.

5.05 Engineer's Services do not include any services related to unknown or undisclosed Constituents of Concern, *as defined herein*. If Engineer or any other party encounters, uncovers, or reveals an unknown or undisclosed Constituent of Concern, then Engineer may, at its option and without liability for consequential or any other damages, suspend performance of Services on the portion of the Project affected thereby until *the City retains appropriate specialist consultants or contractors to identify, abate and/or remove the Constituent of Concern and warrant that the portion of the Project affected is in full compliance with applicable laws and regulations*, or terminate this Agreement for cause if it is not practical to continue providing Services.

5.06 Engineer's Services and, if applicable, Additional Services do not include:

- .1 serving as a "municipal advisor" for purposes of the registration requirements of Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) or the municipal advisor for registration rules issued by the Securities and Exchange Commission;
- .2 advising City, or other person or entity, regarding municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, or other similar matters concerning such products or issuances;

- .3 providing surety bonding or insurance-related advice, recommendations, counseling, or research, or enforcement of construction insurance or surety bonding requirements; and
- .4 providing legal advice or representation;
- .5 geotechnical, soils or subsurface engineering and/or structural engineering, and/or construction inspection.

ARTICLE 6. TERMINATION

6.01 The obligation to continue performance under this Agreement may be terminated for cause:

- .1 By either party upon thirty (30) days written notice in the event of substantial failure by the other party to perform in accordance with the Agreement's terms through no fault of the terminating party; or
- .2 Failure to pay Engineer for its Services is a substantial failure to perform and a basis for termination.

6.02 The obligation to continue performance under this Agreement may be terminated by Engineer upon seven days written notice if City demands that Engineer furnish or perform services contrary to Engineer's responsibilities as a licensed professional. Engineer shall have no liability to City on account of a termination for cause by Engineer.

6.03 Notwithstanding the foregoing, this Agreement will not terminate as a result of a substantial failure under paragraphs 7.01 if the party receiving such notice begins, within seven (7) days receipt of such notice, to correct its substantial failure to perform and proceeds diligently to cure such failure within no more than thirty (30) days of receipt of notice; provided, however, that if and to the extent such substantial failure cannot be reasonably cured within such thirty (30) day period, and if such party has diligently attempted to cure the same and thereafter continues diligently to cure the same, then the cure period provided for herein shall extend up to, but in no case more that, sixty (60) days after the date of receipt of the notice.

6.04 The obligation to continue performance under this Agreement may be terminated for convenience, by City effective upon Engineer's receipt of written notice from City.

6.05 In the event of any termination under paragraph 7.01, Engineer will be entitled to invoice City and to receive full payment for all Services *and, if applicable*, Additional Services performed or furnished in accordance with this Agreement, plus reimbursement of expenses incurred through the effective date of termination in connection with providing the Services *and, if applicable*, Additional Services, and Engineer's consultants' charges, if any, *upon providing documentary support to the City's satisfaction*.

ARTICLE 7 CHANGE ORDERS

7.01 *The Engineer and the City agree and acknowledge as a part of this Agreement that no Change Order, as defined herein, or other form or order or directive is authorized without written assurance by the City that lawful appropriations to cover the costs of the additional*

work have been made, and without the change order being signed by the City and the Engineer. It is the Engineer's sole responsibility to know, determine, and ascertain the authority of the City representative signing any change order under this Agreement.

ARTICLE 8 DISPUTE RESOLUTION

8.01 City and Engineer agree to negotiate each dispute between them in good faith during the thirty (30) days after written notice of dispute. If negotiations are unsuccessful in resolving the dispute, then the dispute shall be mediated by using a mediation service in Pulaski County, Arkansas mutually agreed upon by the parties with the costs being shared equally by the parties. If mediation is unsuccessful, the parties may exercise their rights at law in a court of competent jurisdiction in Pulaski County, Arkansas.

ARTICLE 9 INSURANCE

9.01 Engineer shall maintain for the duration of this Agreement all forms of insurance required by law in the State of Arkansas, where the Project is located, and the state in which the Engineer is located, if different. In addition to professional liability insurance with a per occurrence basis, the Engineer shall also maintain insurance coverage for comprehensive general liability, automobile liability, and workers compensation by a carrier satisfactory to the City. The Engineer shall ensure that any and all Consultants engaged or employed by the Engineer carry and maintain similar insurance covering their respective portions of the Services.

ARTICLE 10 COPYRIGHT

10.01 The Engineer and the City warrant that in transmitting Instruments of Service, or any other information, the transmitting party is the copyright owner of such information or has permission from the copyright owner to transmit such information for its use on the Project.

10.02 The Engineer hereby assigns to the City, without reservation, all copyrights in all Project-related documents, models, photographs, and other expression created by the Engineer. Among those documents are certain "Instruments of Service," including the design drawings and the Construction Documents. The assignment provided for in this Section 10.02 shall result in the City being deemed sole copyright holder in the Instruments of Service and in all other designs and drawings created or prepared for this Project; and no other person or entity shall be deemed co-author or joint copyright holder in the works created or prepared for this Project. The City's obligation to pay the Engineer is expressly conditioned upon the Engineer's obtaining a valid written comprehensive assignment of copyrights from its Consultants in terms identical to those that obligate the Engineer to the

City as expressed in this subsection, which copyrights the Engineer, in turn, hereby assigns to the City. The City, in consideration, hereby grants the Engineer and its Consultants a revocable, nonexclusive license to reproduce the documents for purposes relating directly to the Engineer's performance of its obligations under this Agreement, for the Engineer's archival records, and for the Engineer's reproduction of drawings and photographs in the Engineer's marketing materials, provided that the Project-related contents of those materials are approved as requested in Section ___ of this Agreement. This nonexclusive license shall terminate automatically upon the occurrence of either a breach of this Agreement by the Engineer or the accused commission by the Engineer of a tort or a crime affecting the City or the Project or upon termination of this Agreement. This nonexclusive license is granted to the Engineer alone and shall not be assigned by the Engineer to any other person or entity, except that the nonexclusive license granted in this Agreement to the Engineer for purposes of the Engineer's performance hereunder may be sub-licensed to the Engineer's Consultants (with the same limitations). Subject to the foregoing, this nonexclusive license shall terminate automatically upon an Engineer's assignment of this nonexclusive license to another or its attempt to do so.

10.03 The Engineer shall obtain similar nonexclusive licenses from the Engineer's consultants consistent with this Agreement.

10.04 In the event City uses the Instruments of Service on other projects not specific to this Scope of Work, the City releases the Engineer from all claims and causes of action arising from such uses.

10.05 Except for the licenses granted in this Article 12, no other license or right shall be deemed granted or implied under this Agreement. No other Project-related data, expression, or documents may be reproduced by the Engineer or its Consultants for any other purpose without the express written permission of the Owner.

10.06 If the City subsequently reproduces Project-related documents or creates a derivative work based upon Project-related documents created by the Engineer, the City shall (where permitted or required by law) remove or completely obliterate the original professional's seals, logos, and other indications on the documents of the identity of the Engineer and its Consultants.

10.07 The Engineer shall maintain the confidentiality of all Project documents and information and shall not publish or in any way disseminate or distribute any Project-

related document, including, but not limited to, correspondence, estimates, drawings, specifications, photographs, or any other material relating to the Project without the express written authorization of the City.

ARTICLE 11 DEFINITIONS

11.01 Constituent of Concern – Any substance, product, waste, or other material of any nature whatsoever (including, but not limited to, Asbestos, Petroleum, Radioactive Material, and PCBs) which is or becomes listed, regulated, or addressed pursuant to (a) the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601 et seq. ("CERCLA"); (b) the Hazardous Materials Transportation Act, 49 U.S.C. §§1801 et seq.; (c) the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 et seq. ("RCRA"); (d) the Toxic Substances Control Act, 15 U.S.C. §§2601 et seq.; (e) the Clean Water Act, 33 U.S.C. §§1251 et seq.; (f) the Clean Air Act, 42 U.S.C. §§7401 et seq.; and (g) any other federal, state, or local statute, law, rule, regulation, ordinance, resolution, code, order, or decree regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic, or dangerous waste, substance, or material.

11.02 Constructor – any person or entity (not including the Engineer, its employees, agents, representatives, and consultants), performing or supporting construction activities relating to the Project, including but not limited to contractors, subcontractors, suppliers City's work forces, utility companies, construction managers, testing firms, shippers, and truckers, and the employees, agents, and representatives of any or all of them.

11.04 Reimbursable Expenses – The expenses incurred directly by Engineer in connection with the performing or furnishing of Basic and, if applicable, Additional Services, for the Project.

11.05 Remote or Speculative Damages – losses that were not reasonably foreseeable as a consequence of the breach, on the Effective Date, by the Party that breaches this Agreement.

ARTICLE 12 MISCELLANEOUS

12.01 Choice of Law; Venue

The parties hereto agree that this Contract shall be construed under Arkansas law, excluding its conflict of laws rules. The parties further agree that proper jurisdiction and venue for any cause of action arising from this Contract shall be vested in either the U.S. District Court for the Eastern District of Arkansas or the Circuit Court of Pulaski County, Arkansas.

12.02 Non-Waiver

No delay or failure to exercise any right under this Contract shall impair any such right or be construed to be a waiver thereof. No waiver shall be effective unless in writing signed by the party waiving. A waiver of a right on one occasion shall not be deemed to be a waiver of such right on any other occasion. A waiver of a right on one occasion shall not be deemed to be a waiver of any other right on that occasion.

12.03 No Assignment

The Project to be performed pursuant to this Contract is personal in nature, and Contractor may not, voluntarily or by operation of law, assign or transfer any of its rights or obligations under this Contract without the prior written consent of the City.

12.04 Merger

This Contract constitutes the full understanding of the parties, a complete allocation of risks between them and a complete and exclusive statement of the terms and conditions of their agreement, related to the Services provided hereunder. All prior agreements, negotiations, dealings and understandings, whether written or oral, regarding the subject matter hereof, are superseded by and merged into this Contract.

12.05 Data Transmission

City and Engineer may transmit, and shall accept, Project-related correspondence, documents, text, data, drawings, information, and graphic, in electronic media or digital format, either directly, or through access to a secure Project website, in accordance with a mutually agreeable protocol.

12.06 Modification

No conditions, usage of trade, course of dealing or performance, understanding or agreement purporting to modify, vary the terms or conditions of the Contract shall be binding unless hereafter made in writing and signed by the party to be bound, and no modification shall be effected by the acknowledgment or acceptance of any forms containing terms or conditions or variance with or in addition to those set forth in this Contract.

12.07 Severability

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.

12.08 No Presumption against Drafter

Each of the parties hereto has jointly participated in the negotiation and drafting of this Agreement. In the event an ambiguity or a question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by each of the parties hereto and no presumptions or burdens of proof shall arise favoring any party by virtue of the authorship of any provisions of this Agreement.

12.09 Counterpart Execution

This Contract may be executed in two or more counterparts, each of which is deemed as original but all constitute one and the same instrument.

12.10 Filing

This document shall be filed in the official records of the City Clerk of the City of North Little Rock, Arkansas. Either party may additionally file this document in any other governmental office deemed appropriate; however, the parties waive all claims and defenses in law or equity based upon such additional filing.

IN WITNESS WHEREOF, the parties have caused this Contract to be duly executed on the above date intending to be bound thereby.

City of North Little Rock

Marlar Engineering Co., Inc.

By: _____
Joe A. Smith, Mayor

By: _____
Michael P. Marlar, PE, President

ATTEST:

Contract reviewed and approved by:

Diane Whitbey, City Clerk

CITY OF NORTH LITTLE ROCK, ARKANSAS

AMY BECKMAN FIELDS
North Little Rock City Attorney

BY: _____
Deputy City Attorney Date