



MEMORANDUM

To: Mayor and Members of the City Council

From: Reginald Goodson, City Manager
Dwan Bell, Public Utilities Director
Jon Hawley, Grants Administrator

Date: May 23, 2025

Re: Consideration - Tentative Award for Construction, Ray Street Water and Sewer Replacement Project

BACKGROUND:

City staff are working to get the long-awaited Ray Street Water and Sewer Replacement Project underway; this project's available funding consists of \$929,725 in Community Development Block Grant-Infrastructure awards. As recently reported to the Council, we solicited construction bids in two advertisements this spring, and received one bid, from McPherson Enterprises Plumbing and Trenching, of Elizabeth City, for \$1,046,550.16. This exceeds our available funding by \$116,825.16, and we are working to formally amend our project to increase our CDBG-I awards accordingly.

The City Council held a required public hearing on these amendments on May 12, 2025, and approved submitting them. Pending state approval, City staff wish to request the Council consider a *tentative* award of a construction contract to McPherson.

ANALYSIS:

The proposed, tentative award of construction to McPherson would be contingent on all necessary state approvals, including awarding and releasing the additional funding needed. This action is optional but advantageous, because it could help City staff "lock in" McPherson's bid slightly sooner. His bid was only good for 60 days from April 10, 2025, or until June 9, 2025. Though McPherson has not yet indicated any price adjustments will be necessary, we wish to avoid or minimize that risk as much as possible.

STAFF RECOMMENDATION:

By motion: tentatively award a construction contract to McPherson Enterprises for \$1,046,550.16 for the Ray Street Water and Sewer Replacement Project, contingent upon all necessary state approvals and release of sufficient funds.

**NORTH CAROLINA
CITY OF ELIZABETH CITY**

SERVICE CONTRACT

THIS CONTRACT is made, and entered into this the ____ day of _____, 2023, by and between the **CITY of ELIZABETH CITY**, a political subdivision of the State of North Carolina, (hereinafter referred to as "CITY"), and _____ a corporation duly authorized to do business in the state of North Carolina, (hereinafter referred to as "CONTRACTOR").

For and in consideration of mutual promises to each as herein after set forth, the parties hereto do mutually agree as follows:

- 1. SCOPE OF SERVICES.** CONTRACTOR hereby agrees to provide the services and/or materials under this contract pursuant to the provisions and specifications identified in "Attachment 1" (hereinafter collectively referred to as "Services"). Attachment 1, **the Request for Proposals, the Bid and Memorandum**, is hereby incorporated herein and made a part of this contract. Time is of the essence with respect to all provisions of this contract that specify a time for performance.

The CITY will perform on-going contract monitoring to ensure that the terms of this contract are complied with. CONTRACTOR agrees to cooperate with the CITY in its monitoring process and provide documentation and/or information requested during the term of this Agreement for the purpose of monitoring the services provided by CONTRACTOR.

- 2. TERM OF CONTRACT.** The Term of this contract for services is from _____ to _____ unless sooner completed or terminated as provided herein.
- 3. PAYMENT TO CONTRACTOR.** CONTRACTOR shall receive from CITY an amount not to exceed _____ as full compensation for the provision of Services. CITY agrees to pay CONTRACTOR at the rates specified for Services performed to the satisfaction of the CITY, in accordance with this contract, and Attachment 1. Unless otherwise specified, CONTRACTOR shall submit an itemized invoice to CITY by the end of each month during which Services are performed. A Purchase Order number may be assigned to encumber the funds associated with this contract and must appear on all invoices and correspondence mailed to the CITY. Payment will be processed within 30 days of receipt pending approval of the invoice by CITY.
- 4. INDEPENDENT CONTRACTOR.** CITY and CONTRACTOR agree that CONTRACTOR is an independent contractor and shall not represent itself as an agent or employee of CITY for any purpose in the performance of CONTRACTOR's duties under this Contract. Accordingly, CONTRACTOR shall be responsible for payment of all federal, state and local taxes as well as business license fees arising out of CONTRACTOR's activities in accordance with this Contract. For purposes of this contract taxes shall include, but not be limited to, Federal and State Income, Social Security and Unemployment Insurance taxes.

CONTRACTOR, as an independent contractor, shall perform the Services required hereunder in a professional manner and in accordance with the standards of applicable professional organizations and licensing agencies.

- 5. INDEMNIFICATION.** To the fullest extent permitted by laws and regulations, CONTRACTOR shall indemnify and hold harmless the CITY and its officials, agents, and employees from and against all claims, damages, losses, and expenses, direct, indirect, or consequential (including but not limited to fees and charges of engineers or architects, attorneys, and other professionals and costs related to court action or mediation) arising out of or resulting from CONTRACTOR's performance of this Contract or the actions of the CONTRACTOR or its officials, employees, or subcontractors under this Contract or under contracts entered into by the CONTRACTOR in connection with this Contract. This indemnification shall survive the termination of this Contract.

In claims against any person or entity indemnified under this provision by an employee of the CONTRACTOR, a subcontractor, an employee of a subcontractor, or an agent of the CONTRACTOR or a subcontractor, the indemnification obligation under this provision shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the CONTRACTOR or a subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

6. **INSURANCE.** CONTRACTOR shall procure and maintain for the duration of the contract the following insurance coverage from an insurance company(s) possessing a rating of A-VII or higher from the A.M. Best Company and licensed to do business in North Carolina. All of the policies required of the CONTRACTOR shall contain a waiver of subrogation provision to waive all rights of recovery under subrogation or otherwise against the CITY. In the event CONTRACTOR'S Insurance Policy or Certificate of Insurance conflicts with the aforesaid language concerning "waiver of subrogation" this contract shall govern. CONTRACTOR shall advise the CITY of any cancellation, non-renewal, or material change in any policy within ten (10) days of notification of such action and provide updated certificates of insurance evidencing renewals within fifteen (15) days of the expiration of any previous insurance coverage. CONTRACTOR'S insurance shall be primary and any insurance or self-funded liability programs maintained by the CITY shall not contribute with respect to the CONTRACTOR's insurance. CITY shall be listed as an additional insured on any Insurance Policy or Certificate of Insurance of the CONTRACTOR. In the event CONTRACTOR'S Insurance Policy or Certificate of Insurance conflicts with the aforesaid language concerning "additional insured" this contract shall govern.

6.1 Commercial General Liability: CONTRACTOR shall provide coverage on an "occurrence" basis, including products and completed operations, property damage, bodily injury, and personal & advertising injury with limits no less than \$1,000,000 per occurrence and \$3,000,000 aggregate.

6.2 Commercial Automobile Liability: CONTRACTOR shall provide coverage covering any auto with limit not less than \$1,000,000 per accident for bodily injury and property damage.

6.3 Worker's Compensation and Employers Liability: as required by The State of North Carolina, with statutory limits, and Employers Liability Insurance with a limit of no less than \$1,000,000 per occurrence.

6.4 Performance and Payment Bonds: Contractor to provide 100% Payment and Performance bonds before initiating work by surety company.

By requiring insurance herein, the CITY does not represent that coverage and limits will necessarily be adequate to protect CONTRACTOR, and such coverage and limits shall not be deemed as a limitation on CONTRACTOR's liability under the indemnities granted to the CITY in this Contract. CONTRACTOR shall provide the CITY a valid certificate of insurance, in advance of the performance of any work, exhibiting coverage required. CONTRACTOR shall require and verify that all subcontractors maintain insurance meeting all the requirements stated herein.

The failure of the CITY at any time to enforce the insurance provisions, to demand such certificates of insurance, or to identify a deficiency shall not constitute a waiver of those provisions, nor reduce obligations of the CONTRACTOR to maintain such insurance or to meet its obligations under the indemnification provisions. Notwithstanding the foregoing, nothing contained in this section shall be deemed to constitute a waiver of the governmental immunity of the CITY, which immunity is hereby reserved to the CITY.

7. TERMINATION.

7.1. **EVENT OF DEFAULT.** Any one or more of the following acts or omissions of the Contractor shall constitute an Event of Default hereunder:

- a. Failure to perform the Services satisfactorily or on schedule,

- b. Failure to submit any report required hereunder; and/or
- c. Failure to perform any other covenant, term, or condition of this Agreement.

Upon the occurrence of an Event of Default, the City may take one or more or all of the following actions:

1. Give Contractor written Notice of the Event of Default, specifying the Event of Default and requiring it to be remedied within, in the absence of greater or lesser specification of time, seven (7) calendar days from the date of the notice; and if the Event of Default is not timely remedied, terminate the agreement, effective two (2) days after giving the Contractor written Notice of Termination; and/or
2. Deduct any and all expenses incurred by the City for damages caused by the Contractor's Event of Default; and/or
3. Treat the agreement as breached and pursue any of its remedies at law or in equity, or both, including damages and specific performance.

7.2 TERMINATION FOR CONVENIENCE. This Contract may be terminated, without cause, by either party upon thirty (30) days written notice to the other party. This termination notice period shall begin upon receipt of the Notice of Termination.

Termination of this Contract, under either section 7.1 or 7.2, shall not form the basis of any claim for loss of anticipated profits by either party.

8. **CITY NOT RESPONSIBLE FOR EXPENSES.** CITY shall not be liable to CONTRACTOR for any expenses paid or incurred by CONTRACTOR, unless otherwise agreed in writing.
9. **EQUIPMENT.** CONTRACTOR shall supply, at its sole expense, all equipment, tools, materials, and/or supplies required to provide Services hereunder, unless otherwise agreed in writing.
10. **COMPLIANCE WITH LAWS.** CONTRACTOR shall abide by all statutes, rules, regulations, laws, and executive orders Federal, State and Local as they relate to, but are not limited to, (i) services in general, (ii) payment of employees, subcontractors and agents, (iii) the Fair Labor Standards Act and (iv) the Wage and Hour Division. In the event CONTRACTOR is determined by the final order of a court or appropriate agency to be in violation of any Federal, State or Local statute, rule, regulation, law or executive order or this provision, this Contract may be canceled, terminated or suspended in whole or in part by CITY and CONTRACTOR may be declared ineligible for further CITY contracts.
11. **HEALTH AND SAFETY.** CONTRACTOR shall be responsible for initiating, maintaining and supervising all safety precautions and programs required by OSHA and all other regulatory agencies while providing Services under this Contract.
12. **IRAN DIVESTMENT ACT CERTIFICATION. (Applicable only to contracts/agreements valued at \$1,000.00 or more).** CONTRACTOR by signing/executing this contract certifies that as of the date of this contract CONTRACTOR is not on the Final Divestment List as created by the State Treasurer pursuant to North Carolina General Statute 147-86.58 and in compliance with the requirements of the Iran Divestment Act and North Carolina General Statute 147-86.65. CONTRACTOR shall not utilize in the performance of this contract any subcontractor that is identified on the Final Divestment List.
13. **AUDIT RIGHTS.** For all Services being provided hereunder, CITY shall have the right to inspect, examine, and make copies of any and all books, accounts, invoices, records and other writings relating to the performance of the Services. Audits shall take place at times and locations mutually agreed upon by both parties. Notwithstanding the foregoing, CONTRACTOR must make the materials to be audited available within one (1) week of the request for them.

14. DISPUTE RESOLUTION PROCEDURE. To prevent disputes and litigation, it is agreed by the parties that any claim or dispute between CITY and the CONTRACTOR, arising from this Agreement or the services and/or materials being provided by the CONTRACTOR, shall be sent to the City of Elizabeth City Manager who shall appoint a qualified mediator to address the issue. Such request shall be submitted to the City Manager in writing within ten (10) days of the claim or dispute. Upon receipt of a timely written claim, the Manager, or his designee, shall notify the Mediator who will conduct a mediation and notify the CONTRACTOR in writing of the decision within forty five (45) calendar days from the date of the submission of the claim or dispute, unless the Mediator requires additional time to gather information or allow the parties to provide additional information. The Mediator's orders, decisions and decrees shall be non-binding. Mediation, pursuant to this provision, shall be a pre-condition to initiating litigation concerning the dispute. During the pendency of any dispute and after a determination thereof, parties to the dispute shall act in good faith to mitigate any potential damages including utilization of schedule changes and alternate means of providing services and/or materials. The costs of mediation shall be divided equally between parties to the dispute.

The mediation session shall be private and shall be held in Elizabeth City, North Carolina. Mediation under this provision shall not be the cause for a delay of services and/or materials being provided which is the focus of the dispute.

If the disputed issue cannot be resolved in mediation or either party disagrees with the results of the mediation, the parties may seek resolution in the General Court of Justice in the County of Pasquotank and the State of North Carolina. If a party fails to comply in strict accordance with the requirements of this provision, the non-complying party specifically waives all of its rights provided hereunder, including its rights and remedies under State law.

15. EXISTENCE. CONTRACTOR warrants that it is a corporation or otherwise legal entity duly organized, validly existing, and in good standing under the laws of the State of North Carolina and is duly qualified to do business in the State of North Carolina and has full power and authority to enter into and fulfill all the terms and conditions of this contract.

16. CORPORATE AUTHORITY. By execution hereof, the person signing for CONTRACTOR below certifies that he/she has read this contract and that he/she is duly authorized to execute this contract on behalf of the CONTRACTOR.

17. SUCCESSORS AND ASSIGNS. CONTRACTOR shall not assign its interest in this Contract without the written consent of CITY. CONTRACTOR has no authority to enter into contracts on behalf of CITY.

18. NOTICES. All notices which may be required by this contract or any rule of law shall be effective when received by certified mail sent to the following addresses:

**CITY OF ELIZABETH CITY
ATTN: PURCHASING DEPARTMENT
PO BOX 347
ELIZABETH CITY, NC 27907-0347**

24. HEADINGS. The subject headings of the sections are included for purposes of convenience only and shall not affect the construction or interpretation of any of its provisions. This contract shall be deemed to have been drafted by both parties and no interpretation shall be made to the contrary.

25. GOVERNING LAW. This Contract shall be governed by and in accordance with the laws of the State of North Carolina. All actions relating in any way to this Contract shall be brought in the General Court of Justice in the County of Pasquotank and the State of North Carolina.

26. ENTIRE CONTRACT. This contract, including Attachment 1, shall constitute the entire understanding between CITY and CONTRACTOR and shall supersede all prior understandings and agreements relating to the subject matter hereof and may be amended only by written mutual agreement of the parties.

IN TESTIMONY WHEREOF, the parties have expressed their agreement to these terms by causing this Service Contract to be executed by their duly authorized officer or agent.

CITY OF ELIZABETH CITY

Name and Title

This instrument has been pre-audited in the manner required by the Local Government Budget and Fiscal Budget Control Act.

City of Elizabeth City, Chief Financial Officer

CONTRACTOR

By: _____
Authorized Representative

Print Name/Title: _____

ATTACHMENT 1 to follow