

City of Fayetteville Staff Review Form

2022-0035

Legistar File ID

2/1/2022

City Council Meeting Date - Agenda Item Only

N/A for Non-Agenda Item

David Carver

1/14/2022

FACILITIES MANAGEMENT (140)

Submitted By

Submitted Date

Division / Department

Action Recommendation:

A RESOLUTION TO APPROVE BID 21-73 CONSTRUCTION CONTRACT WITH LEGACY CONSTRUCTION MANAGEMENT, INC. IN THE AMOUNT OF \$668,237.00 FOR CITY HALL IMPROVEMENTS, INCLUDING A BUDGET ADJUSTMENT.

Budget Impact:

4470.140.8900-5400.00

Sales Tax Capital Improvement

Account Number

Fund

02046.1

Building Improvements

Project Number

Project Title

Budgeted Item? Yes

Current Budget \$ 1,183,994.00

Funds Obligated \$ 6,700.00

Current Balance \$ 1,177,294.00

Does item have a cost? Yes

Item Cost \$ 668,237.00

Budget Adjustment Attached? Yes

Budget Adjustment \$ 100,000.00

Remaining Budget \$ 609,057.00

Purchase Order Number:

Previous Ordinance or Resolution #

V20210527

Change Order Number:

Approval Date:

Original Contract Number:

Comments:



**CITY OF  
FAYETTEVILLE  
ARKANSAS**

**CITY COUNCIL MEMO**

**MEETING OF FEBRUARY 1<sup>ST</sup>, 2022**

**TO:** Mayor and City Council

**THRU:** Susan Norton, Chief of Staff  
Paul Becker, Chief Financial Officer  
Wade Abernathy, Director of Bond Projects and Facilities

**FROM:** David Carver, Facilities Management - Project Coordinator

**DATE:** January 14<sup>th</sup>, 2022

**SUBJECT: APPROVAL OF BID 21-73 CONSTRUCTION CONTRACT FOR CITY HALL IMPROVEMENTS IN THE AMOUNT OF \$668,237.00, including a budget adjustment.**

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**RECOMMENDATION:**

Staff recommends approval of bid 21-73 construction contract for City Hall improvements in the amount of \$668,237.00, including a budget adjustment.

**BACKGROUND:**

In 2019 DeMX architecture was engaged as an on-call vendor to prepare drawings for the City Hall improvements project phase 2. The subsequent bidding process was delayed until October 2021 due to the pandemic.

**DISCUSSION:**

Bids were publicly advertised and received on November 16<sup>th</sup>, 2021. Legacy Construction Management, Inc. was the low bidder at \$668,237.00. This contract is to address and improve multiple aspects of the exterior conditions of City Hall. Through this contract the City will attain handicapped parking built to current ADA standards, along with higher energy efficiency levels via new windows & doors on the North entry. Improved exterior aesthetics and drainage functionality will correct existing water concerns. This contract also includes addressing potential safety hazards on the South entrance via replacement of cracking concrete and existing, deteriorating stairways.

**BUDGET/STAFF IMPACT:**

This is funded by the Sale Tax Capital Improvements Funds 4470.140.8900-5400 sub project 02046.1502.

**Attachments:**

Bid 21-73 Contract  
Certified Bid Tab



THIS AGREEMENT is made this \_\_\_\_\_ day of \_\_\_\_\_, 2020, by and between City of Fayetteville, Arkansas, acting by and through its Mayor (hereinafter called CITY OF FAYETTEVILLE or CITY) and **Legacy Construction Management, Inc.** (Vendor or **Legacy**), and

CITY OF FAYETTEVILLE from time to time requires professional construction services in connection with construction projects. Therefore, CITY OF FAYETTEVILLE and **Legacy** in consideration of their mutual covenants agree as follows:

Work performed by **Legacy** shall be performed under valid, active, current license with the Arkansas Contractor's Licensing Board. **Legacy** shall follow all federal, state, and local laws at all times.

**1. Contracted parties and relationship:**

a. This agreement shall be binding between all parties. Fees shall be provided as identified in appendices.

i. **Legacy** Tax identification number (TIN) ending in 1498

ii. **Legacy** Arkansas Contractor License No. 0372390521

iii. **Legacy** Secretary of State Filing No. 811123269

b. Parties agree to act on the basis of mutual trust, good faith, and fair dealing, and perform in a fiscally responsible and timely manner. Parties shall each endeavor to promote harmony and cooperation among all Project participants.

**2. Entire Agreement and Exhibits:** This Agreement sets forth the entire agreement and understanding between the parties on the subject matter of this Agreement. Neither party shall be bound by any conditions, definitions, representations or warranties with respect to the subject matter of this Agreement other than those as expressly provided herein.

a. Appendices included under this agreement include the following:

i. **Appendix A:** Bid package identified as Bid 21-73 Construction City Hall Improvements with the specifications and conditions typed thereon inclusive of all bidding documents, plans and drawings and issued addenda.

ii. **Appendix B:** **Legacy's** bid submittal

iii. **Appendix C:** Bid 21-73, Recommendation for Award, inclusive of the bid tabulation

iv. **Appendix D:** **Legacy's** Certificate of Insurance

v. **Appendix E:** **Legacy's** 100% Performance and Payment Bonds

1. **Appendix D and E** shall be submitted to the City within the time frame identified in the bid documents or 10 (ten) calendar days after fully executed contract.

b. This agreement may be modified only by a duly executed written instrument signed by the CITY and **Legacy**.

c. **ORDER OF PRECEDENCE:** In case of any inconsistency, conflict, or ambiguity among the Contract Documents, the documents shall govern in the following order: (a) Change Orders and written

amendments to this Agreement which are executed by all parties; (b) the Agreement; (c) Legacy's bid submittal (d) City's published bid and associated Addenda.

3. **Notices:** Any notice required under this Agreement shall be in writing, address to the appropriate party at the following addresses:

- a. City of Fayetteville: Attention: Mayor Lioneld Jordan, 113 W. Mountain, Fayetteville, AR 72701
- b. Vendor: Legacy Construction Management, Inc., 3733 Wildcat Creek Blvd., Fayetteville, AR 72704

4. **General Provisions:**

- i. **ETHICS:** All parties shall perform with integrity. Each shall avoid conflicts of interest and promptly disclose to any other part any conflicts that may arise. All parties warrant that it has not and shall not pay or receive any contingent fees or gratuities to or from any other party, including agents, officer's employers, Subcontractors, Subsubcontractors, Suppliers, Volunteers, Elected Officials, or Others to secure preferential treatment.
- ii. **Workmanship:** The Work shall be executed in accordance with the Contract Documents in a workmanlike manner. All materials used in the Work shall be furnished in sufficient quantities to facilitate the proper and expeditious execution of the Work and shall be new except as otherwise provided in the Contract Documents.
- iii. **MATERIALS FURNISHED BY OWNER OR OTHERS:** If the Work includes installation of materials or equipment furnished by City or Others, it shall be the responsibility of the vendor to examine the items so provided and thereupon handle, store, and install the items, unless otherwise provided in the Contract Documents, with such skill and care as to provide a satisfactory and proper installation. Loss or damage due to acts or omissions of the vendor shall be the responsibility of vendor and may be deducted from any amounts due or to become due. Any defects discovered in such materials or equipment shall be reported at once to the City and the City's contracted third-party Design Professional. Following receipt of written notice from vendor of defects, City and Design Professional shall promptly inform the City what action, if any, vendor shall take with regard to the defects.
- iv. **WORKSITE VISIT:** Vendor acknowledges that it has visited, or has had the opportunity to visit, the Worksite to visually inspect the general and local conditions which could affect the Work.
- v. Vendor shall perform all duties and responsibilities necessary to coordinate the various parts of the Work and to prepare its Work for the work of City or Others.
  - 1. Cutting, patching, or altering the work of City or Others shall be done with the prior written approval of City and Design Professional. Such approval shall not be unreasonably withheld.
- vi. **COMPLIANCE WITH LAWS:** Vendor shall comply with all the Law at its own cost. Vendor shall be liable to City for all loss, cost, or expense attributable to any acts or omissions by Vendor its employees, subcontractors, suppliers, and agents for failure to comply with Laws, including fines, penalties, or corrective measures.
- vii. **COST OF CORRECTING DAMAGED OR DESTROYED WORK:** With regard to damage or loss attributable to the acts or omissions of City or Others and not to Vendor, City may either (a) promptly remedy the damage or loss and assume affected warranty responsibilities, (b) accept the damage or loss, or (c) issue a Change Order to remedy the damage or loss. If Vendor incurs costs or is delayed due to such loss or damage, Vendor may seek an equitable adjustment in the

Cost of the Work, Date of Substantial Completion or Date of Final Completion. Any equitable adjustment shall be approved by all parties.

- viii. Taxes and Permits: Vendor shall give public authorities all notices required by law and shall obtain and pay for all necessary permits, licenses, and renewals pertaining to the Work. Vendor shall provide to City copies of all notices, permits, licenses, and renewals required under this Agreement.
  - 1. Vendor shall pay applicable taxes and permit fees associated with the entire project.
- ix. DISCOUNTS: All discounts for prompt payment shall accrue to City. All trade discounts, rebates, and refunds, and all returns from sale of surplus materials and equipment, shall be credited to the Cost of the Work, or directly to the City after final payment.
- x. City may occupy or use completed or partially completed portions of the Work when (a) the portion of the Work is designated in a Certificate of Substantial Completion, (b) appropriate insurer(s) consent to the occupancy or use, and (c) public authorities authorize the occupancy or use. Vendor shall not unreasonably withhold consent to partial occupancy or use.
- xi. JOINT DRAFTING: All Parties expressly agree that this Agreement was jointly drafted, and that both had opportunity to negotiate its terms and to obtain the assistance of counsel in reviewing its terms before execution. Therefore, this Agreement shall be construed neither against nor in favor of either Party but shall be construed in a neutral manner.
- xii. EXTENT OF AGREEMENT: Except as expressly provided, this Agreement is for the exclusive benefit of all Parties, and not the benefit of any third party. This Agreement represents the entire and integrated agreement between the Parties, and supersedes all prior negotiations, representations, or agreements, either written or oral. This Agreement and each and every provision is for the exclusive benefit of all Parties and not for the benefit of any third party.
- xiii. ASSIGNMENT: Except as to the assignment of proceeds, no Party shall assign their interest in this Agreement without the written consent of the other Party. The terms and conditions of this Agreement shall be binding upon all Parties, their partners, successors, assigns, and legal representatives. No Party shall assign the Agreement without written consent of the other.
- xiv. Where figures are given, they shall be preferred to scaled dimensions.
- xv. The drawings and specifications are complementary. If Work is shown only on one but not on the other, Vendor shall perform the Work as though fully described on both. Vendor shall seek clarification from the City or the City's third-party Design Professional for any discrepancies.
- xvi. In case of conflicts between the drawings and specifications, the specifications shall govern unless otherwise stated in the bidding documents. In any case of omissions or errors in figures, drawings, or specifications, Vendor shall immediately submit the matter to City and Design Professional for clarification. The City's clarifications are final and binding, which may include third-party Design Professional content.
- xvii. DEBARMENT AND SUSPENSION: By execution of this agreement, Vendor certifies that to the best of its knowledge and belief that the Vendor and its principals:



1. Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;
2. Have not within a three year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
3. Are not presently indicted for or otherwise criminally or civilly charged by a government entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (2) of this certification; and
4. (d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State, or local) terminated for cause or default.
5. Vendor understands that a false statement on certification regarding debarment and suspension may be grounds for rejection of this proposal or termination of the award. In addition, under 18 USC Sec. 1001, a false statement may result in a fine. I further certify that I will obtain a similar certification for each subcontract awarded in excess of \$25,000.
6. Certifications for subcontracts or subsubcontracts executed under this agreement shall include all language in this section.

**5. Definitions:**

- a. Unless otherwise specifically defined in this Agreement, any terms that have well-known technical or trade meanings shall be interpreted in accordance with their well-known meanings.
- b. "Business Day" means all Days, except weekends and official federal or state holidays where the Project is located.
- c. A "Change Order" is a written order signed by all Parties after execution of this Agreement, indicating changes in the scope of the Work, and Date of Substantial Completion or Date of Final Completion.
- d. "Contract Time" is the period between the Date of Notice to Proceed and the total time authorized to achieve Final Completion.
- e. "Cost of the Work" means the total costs and discounts charged to the City.
- f. The "Vendor" is the person or entity identified in this contract and includes Vendor's Representative.
- g. "Day" means a calendar day unless otherwise specified.
- h. "Defective Work" is any portion of the Work that that does not conform with the requirements of the Contract Documents.
- i. "Design Professional" means the licensed architect retained by the City and its subconsultants, to perform design services for the Project.
- j. "Final Completion" occurs on the date when Vendor's obligations under this Agreement are complete and accepted by City and final payment becomes due and payable. This date shall be confirmed by a Certificate of Final Completion signed by all Parties.
- k. "Hazardous Material" is any substance or material identified now or in the future as hazardous under the Law, or any other substance or material that may be considered hazardous or otherwise subject to statutory or regulatory requirement governing handling, disposal, or cleanup.

- l. "Interim Directive" is a written order containing change to the Work directed by and in consultation with City and Design Professional after execution of this Agreement and before Substantial Completion. Interim Directives shall be consolidated and formalized in a change order to be signed by all parties.
- m. "Law" means federal, state, or local laws, ordinances, codes, rules, and regulations applicable to the Work with which Vendor must comply that are enacted as of the Agreement date.
- n. "Others" means City's other: (a) contractors/constructors, (b) suppliers, (c) subcontractors, subsubcontractors, or suppliers of (a) and (b); and others employed directly or indirectly by (a), (b), or (c) or any by any of them or for whose acts any of them may be liable.
- o. "Overhead" means (a) payroll costs, burden, and other compensation of Vendor's employees in Vendor's principal and branch offices for work associated with this project.
- p. "Owner" is the City of Fayetteville, Arkansas (City).
- q. The "Owner's Program" is an initial description of Owner's objectives, including budgetary and time criteria, space requirements and relationships, flexibility and expandability requirements, special equipment and systems, site requirements, and any requirements for phased occupancy.
- r. The "Parties" are collectively City and Vendor.
- s. The "Project," is the building, facility, or other improvements for which Vendor is to perform Work under this Agreement. It may also include construction by Owner or Others.
- t. The "Schedule of the Work" is the document prepared by Vendor that specifies the dates on which Vendor plans to begin and complete various parts of the Work, including dates on which information and approvals are required from City.
- u. "Subcontractor" is a person or entity retained by Vendor as an independent contractor to provide the labor, materials, equipment, or services necessary to complete a specific portion of the Work. The term Subcontractor does not include Design Professional or Others.
- v. "Substantial Completion" of the Work, or of a designated portion, occurs on the date when the Work is sufficiently complete in accordance with the Contract Documents so that City may occupy or utilize the Work, or a designated portion, for the use for which it is intended, without unapproved disruption. This date shall be confirmed by a certificate of Substantial Completion signed by all Parties.
- w. A "Subsubcontractor" is a person or entity who has an agreement with a Subcontractor or another subsubcontractor or Supplier to perform a portion of the Subcontractor's Work or supply material or equipment.
- x. A "Supplier" is a person or entity retained by Vendor to provide material or equipment for the Work.
- y. "Terrorism" means a violent act, or an act that is dangerous to human life, property, or infrastructure, that is committed by an individual or individuals and that appears to be part of an effort to coerce a civilian population or to influence the policy or affect the conduct of any government by coercion. Terrorism includes, but is not limited to, any act certified by the United States government as an act of terrorism pursuant to the Terrorism Risk Insurance Act, as amended.
- z. "Work" means the construction services necessary or incidental to fulfill Vendor's obligations for the Project in accordance with and reasonably inferable from the Contract Documents. The Work may refer to the whole Project or only a part of the Project if work is also being performed by Owner or Others.
- aa. "Worksite" means the area of the Project where the Work is to be performed.
- bb. "Bi-monthly basis" means every fourteen to sixteen calendar days.

## 6. Contract Document Review and Administration

- a. Before commencing the Work, Vendor shall examine and compare the drawings and specifications with information furnished by the City and Design Professional that are considered Contract Documents, relevant field measurements made by Vendor, and any visible conditions at the Worksite affecting the Work.
- b. Should Vendor discover any errors, omissions, or inconsistencies in the Contract Documents, Vendor shall promptly report them to the City and Design Professional. Following receipt of written notice from Vendor of defects, City shall promptly inform Vendor what action, if any, Vendor shall take with regard to the defect.
- c. Nothing in this section shall relieve VENDOR of responsibility for its own errors, inconsistencies, or omissions.
- d. COST REPORTING: Vendor shall maintain complete, accurate, and current records that comply with generally accepted accounting principles and calculate the proper financial management under this Agreement. Vendor shall maintain a complete set of all books and records prepared or used by Vendor with respect to the Project. City shall be afforded access to all of Vendor's records, books, correspondence, instructions, drawings, receipts, vouchers, memoranda, and similar data relating to this Agreement. Vendor shall preserve all such records for a period of three years after the final payment or longer where required by Law.

#### 7. Warranty

- a. Vendor warrants all materials and equipment furnished under the Construction Phase of this Agreement will be new unless otherwise specified, of good quality, in conformance with the Contract Documents, and free from defective workmanship and materials. At City or Design Professional request, Vendor shall furnish satisfactory evidence of the quality and type of materials and equipment furnished. Vendor further warrants all Work shall be free from material defects not intrinsic in the design or materials required in the Contract Documents. Vendor's warranty does **not include** remedies for defects or damages caused by normal wear and tear during normal usage beyond the warranty period, use for a purpose for which the Project was not intended, improper or insufficient maintenance, modifications performed by the City or others, or abuse. Vendor's warranty shall commence on the Date of Final Completion of the Project.
- b. To the extent products, equipment, systems, or materials incorporated in the Work are specified and purchased by the City, they shall be covered exclusively by the warranty of the manufacturer. There are no warranties which extend beyond the description on the face of any such warranty. For such incorporated items, ALL OTHER WARRANTIES EXPRESSED OR IMPLIED INCLUDING THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE ARE EXPRESSLY DISCLAIMED.
- c. Vendor shall obtain from its Subcontractors and Suppliers any special or extended warranties required by the Contract Documents. Vendor's liability for such warranties shall be limited to the one-year correction period, as further defined in this Agreement. After that period Vendor shall provide full and comprehensive assistance to the City in enforcing the obligations of Subcontractors or Suppliers for such extended warranties.
- d. Correction of Work
  - i. If before Substantial Completion or within two-years after the date of Final Completion of the Work any Defective Work is found, City shall promptly notify Vendor in writing. Unless City provides written acceptance of the condition, Vendor shall promptly correct the Defective Work



at its own cost and time and bear the expense of additional services required for correction of any Defective Work for which it is responsible. If within the two-year correction period City discovers and does not promptly notify Vendor or give Vendor an opportunity to test or correct Defective Work as reasonably requested by Vendor, City waives Vendor's obligation to correct that Defective Work as well as City's right to claim a breach of the warranty with respect to that Defective Work.

- ii. If Vendor fails to correct Defective Work within a reasonable time after receipt of written notice from City before final payment, City may correct it in accordance with Owner's right to carry out the Work. In such case, an appropriate Change Order shall be issued deducting the cost of correcting the Defective Work from payments then or thereafter due Vendor. If payments then or thereafter due Vendor are not sufficient to cover such amounts, Vendor shall pay the difference to City.
- iii. Vendor's obligations and liability, if any, with respect to any Defective Work discovered after the two-year correction period shall be determined by the Law. If, after the two-year correction period but before the applicable limitation period has expired, City discovers any Work which City considers Defective Work, City shall, unless the Defective Work requires emergency correction, promptly notify Vendor and allow Vendor an opportunity to correct the Work if Vendor elects to do so. If Vendor elects to correct the Work it shall provide written notice of such intent within fourteen (14) Days of its receipt of notice from City and shall complete the correction of Work within a mutually agreed timeframe. If Vendor does not elect to correct the Work, City may have the Work corrected by itself or Others, and, if City intends to seek recovery of those costs from Vendor, City shall promptly provide Vendor with an accounting of the actual correction costs.
- iv. If Vendor's correction or removal of Defective Work causes damage to or destroys other completed or partially completed work or existing building, Vendor shall be responsible for the cost of correcting the destroyed or damaged property.
- v. The two-year period for correction of Defective Work does not constitute a limitation period with respect to the enforcement of Vendor's other obligations under the Contract Documents.
- vi. Before final payment, at City option and with Vendor's agreement, City may elect to accept Defective Work rather than require its removal and correction. In such cases the contract shall be equitably adjusted for any diminution in the value, as determined by City, of the Project caused by such Defective Work via formal written change order.

#### 8. Safety of Persons and Property

- a. **SAFETY PROGRAMS:** Vendor holds overall responsibility for safety programs. However, such obligation does not relieve Subcontractors of their safety responsibilities and to comply with the Law. Vendor shall prevent against injury, loss, or damage to persons or property by taking reasonable steps to protect: (a) its employees and other persons at the Worksite; (b) materials and equipment stored at onsite or offsite locations for use in performing the Work; and (c) property located at the Worksite and adjacent to work areas, whether or not the property is part of the Worksite.
- b. **VENDOR'S SAFETY REPRESENTATIVE:** Vendor shall designate an individual at the Worksite in its employ as its safety representative. Unless otherwise identified by Vendor in writing to City, Vendor's project superintendent shall serve as its safety representative. Vendor shall report promptly in writing all

recordable accidents and injuries occurring at the Worksite. When Vendor is required to file an accident report with a public authority, Vendor shall furnish a copy of the report to City.

- c. Vendor shall provide City with copies of all notices required of Vendor by the Law. Vendor's safety program shall comply with the requirements of governmental and quasi-governmental authorities having jurisdiction.
  - i. Damage or loss not insured under property insurance that may arise from the Work, to the extent caused by negligent or intentionally wrongful acts or omissions of Vendor, or anyone for whose acts Vendor may be liable, shall be promptly remedied by Vendor.
- d. If City deems any part of the Work or Worksite unsafe, City, without assuming responsibility for Vendor's safety program, may require Vendor to stop performance of the Work, take corrective measures satisfactory to City. If Vendor does not adopt corrective measures, City may perform them and deduct their cost from the GMP. Vendor agrees to make no claim for damages, or an increase in the GMP, or for a change in the Dates of Substantial or Final Completion based on Vendor's compliance with City's reasonable request.

**9. Subcontracts:**

- a. **BINDING OF SUBCONTRACTORS AND SUPPLIERS:** Vendor agrees to bind every Subcontractor and Supplier and require every Subcontractor to so bind its subcontractors and significant supplier, to the Contract Documents as they apply to the Subcontractor's or Supplier's applicable provisions to that portion of the Work.
- b. Vendor agrees not to subcontract Vendor at risk related services without prior written consent from the City.

**10. Fees, Expenses, and Payments:**

- a. **Legacy** at its own cost and expense shall furnish all labor, materials, supplies, machinery, equipment, tools, supervision, bonds, insurance, tax permits, and all other accessories and services necessary to complete items bid per Bid 21-23 as stated in **Legacy** bid response, and in accordance with specifications attached hereto and made a part hereof under Bid 21-23, all included herein as if spelled out word for word.
- b. This turn-key project providing labor and materials shall be provided to the City for a not to exceed fee of \$668,237.00 US Dollars.
- c. The City of Fayetteville shall pay **Legacy** for completion of the project based on a percentage of work completed. At no point shall payment exceed the percentage of work completed, as determined by the City.
- d. Payments will be made after approval and acceptance of work and submission of invoice. Payments will be made approximately 30 days after approval of invoice. The City of Fayetteville reserves the right to request receipts for materials purchased for the City of Fayetteville from suppliers, subcontractors, or other sources. The City of Fayetteville does not agree to any interest or penalty for "untimely" payments.
- e. The City reserves the right to withhold five percent (5%) retainage from all payments until project is completed in full.
- f. Not to exceed pricing shall include but not be limited to:

1. Labor wages directly employed by Vendor in performing of the Work.
2. Salaries of Vendor's employees when stationed at the field office, in whatever capacity employed, employees engaged on the road expediting the production or transportation of material and equipment, and employees from the principal or branch office as mutually agreed by the Parties in writing.
3. Cost of all employee benefits and taxes, including but not limited to, workers' compensation, unemployment compensation, social security, health, welfare, retirement, and other fringe benefits as required by law, labor agreements, or paid under Vendor's standard personnel policy, insofar as such costs are paid to employees of Vendor who are included in the Cost of the Work.
4. Transportation, travel, hotel, and moving expenses of Vendor's personnel incurred in connection with the Work.
5. Cost of all materials, supplies, and equipment incorporated in the Work, including costs of inspection and testing if not provided by City, transportation, storage, and handling.
6. Payments made by Vendor to Subcontractors for work performed under this Agreement.
7. Cost, including transportation and maintenance of all materials, supplies, equipment, temporary facilities, and hand tools not owned by the workers that are used or consumed in the performance of the Work, less salvage value or residual value; and cost less salvage value on such items used, but not consumed that remain the property of Vendor.
8. Rental charges of all necessary machinery and equipment, exclusive of hand tools owned by workers, used at the Worksite, whether rented from Vendor or others, including installation, repair, and replacement, dismantling, removal, maintenance, transportation, and delivery costs at competitive market rates.
9. Cost of the premiums for all insurance and surety, performance or payment bonds which Vendor is required to procure or deems necessary and approved by City.
10. Sales, use, gross receipts, or other taxes, tariffs, or duties related to the Work for which Vendor is liable.
11. Permits, taxes, fees, licenses, tests, royalties.
12. Losses, expenses, or damages to the extent not compensated by insurance or otherwise, and the cost of corrective work during the Construction Phase and for the warranty period.
13. Costs associated with establishing, equipping, operating, maintaining, mobilizing and demobilizing the field office and site.
14. Water, power, and fuel costs necessary for the Work.
15. Cost of removal of all nonhazardous substances, debris, and waste materials.

16. Costs incurred due to an emergency affecting the safety of persons or property.
  17. Costs directly incurred in the performance of the Work or in connection with the Project, and not included in Vendor's Fee, which are reasonably inferable from the Contract Documents.
- g. **STORED MATERIALS AND EQUIPMENT:** Unless otherwise provided in the contract documents, applications for payment may include materials and equipment not yet incorporated into the Work but delivered to and suitably stored onsite or offsite including applicable insurance, storage, and costs incurred transporting the materials to an offsite storage facility. Approval of payment applications for stored materials and equipment stored offsite shall be conditioned on a submission by Vendor of bills of sale and proof of required insurance, or such other documentation satisfactory to City to establish the proper valuation of the stored materials and equipment, City's title to such materials and equipment, and to otherwise protect City's interests therein, including transportation to the Worksite. Materials and equipment stored offsite shall be in a bonded and insured secure facility.
  - h. **Final Payment:** Upon satisfactory completion of the work performed under this Agreement, as a condition before final payment under this Agreement, or as a termination settlement under this Agreement, VENDOR shall execute and deliver to CITY OF FAYETTEVILLE a release of all claims against CITY OF FAYETTEVILLE arising under or by virtue of this Agreement, except claims which are specifically exempted by VENDOR to be set forth therein.
    - i. Unless otherwise provided in this Agreement or by State law or otherwise expressly agreed to by the parties to this Agreement, final payment under this Agreement or settlement upon termination of this Agreement shall not constitute a waiver of CITY OF FAYETTEVILLE's claims against VENDOR or sureties under this Agreement.
- 11. Project Bonding - Performance and payment bonding:** After execution of this contract by all parties, VENDOR shall provide a 100% **separate** performance and payment bond from a bonding company, licensed to do business in the state of Arkansas, to the City of Fayetteville after being file marked at the Washington County Circuit Clerk's Office. Bonds shall be provided within ten (10) calendar days after this contract has been executed by all parties.
- a. All bonds shall be listed with the U.S. Treasury Department listing of approved surety's (T-List) and shall be rated A+ minimum by A. M. Best.
- 12. Time:**
- a. **SUBSTANTIAL and FINAL COMPLETION:** Date of Substantial Completion and the Date of Final Completion shall be established in the contract documents as a hard not to exceed date. If such dates are not established upon the execution of this Agreement, a Date of Substantial Completion and Date of Final Completion of the Work shall be established via Change Order.
  - b. Time is of the essence with regard to the obligations of the Contract Documents.
  - c. Unless instructed by City in writing, Vendor shall not knowingly commence the Work before the effective date of Vendor's required insurance and bonds and formal written and signed Purchase Order issued by the City of Fayetteville Purchasing Division.
  - d. **Schedule of Work:** Before submitting its first application for payment, Vendor shall submit to City and, if directed, Design Professional a Schedule of the CONTRACT: CONTRACT Work showing the dates on which Vendor plans to begin and complete various parts of the Work, including dates on which information and approvals are required



from City. Except as otherwise directed by City, Vendor shall comply with the approved Schedule of the Work or Vendor.

- i. City may determine the sequence in which the Work shall be performed, provided it does not unreasonably interfere with the approved project schedule. City may require Vendor to make reasonable changes in the sequence at any time during the performance of the Work in order to facilitate the performance of work by City or Others. If Vendor consequently incurs costs or is delayed, the Dates of Substantial or Final Completion, or both, Vendor may seek equitable adjustment.
- e. NOTICE OF DELAY CLAIMS: If Vendor requests an equitable extension of the Contract Time or an equitable adjustment contract as a result of a delay described, Vendor shall give City written notice of the claim. If Vendor causes delay in the completion of the Work, City shall be entitled to recover its additional costs.

### 13. Substantial Completion:

- a. Vendor shall notify City and, if directed, Design Professional when it considers Substantial Completion of the Work or a designated portion to have been achieved. City, with the assistance of its Design Professional, shall promptly conduct an inspection to determine whether the Work or designated portion can be occupied or used for its intended use by City without excessive interference in completing any remaining unfinished Work. If City determines the Work or designated portion has not reached Substantial Completion, City, with the assistance of its Design Professional, shall promptly compile a list of items to be completed or corrected so City may occupy or use the Work or designated portion for its intended use. Vendor shall promptly and accurately complete all items on the list.
- b. When Substantial Completion of the Work or a designated portion is achieved, Vendor shall prepare a Certificate of Substantial Completion establishing the date of Substantial Completion and the respective responsibilities of each Party for interim items such as security, maintenance, utilities, insurance, and damage to the Work, and fixing the time for completion of all items on the list accompanying the Certificate. The Certificate of Substantial Completion shall be submitted by Vendor to City and, if directed, to Design Professional for written acceptance of responsibilities assigned in the Certificate of Substantial Completion.
- c. Unless otherwise provided in the Certificate of Substantial Completion, warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or a designated portion.
- d. Upon City's written acceptance of the Certificate of Substantial Completion, City shall pay to Vendor the remaining retainage held by City for the Work described in the Certificate of Substantial Completion less a sum equal to one hundred and fifty percent (150%) of the estimated cost of completing or correcting remaining items on that part of the Work, as agreed to by the Parties as necessary to achieve Final Completion, including all close outs. Uncompleted items shall be completed by Vendor in a mutually agreed upon timeframe.

### 14. Final Completion:

- i. Upon notification from Vendor that the Work is complete and ready for final inspection and acceptance, City, with the assistance of its Design Professional shall promptly conduct an inspection to determine if the Work has been completed and is acceptable under the Contract Documents.

- ii. When the Work is complete, Vendor shall prepare for City's written acceptance a final application for payment stating that to the best of Vendor's knowledge, and based on City's inspections, the Work has reached Final Completion in accordance with the Contract Documents.
  - iii. Final payment shall be made to Vendor within thirty (30) Days after Vendor has submitted an application for final payment, pending the application has been approved by the City, including submissions required, and a Certificate of Final Completion has been executed by all Parties.
  - iv. Final payment shall be due on Vendor's submission of the following to the City:
    - 1. an affidavit declaring any indebtedness connected with the Work, to have been paid, satisfied, or to be paid with the proceeds of final payment, so as not to encumber City property;
    - 2. as-built drawings, manuals, copies of warranties, and all other close-out documents required by the Contract Documents;
    - 3. release of any liens, conditioned on final payment being received;
    - 4. consent of any surety; and
    - 5. any outstanding known and unreported accidents or injuries experienced by Vendor or its Subcontractors at the Worksite.
  - v. If, after Substantial Completion of the Work, the Final Completion of a portion of the Work is materially delayed through no fault of Vendor. If approved by City, they shall pay the balance due for any portion of the Work fully completed and accepted. If the remaining contract balance for Work not fully completed and accepted is less than the retained amount before payment, Vendor shall submit to City and, if directed, Design Professional the written consent of any surety to payment of the balance due for portions of the Work that are fully completed and accepted. Such payment shall not constitute a waiver of claims, but otherwise shall be governed by this section.
  - vi. ACCEPTANCE OF FINAL PAYMENT: Unless Vendor provides written identification of unsettled claims with an application for final payment, its acceptance of final payment constitutes a waiver of such claims.
- b. Legacy shall ensure that the City of Fayetteville receives lien waivers from all material suppliers, subcontractors and sub-subcontractors and **before** work begins on the project. The contractor shall give written notice to the material suppliers, subcontractors and sub-subcontractors providing work on the project that states the following:
- i. *'According to Arkansas law, it is understood that no liens can be filed against public property if valid and enforceable payment and performance bond is in place. Regarding this Project and Agreement, the valid and enforceable bonds are with ( Cincinatti Surety Company ).'*
  - ii. Legacy shall have each subcontractor, sub-subcontractor and material supplier execute a written receipt evidencing acknowledgment of this statement prior to commencement of the work of the subcontractor or material supplier.

15. **Notices:** Any notice required to be given under this Agreement to either party to the other shall be sufficient if addressed and mailed, certified mail, postage paid, delivery, fax or e-mail (receipt confirmed), or overnight courier.
16. **Jurisdiction:** Legal jurisdiction to resolve any disputes shall be Arkansas with Arkansas law applying to the case.
17. **Venue:** Venue for all legal disputes shall be Washington County, Arkansas.
18. **Freedom of Information Act:** City of Fayetteville contracts and documents prepared while performing contractual work are subject to the Arkansas Freedom of Information Act. If a Freedom of Information Act request is presented to the City of Fayetteville, the VENDOR shall do everything possible to provide the documents in a prompt and timely manner as prescribed in the Arkansas Freedom of Information Act (A.C.A. 25-19-101 et. Seq.). Only legally authorized photo copying costs pursuant to the FOIA may be assessed for this compliance.
19. **Changes in Scope or Price:** Changes, modifications, or amendments in scope, price or fees to this contract shall not be allowed without a prior formal contract amendment approved by the Mayor and the City Council in advance of the change in scope, cost or fees.
20. **Insurance:**
- a. Before starting the Work and as a condition precedent to payment, Vendor shall procure and maintain in force Workers' Compensation Insurance, Employers' Liability Insurance, Business Automobile Liability Insurance, and Commercial General Liability Insurance ("CGL"). The CGL policy shall include coverage for liability arising from premises, operations, independent contractors, products-completed operations, personal injury and advertising injury, contractual liability, pollution coverage, and broad form property damage. Vendor shall maintain completed operations liability insurance for one year after Substantial Completion, or as required by the Contract Documents, whichever is longer. Vendor's Employers' Liability, Business Automobile Liability and CGL policies shall be written with at least the limits of liability presented in Appendix D.
  - b. Employers' Liability, Business Automobile Liability, and CGL coverages required may be provided by a single policy for the full limits required or by a combination of underlying policies with the balance provided by excess or umbrella liability policies.
  - c. Vendor shall maintain in effect all insurance coverage required with insurance companies lawfully authorized to do business in the jurisdiction in which the Project is located. If Vendor fails to obtain or maintain any insurance coverage required under this Agreement, City may purchase such coverage and charge the expense to Vendor or terminate this Agreement.
  - d. To the extent commercially available to Vendor from its current insurance company, insurance policies required shall contain a provision that the insurance company or its designee shall give City written notice transmitted in paper and electronic format: (a) 30 Days before coverage is nonrenewed by the insurance company and (b) within 10 Business Days after cancellation of coverage by the insurance company. Before commencing the Work and upon renewal or replacement of the insurance policies, Vendor shall furnish City with certificates of insurance until one year after Substantial Completion or longer if required by the Contract Documents. In addition, if any insurance policy required is not to be immediately replaced without lapse in coverage when it expires, exhausts its limits, or is to be cancelled, Vendor shall give City prompt written notice upon actual or constructive knowledge of such condition.
  - e. Certificates of Insurance shall list the City as Additional Insured Parties.
  - f. **PROPERTY INSURANCE:**

- i. At no time shall any policy be covered by self-insurance or in a self-insured format. All policies shall be covered by an approved commercial insurance professional properly licensed to do business in Arkansas.
- ii. Unless otherwise directed in writing by City, before starting the Work, **Legacy** shall obtain and maintain a Builder's Risk Policy upon the entire Project for the full cost of replacement at the time of loss, including existing structures. This insurance shall also (a) name Vendor, Subcontractors, Subsubcontractors, and Design Professional as named insureds; (b) be written in such form to cover all risks of physical loss except those specifically excluded by the policy; and (c) insure at least against and **not** exclude:
  1. the perils of fire, lightning, explosion, windstorm, hail, smoke, aircraft (except aircraft, including helicopter, operated by or on behalf of Vendor) and vehicles, riot and civil commotion, theft, vandalism, malicious mischief, debris removal, flood, earthquake, earth movement, water damage, wind damage, testing if applicable, collapse, however caused;
  2. damage resulting from defective design, workmanship, or material;
  3. coverage extension for damage to existing buildings, plant, or other structures at the Worksite, when the Project is contained within or attached to such existing buildings, plant or structures. Coverage shall be to the extent loss or damage arises out of Constructor's activities or operations at the Project;
  4. equipment breakdown, including mechanical breakdown, electrical injury to electrical devices, explosion of steam equipment, and damage to steam equipment caused by a condition within the equipment;
  5. testing coverage for running newly installed machinery and equipment at or beyond the specified limits of their capacity to determine whether they are fit for their intended use; and
  6. physical loss resulting from Terrorism.
- iii. The Party that is the primary cause of a Builder's Risk Policy claim shall be responsible for any deductible amounts or coinsurance payments. If no Party is the primary cause of a claim, then the Party obtaining and maintaining the Builder's Risk Policy shall be responsible for the deductible amounts or coinsurance payments. This policy shall provide for a waiver of subrogation. This insurance shall remain in effect until final payment has been made or until no person or entity other than City has an insurable interest in the property to be covered by this insurance, whichever is sooner. Partial occupancy or use of the Work shall not commence until City has secured the consent of the insurance company or companies providing the coverage required in this subsection. Before commencing the Work, City shall provide a copy of the property policy or policies obtained.
- iv. If City elects to purchase the property insurance required by this Agreement, including all of the coverages and deductibles for the same durations specified, City shall give written notice to Vendor before the Work is commenced and provide a copy of the property policy or policies obtained in compliance with this agreement. City may then provide insurance to protect its



interests and the interests of the Constructor, Subcontractors, Suppliers, and Subsubcontractors. The cost of this insurance shall be paid by City in a Change Order. If City gives written notice of its intent to purchase property insurance required by this Agreement and fails to purchase or maintain such insurance, City shall be responsible for costs reasonably attributed to such failure.

- v. The Parties each waive all rights against each other and their respective employees, agents, contractors, subcontractors, suppliers, subsubcontractors, and design professionals for damages caused by risks covered by the property insurance, except such rights as they may have to the proceeds of the insurance.
  - 1. To the extent of the limits of Vendor's Commercial General Liability Insurance, Vendor shall indemnify and hold harmless City against any and all liability, claims, demands, damages, losses, and expenses, including attorneys' fees, in connection with or arising out of any damage or alleged damage to any of City's existing adjacent property, including personal property, that may arise from the performance of the Work, to the extent caused by the negligent or intentionally wrongful acts or omissions of Vendor, Subcontractor, Supplier, Subsubcontractor, or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable.
- g. RISK OF LOSS: Except to the extent a loss is covered by applicable insurance, risk of loss from damage to the Work shall be upon the Party obtaining and maintaining the Builder's Risk until the Date of Final Completion.
- h. ADDITIONAL GENERAL LIABILITY COVERAGE: City shall require Vendor to purchase and maintain additional liability coverage. Vendor shall provide:
  - i. Additional Insured. City shall be named as an additional insured on Vendor's Commercial General Liability (CGL) specified, for on-going operations and completed operations, excess/umbrella liability, commercial automobile liability, and any required pollution liability, but only with respect to liability for bodily injury, property damage, or personal and advertising injury to the extent caused by the negligent acts or omissions of Vendor, or those acting on Vendor's behalf, in the performance of Vendor's work for Owner at the Worksite. The insurance of the Vendor and its Subcontractors (both primary and excess) shall be primary to any insurance available to the Additional Insureds. Any insurance available to the Additional Insureds shall be excess and non-contributory.
  - ii. OCP. Vendor shall provide an Owners' and Contractors' Protective Liability Insurance ("OCP") policy with limits equal to the limits on CGL specified, or limits as otherwise required by Owner.
- i. Any documented additional cost in the form of a surcharge associated with procuring the additional liability coverage in accordance with this subsection shall be paid by VENDOR. Before commencing the Work, Vendor shall provide either a copy of the OCP policy, or a certificate and endorsement evidencing that City has been named as an additional insured, as applicable.
- i. ROYALTIES, PATENTS, AND COPYRIGHTS: Vendor shall pay all royalties and license fees which may be due on the inclusion of any patented or copyrighted materials, methods, or systems selected by Vendor and incorporated in the Work. Vendor shall defend, indemnify, and hold City harmless from all suits or claims for infringement of any patent rights or copyrights arising out of such

selection.

- j. **PROFESSIONAL LIABILITY INSURANCE:** To the extent Vendor is required to procure design services, Vendor shall require its design professionals to obtain a commercial professional liability insurance for claims arising from the negligent performance of professional services under this Agreement, with a company reasonably satisfactory to City, including coverage for all professional liability caused by any consultants to Vendor's design professional, written for not less than one million US dollars (\$1,000,000) per claim and in the aggregate. Vendor's design professional shall pay the deductible. The Professional Liability Insurance shall contain a retroactive date providing prior acts coverage sufficient to cover all Services performed by the Constructor's design professional for this Project. Coverage shall be continued in effect for the entire warranty period.

**21. Professional Responsibility:** VENDOR will exercise reasonable skill, care, and diligence in the performance of services and will carry out its responsibilities in accordance with customarily accepted professional practices. CITY OF FAYETTEVILLE will promptly report to VENDOR any defects or suspected defects in services of which CITY OF FAYETTEVILLE becomes aware, so VENDOR can take measures to minimize the consequences of such a defect. CITY OF FAYETTEVILLE retains all remedies to recover for its damages caused by any negligence of VENDOR.

**22. Responsibility of the City of Fayetteville**

- a. CITY OF FAYETTEVILLE shall, within a reasonable time, so as not to delay the services of VENDOR:
- i. Provide full information as to the requirements for the Project.
  - ii. Assist **Legacy** by placing at **Legacy's** disposal all available information pertinent to the assignment including previous reports and any other data relative thereto.
  - iii. Assist **Legacy** in obtaining access to property reasonably necessary for **Legacy** to perform its services.
  - iv. Examine all studies, reports, sketches, cost opinions, proposals, and other documents presented by **Legacy** and render in writing decisions pertaining thereto.
  - v. Review all documents and provide written comments to **Legacy** in a timely manner.
  - vi. The City of Fayetteville Facilities Director is the project representatives with respect to the services to be performed under this Agreement. The Facilities Director Representative shall have complete authority to transmit instructions, receive information, interpret and define policies and decisions with respect to materials, equipment, elements and systems to be used in the Project, and other matters pertinent to the services covered by this Agreement.

**23. Cost Opinions and Projections:** Cost opinions and projections prepared by the **Legacy** relating to construction costs and schedules, operation and maintenance costs, equipment characteristics and performance, cost estimating, and operating results are based on **Legacy's** experience, qualifications, and judgment as a **Legacy** professional.

**24. Period of Service:** This Agreement will become effective upon the first written notice by CITY OF FAYETTEVILLE authorizing services hereunder.

- a. The provisions of this Agreement have been agreed to in anticipation of the orderly progress of the Project through completion of the services stated in the Agreement. VENDOR shall proceed with providing the authorized services immediately upon receipt of written authorization from CITY OF FAYETTEVILLE. Said authorization shall include the scope of the services authorized and the time in which the services are to be completed.

**25. Termination:**

- a. This Agreement may be terminated in whole or in part in writing by either party in the event of substantial failure by the other party to fulfill its obligations under this Agreement through no fault of the terminating party, provided that no termination may be effected unless the other party is given:
  - i. Not less than ten (10) calendar days written notice (delivered by certified mail, return receipt requested) of intent to terminate,
  - ii. An opportunity for consultation with the terminating party prior to termination.
- b. This Agreement may be terminated in whole or in part in writing by CITY OF FAYETTEVILLE for its convenience, provided that VENDOR is given:
  - i. Not less than ten (10) calendar days written notice (delivered by certified mail, return receipt requested) of intent to terminate,
  - ii. An opportunity for consultation with the terminating party prior to termination.
- c. If termination for default is effected by CITY OF FAYETTEVILLE, an equitable adjustment in the price provided for in this Agreement shall be made, but
  - i. No amount shall be allowed for anticipated profit on unperformed services or other work,
  - ii. Any payment due to VENDOR at the time of termination may be adjusted to cover any additional costs to CITY OF FAYETTEVILLE because of VENDOR's default.
- d. If termination for default is effected by VENDOR, or if termination for convenience is effected by CITY OF FAYETTEVILLE, the equitable adjustment shall include a reasonable profit for services or other work performed. The equitable adjustment for any termination shall provide for payment to VENDOR for services rendered and expenses incurred prior to the termination, in addition to termination settlement costs reasonably incurred by VENDOR relating to commitments which had become firm prior to the termination.
- e. Upon receipt of a termination action under Paragraphs above, VENDOR shall:
  - i. Promptly discontinue all affected work (unless the notice directs otherwise),
  - ii. Deliver or otherwise make available to CITY OF FAYETTEVILLE all data, drawings, specifications, reports, estimates, summaries and such other information and materials as may have been accumulated by VENDOR in performing this Agreement, whether completed or in process.
- f. Upon termination under sections above CITY OF FAYETTEVILLE may take over the work and may award another party an agreement to complete the work under this Agreement.
- g. If, after termination for failure of VENDOR to fulfill contractual obligations, it is determined that VENDOR had not failed to fulfill contractual obligations, the termination shall be deemed to have been for the convenience of CITY OF FAYETTEVILLE. In such event, adjustments of the agreement price shall be made as provided in this agreement.

## 26. Delays

- a. In the event the services of **Legacy** are suspended or delayed by CITY OF FAYETTEVILLE, or by other events beyond VENDOR's reasonable control, VENDOR shall be entitled to additional compensation and time for reasonable documented costs incurred by VENDOR in temporarily closing down or delaying the Project.
- b. In the event the services are suspended or delayed by VENDOR, CITY shall be entitled to compensation and time for reasonable costs incurred in temporarily closing down or delaying the Project.

## 27. Rights and Benefits



- a. **Legacy's** services shall be performed solely for the benefit of CITY OF FAYETTEVILLE and not for the benefit of any other persons or entities.

## 28. Dispute Resolution

- a. **Scope of Paragraph:** The procedures of this Paragraph shall apply to any and all disputes between CITY OF FAYETTEVILLE and VENDOR which arise from, or in any way are related to, this Agreement, including, but not limited to the interpretation of this Agreement, the enforcement of its terms, any acts, errors, or omissions of CITY OF FAYETTEVILLE or VENDOR in the performance of this Agreement, and disputes concerning payment.
- b. **Exhaustion of Remedies Required:** No action may be filed unless the parties first negotiate. If timely Notice is given as described in this agreement, but an action is initiated prior to exhaustion of these procedures, such action shall be stayed, upon application by either party to a court of proper jurisdiction, until the procedures in this agreement have been complied with.
- c. **Notice of Dispute**
  - i. For disputes arising prior to the making of final payment promptly after the occurrence of any incident, action, or failure to act upon which a claim is based, the party seeking relief shall serve the other party with a written Notice.
  - ii. For disputes arising within one year after the making of final payment, CITY OF FAYETTEVILLE shall give VENDOR written Notice at the address listed in this agreement within thirty (30) calendar days after occurrence of any incident, accident, or first observance of defect or damage. In both instances, the Notice shall specify the nature and amount of relief sought, the reason relief should be granted, and the appropriate portions of this Agreement that authorize the relief requested.
  - iii. **Negotiation:** Within seven (7) calendar days of receipt of the Notice, the Project Managers for CITY OF FAYETTEVILLE and VENDOR shall confer in an effort to resolve the dispute. If the dispute cannot be resolved at that level, then, upon written request of either side, the matter shall be referred to the President of VENDOR, and the Mayor of CITY OF FAYETTEVILLE or his or her designee. These officers shall meet at the Project Site or such other location as is agreed upon within 30 calendar days of the written request to resolve the dispute.

29. **Sufficient Funds:** The CITY represents to have sufficient funds or the means of obtaining funds to remit payment to **Legacy** for services rendered by **Legacy**. All parties agree if funding should become insufficient to complete the project, VENDOR shall be notified in a timely manner.

## 30. Publications:

- a. Recognizing the importance of professional services on the part of VENDOR's employees and the importance of VENDOR's public relations, VENDOR may prepare publications, such as technical papers, articles for periodicals, promotional materials, and press releases, in electronic or other format, pertaining to VENDOR's services for the Project. Such publications will be provided to CITY OF FAYETTEVILLE in draft form for CITY OF FAYETTEVILLE's advance review. CITY OF FAYETTEVILLE shall review such drafts promptly and provide CITY OF FAYETTEVILLE's comments to VENDOR, CITY OF FAYETTEVILLE may require deletion of proprietary data or confidential information from such publications, but otherwise CITY OF FAYETTEVILLE will not unreasonably withhold approval. Approved materials may be used in a variety of situations and do not require additional review or approval for each use. The cost of VENDOR's activities pertaining to any such publication shall be for VENDOR's account.

## 31. Indemnification:



- a. The CITY requires the VENDOR to indemnify, defend and hold harmless the CITY OF FAYETTEVILLE for any loss caused by negligence and from and against any and all loss where loss is caused or incurred or alleged to be caused or incurred in whole or in part as a result of the negligence or other actionable fault of the VENDOR, or their employees, agents, Subcontractors, sub consultant and Suppliers of the VENDOR.

### 32. Ownership of Documents:

- a. All documents provided by CITY OF FAYETTEVILLE including original drawings, CAD drawings, estimates, field notes, and project data are and remain the property of CITY OF FAYETTEVILLE. Vendor may retain reproduced copies of drawings and copies of other documents.
- b. Engineering and architectural documents, computer models, drawings, specifications and other hard copy or electronic media prepared by Vendor as part of the Services shall become the property of CITY OF FAYETTEVILLE when VENDOR has been compensated for all Services rendered, provided, however, that Vendor shall have the unrestricted right to their use. Vendor shall, however, retain its rights in its standard drawings details, specifications, databases, computer software, and other proprietary property. Rights to intellectual property developed, utilized, or modified in the performance of the Services shall remain the property of Vendor.
- c. Any files delivered in electronic medium may not work on systems and software different than those with which they were originally produced. Vendor makes no warranty as to the compatibility of these files with any other system or software. Because of the potential degradation of electronic medium over time, in the event of a conflict between the sealed original drawings/hard copies and the electronic files, the sealed drawings/hard copies will govern.

### 33. Additional Responsibilities of VENDOR:

- a. Review, approval, or acceptance of design drawings, specifications, reports and other services furnished hereunder by CITY shall not in any way relieve Vendor of responsibility for the technical adequacy of the work. Review, approval or acceptance of, or payment for any of the services by CITY shall not be construed as a waiver of any rights under this Agreement or of any cause of action arising out of the performance of this Agreement.
- b. Vendor shall be and shall remain liable, in accordance with applicable law, for all damages to CITY OF FAYETTEVILLE caused by Vendor's negligent performance, except beyond the Vendor's normal standard of care, of any of the services furnished under this Agreement, and except for errors, omissions or other deficiencies to the extent attributable to CITY OF FAYETTEVILLE or CITY OF FAYETTEVILLE-furnished data.
- c. Vendor's obligations under this clause are in addition to Vendor's other express or implied assurances under this Agreement or State law and in no way diminish any other rights that CITY OF FAYETTEVILLE may have against VENDOR for faulty materials, equipment, or work.

### 34. Audit and Access to Records:

- a. Vendor's shall maintain books, records, documents and other evidence directly pertinent to performance on work under this Agreement in accordance with generally accepted accounting principles and practices consistently applied in effect on the date of execution of this Agreement.
- b. Vendor's shall also maintain the financial information and data used by Vendor's in the preparation of support of the cost submission required for any negotiated agreement or change order and send to CITY OF FAYETTEVILLE a copy of the cost summary submitted. CITY OF FAYETTEVILLE, the State or any of their authorized representatives shall have access to all such books, records, documents and other evidence for the purpose of inspection, audit and copying during normal business hours. VENDOR will provide proper facilities for such access and inspection.

- c. Records shall be maintained and made available during performance on assisted work under this Agreement and until three years from the date of final payment for the project. In addition, those records which relate to any controversy arising out of such performance, or to costs or items to which an audit exception has been taken, shall be maintained and made available until three years after the date of resolution of such appeal, litigation, claim or exception.
- d. This right of access clause (with respect to financial records) applies to:
  - i. Negotiated prime agreements
  - ii. Negotiated change orders or agreement amendments affecting the price of any formally advertised, competitively awarded, fixed price agreement
  - iii. Agreements or purchase orders under any agreement other than a formally advertised, competitively awarded, fixed price agreement. However, this right of access does not apply to a prime agreement, lower tier sub agreement or purchase order awarded after effective price competition, except:
    - 1. With respect to record pertaining directly to sub agreement performance, excluding any financial records of VENDOR;
    - 2. If there is any indication that fraud, collusion, gross abuse or corrupt practices may be involved;
    - 3. If the sub agreement is terminated for default or for convenience.

**35. Covenant Against Contingent Fees:**

- a. VENDOR warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon an agreement of understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by VENDOR for the purpose of securing business. For breach or violation of this warranty, CITY OF FAYETTEVILLE shall have the right to annul this Agreement without liability or at its discretion, to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

**36. Gratuities:**

- a. If CITY OF FAYETTEVILLE finds after a notice and hearing that VENDOR or any of VENDOR agents or representatives, offered or gave gratuities (in the form of entertainment, gifts or otherwise) to any official, employee or agent of CITY OF FAYETTEVILLE or related third party contractor associated with this project, in an attempt to secure an agreement or favorable treatment in awarding, amending or making any determinations related to the performance of this Agreement, CITY OF FAYETTEVILLE may, by written notice to VENDOR terminate this Agreement. CITY OF FAYETTEVILLE may also pursue other rights and remedies that the law or this Agreement provides. However, the existence of the facts on which CITY OF FAYETTEVILLE bases such finding shall be in issue and may be reviewed in proceedings under the Remedies clause of this Agreement.
- b. The CITY may pursue the same remedies against VENDOR as it could pursue in the event of a breach of the Agreement by VENDOR. As a penalty, in addition to any other damages to which it may be entitled by law, CITY OF FAYETTEVILLE may pursue exemplary damages in an amount, as determined by CITY, which shall be not less than three nor more than ten times the costs VENDOR incurs in providing any such gratuities to any such officer or employee.

**37. Clarification and Understanding of all parties:**

- a. The citizens of Fayetteville voted to authorize the Fayetteville City Council to issue bonds to fund this project.
- b. All parties agree and acknowledge that all funds derived from the City's sale of the bonds may only be spent or used for purposes authorized by the City voters and applicable state laws.

IN WITNESS WHEREOF, CITY OF FAYETTEVILLE, ARKANSAS by and through its Mayor, and LEGACY CONSTRUCTION MANAGEMENT, INC. through its authorized officer have made and executed this Agreement as of the day and year first above written.

CITY OF FAYETTEVILLE, ARKANSAS

LEGACY CONSTRUCTION MANAGEMENT, INC.

By: \_\_\_\_\_  
Lioneld Jordan, Mayor

By: Steve Collier  
Steve Collier, President

ATTEST:

By: \_\_\_\_\_  
Kara Paxton, City Clerk

Date Signed: \_\_\_\_\_

Date Signed: 1-14-2022