

RESOLUTION R- 43 -17

**A RESOLUTION AUTHORIZING THE EXECUTION OF AN AGREEMENT WITH
ENGINEERING RESOURCE ASSOCIATES, INC., FOR ENGINEERING SERVICES
FOR DESIGN OF PARKING LOT RESURFACING**

WHEREAS, the City of Wheaton, DuPage County, Illinois is desirous to enter into an agreement for engineering services for design of parking lot resurfacing; and

WHEREAS, the City conducted a Request for Proposal process and received and reviewed two submittals for engineering services for design of parking lot resurfacing; and

WHEREAS, it is determined by the City that the proposal received from Engineering Resource Associates, Inc., meets the City's needs; and

WHEREAS, it is necessary for the City to enter into an agreement with Engineering Resource Associates, Inc., for the purpose of providing engineering services for design of parking lot resurfacing.

NOW, THEREFORE, BE IT RESOLVED by the Mayor and City Council of the City of Wheaton, Illinois that the Mayor is hereby authorized to execute and the City Clerk is hereby directed to attest to a professional services agreement between the City of Wheaton and Engineering Resource Associates, Inc., Warrenville, IL, for engineering services for design of parking lot resurfacing.

ADOPTED this 5th day of June 2017.



Mayor

ATTEST:



City Clerk

Roll Call Vote:

Ayes: Councilman Seuss
Councilman Barbier
Councilwoman Fitch
Councilman Prendiville
Mayor Gresk
Councilman Rutledge
Councilman Scalzo

Nays: None

Absent: None

Motion Carried Unanimously

This number must appear on
all invoices and documents
No. C 36951

CITY OF WHEATON, ILLINOIS
PROFESSIONAL SERVICES AGREEMENT
FOR

ERH # 170626-02

ENGINEERING SERVICES FOR DESIGN OF PARKING LOT RESURFACING

THIS AGREEMENT is made and entered into this 5th day of June, by and between the CITY OF WHEATON, an Illinois municipal corporation ("City") and Engineering Resource Associates, Inc., ("Consultant").

WHEREAS, the City has determined that it is reasonable, necessary, and desirable to engage the Consultant to furnish certain professional services in connection with Engineering Services for Design of Parking Lot Resurfacing consistent with the Request for Proposal which is attached hereto and incorporated herein as if fully set forth as Exhibit A; and

WHEREAS, Consultant has submitted a proposal for such services, which is attached hereto and incorporated herein as if fully set forth as Exhibit B, and represents that it has the necessary expertise and experience to furnish such services upon the terms and conditions set forth herein below.

NOW, THEREFORE, in consideration of the recitals and the mutual covenants, agreements, and conditions set forth in the Agreement, the parties agree as follows:

SECTION 1. SCOPE OF SERVICES.

A. **Recitals.** The recitals set forth above, including Exhibits A and B, are incorporated herein as substantive terms and conditions of this Agreement and represent the intent of the parties. Any inconsistency between the services as stated by the City in Exhibit A and the services as proposed by the Consultant in Exhibit B shall be controlled by the services as stated by the City, unless specifically waived in writing in the contrary to this Subsection 1A. Where this Agreement is inconsistent with any provision of Exhibit A or Exhibit B, this Agreement shall control.

B. **Retention and Services.** The City retains the Consultant to perform, and the Consultant agrees to perform, all necessary services to perform the work in connection with the services identified below ("Services"), which Services the Consultant shall provide pursuant to the terms and conditions of this Agreement:

Engineering Services for Design of Parking Lot Resurfacing Services as more fully described in the attached proposal, Exhibit B, which shall be considered contractual requirements that must be met by Consultant.

Consultant shall furnish all labor, materials, and equipment to provide and perform the Services.

C. **Reporting.** The Consultant shall regularly report to the City's Project Manager, or his designee, regarding the progress of the Services during the term of this Agreement.

D. **Time Of Performance.** The Consultant shall perform the Services as indicated in the attached proposal, Exhibit B.

E. **Additional Services.** The Consultant shall provide only the Services specified in this Agreement and its attached Exhibits. Additional services that are not part of the Services of this Agreement may be assigned subject to prior written approval or direction of the City. Payment for additional services shall be as mutually agreed upon by the parties before the commencement of any additional services. Any additional services shall be subject to the terms and conditions of this Agreement.

SECTION 2. COMPENSATION AND METHOD OF PAYMENT.

A. **Agreement Amount.** The total amount billed by the Consultant for the Services performed under this Agreement shall not exceed \$11,416.80, including reimbursable expenses, without the prior express written authorization of the City.

B. **Invoices and Payments.** The Consultant shall be paid as provided in Exhibit B. The Consultant shall submit invoices to the City containing sufficient detail of the Services performed to enable the City to properly evaluate the payout request. The City shall pay Consultant in accordance with the Illinois Local Government Prompt Payment Act.

C. **Unappropriated Funds.** The obligation of the City for payment to the Consultant is limited to the availability of funds appropriated in a current fiscal period, and continuation of this Agreement into a subsequent fiscal period is subject to the appropriation of funds, unless otherwise authorized by law.

D. **Taxes, Benefits, and Royalties.** The Agreement Amount includes all applicable federal, state and City taxes of every kind and nature applicable to the Services as well as all taxes, contributions, and premiums for unemployment insurance, old age or retirement benefits, pensions, annuities, or similar benefits and all costs, royalties, and fees arising from the use of, or the incorporation into, the Services, of patented or copyrighted equipment, materials, supplies, tools, appliances, devices, processes, or inventions. All claims or right to claim additional compensation by reason of the payment of any such tax, contribution, premium, costs, royalties, or fees is hereby waived and released by Consultant.

SECTION 3. REPRESENTATIONS OF CONSULTANT.

A. **Standard of Care.** The Consultant represents, certifies and warrants that it shall perform and complete the Services in a manner consistent with the level of care, skill, and diligence exercised by other recognized professional consultants under similar circumstances at the time the services are performed. The representations, certifications, and warranties expressed shall be in addition to any other representations, certifications, and warranties expressed in this Agreement, or expressed or implied by law, which are hereby reserved unto the City.

B. **Solvency.** The Consultant represents that it is financially solvent and has the necessary financial resources to perform the Services with the standard of care required under this Agreement.

C. **Key Project Personnel/Personnel.** The Key Project Personnel identified in Exhibit B shall be primarily responsible for carrying out the Services on behalf of the Consultant. The Key Project Personnel shall not be changed without the City's prior written approval. The Consultant shall provide all personnel necessary to complete the Services.

SECTION 4. INDEMNIFICATION; INSURANCE; LIABILITY

A. **Indemnification.** The Consultant shall, without regard to the availability or unavailability of any insurance, either of the City or of the Consultant, indemnify, save harmless, and defend the City, and its officials, directors, officers, employees, agents, and attorneys, in whole or in part from and against any and all lawsuits, claims, demands, damages, liabilities, losses, fines, judgments, settlements, penalties, costs, and expenses, including, but not limited to reasonable expert witness and attorneys' fees, as well as costs of litigation, that arise, or may be alleged to have arisen, out of or in connection with the Consultant's performance of or failure to perform, the Services or any part thereof, whether or not due or claimed to be due in whole or in part to the active, passive, or concurrent negligence or fault of the Consultant, except to the extent caused by the sole negligence of the City. The obligation on the part of the Consultant to defend, hold harmless, and indemnify the City shall survive the expiration or termination of this Agreement.

In the event that any claim for indemnification hereunder arises from the negligence or willful misconduct of both the Consultant and the City, the parties agree that any and all lawsuits, claims, demands, damages, liabilities, losses, fines,

judgments, settlements, penalties, costs, and expenses shall be apportioned between the parties on the basis of their comparative degrees of fault, except as otherwise herein provided.

B. Insurance. Contemporaneous with the Consultant's execution of this Agreement, the Consultant shall provide certificates and policies of insurance, all with coverages and limits acceptable to the City, and evidencing at least the minimum insurance coverages and limits as set forth by the City in Exhibit A to this Agreement.

C. No Personal Liability. No elected or appointed official, director, officer, agent or employee of the City shall be personally liable, in law or in contract, to the Consultant as the result of the execution, approval or attempted execution of this Agreement.

SECTION 5. CONFIDENTIAL INFORMATION.

A. Confidential Information. The term "Confidential Information" shall mean information in the possession or under the control of the City relating to the technical, business, or corporate affairs of the City; City property; user information, including, without limitation, any information pertaining to usage of the City's computer system, including and without limitation, any information obtained from server logs or other records of electronic or machine readable form; and the existence of, and terms and conditions of, this Agreement. City Confidential Information shall not include information that can be demonstrated: (i) to have been rightfully in the possession of the Consultant from a source other than the City prior to the time of disclosure of said information to the Consultant under this Agreement ("Time of Disclosure"); (ii) to have been in the public domain prior to the Time of Disclosure; (iii) to have become part of the public domain after the Time of Disclosure by a publication or by any other means except an unauthorized act or omission or breach of this Agreement on the part of the Consultant or the City; or (iv) to have been supplied to the Consultant after the Time of Disclosure without restriction by a third party who is under no obligation to the City to maintain such information in confidence.

B. No Disclosure of Confidential Information by the Consultant. The Consultant acknowledges that it shall, in performing the Services for the City under this Agreement, have access to or be directly or indirectly exposed to Confidential Information. The Consultant shall hold confidential all Confidential Information and shall not disclose or use such Confidential Information without express prior written consent of the City. The Consultant shall use reasonable measures at least as strict as those the Consultant uses to protect its own confidential information. Such measures shall include, without limitation, requiring employees and subcontractors of the Consultant to execute a non-disclosure agreement before obtaining access to Confidential Information.

SECTION 6. PROFESSIONAL SERVICES AGREEMENT GENERAL PROVISIONS.

A. Independent Contractor Status. The Consultant shall act as an independent contractor in providing and performing the Services. Nothing in, nor done pursuant to, this Agreement shall be construed (i) to create the relationship of principal and agent, employer and employee, partners, or joint venturers between the City and Consultant; or (ii) to create any relationship between the City and any subcontractor of the Consultant. Consultant is not in any way authorized to make any contract, agreement, or promise on behalf of the City, or to create any implied obligation on behalf of the City, and Contractor specifically agrees that it shall not do so. The City shall not have the authority to control the method or manner by which Contractor complies with the terms of this Agreement.

B. No Collusion. The Consultant represents and certifies that the Consultant is not barred from contracting with a unit of state or local government as a result of (i) a delinquency in the payment of any tax administered by the Illinois Department of Revenue unless the Consultant is contesting, in accordance with the procedures established by the appropriate revenue act, its liability for the tax, as set forth in 11-42.1-1 et seq. of the Illinois Municipal Code, 65 ILCS 5/11-42.1-1 et seq.; or (ii) a violation of either Section 33E-3 or Section 33E-4 of Article 33E of the Criminal Code of 1961, 720 ILCS 5/33E-1 et seq. The Consultant represents that the only persons, firms, or corporations interested in this Agreement as principals are those disclosed to the City prior to the execution of this Agreement, and that this Agreement is made without collusion with any other person, firm, or corporation. If at any time it shall be found that the Consultant has, in

procuring this Agreement, colluded with any other person, firm, or corporation, then the Consultant shall be liable to the City for all loss or damage that the City may suffer, and this Agreement shall, at the City's option, be null and void.

C. **Sexual Harassment Policy.** The Consultant certifies that it has a written sexual harassment policy in full compliance with Section 2-105(A)(4) of the Illinois Human Rights Act, 755 ILCS 5/2-105(A)(4).

D. **Patriot Act (USA Freedom Act) Compliance.** The Consultant represents and warrants to the City that neither it nor any of its principals, shareholders, members, partners, or affiliates, as applicable, is a person or entity named as a Specially Designated National and Blocked Person (as defined in Presidential Executive Order 13224) and that it is not acting, directly or indirectly for or on behalf of a Specially Designated National and Blocked Person. The Consultant further represents and warrants to the City that the Consultant and its principals, shareholders, members, partners, or affiliates, as applicable, are not directly or indirectly, engaged in, and are not facilitating, the transactions contemplated by this Agreement on behalf of any person or entity named as a Specially Designated National and Blocked Person. The Consultant hereby agrees to defend, indemnify and hold harmless the City, its corporate authorities, and all City elected or appointed officials, officers, employees, agents, representatives, engineers, and attorneys, from and against any and all claims, damages, losses, risks, liabilities, and expenses (including reasonable attorneys' fees and costs) arising from or related to any breach of the representations and warranties in this subsection.

E. **Term.** This Agreement shall become effective upon the latter of the date accepted and signed by the City and the date accepted and signed by the Consultant. It shall be in effect until the City determines that all of the Services under this Agreement are completed. A determination of completion shall not constitute a waiver of any rights or claims which the City may have or thereafter acquire with respect to any term or provision of this Agreement.

F. **Termination.** Notwithstanding any other provision hereof, the City may terminate this Agreement at any time upon fifteen (15) days prior written notice to the Consultant. In the event that this Agreement is so terminated, the City shall pay Consultant for the Services performed and reimbursable expenses actually incurred as of the effective date of termination, less any sums attributable, directly or indirectly, to Consultant's breach of this Agreement. The written notice required under this subsection shall be either (i) served personally during regular business hours; (ii) served by facsimile during regular business hours (iii) served by certified or registered mail, return receipt requested, addressed to the address listed at the end of this Agreement with postage prepaid and deposited in the United States mail or (iv) by e-mail sent to the Consultant's Key Project Personnel. Notice served personally, by facsimile transmission or e-mail shall be effective upon receipt, and notice served by mail shall be effective upon receipt as verified by the United States Postal Service. Consultant shall provide the City with its Key Project Personnel's e-mail address upon its execution of this Agreement.

G. **Default.** If it should appear at any time that the Consultant has failed or refused to prosecute, or has delayed in the prosecution of, the Services with diligence at a rate that assures completion of the Services in full compliance with the requirements of this Agreement, or has otherwise failed, refused, or delayed to perform or satisfy the Services or any other requirement of this Agreement ("**Event of Default**"), and fails to cure any such Event of Default within ten (10) business days after the Consultant's receipt of written notice of such Event of Default from the City, then the City shall have the right, without prejudice to any other remedies provided by law or equity, to pursue any one or more of the following remedies:

1. **Cure by Consultant.** The City may require the Consultant, within a reasonable time, to complete or correct all or any part of the Services that are the subject of the Event of Default; and to take any or all action necessary to bring the Consultant and the Services into compliance with this Agreement.

2. **Termination of Agreement by City.** The City may terminate this Agreement without liability for further payment of amounts due or to become due under this Agreement.

3. **Withholding of Payment by City.** The city may withhold from any payment, whether or not previously approved, or may recover from the Consultant, any and all costs, including attorneys' fees and administrative expenses, incurred by the City as the result of any Event of Default by the Consultant or as a result of actions taken by the City in response to any Event of Default by the Consultant.

H. **Compliance with Laws and Grants.** Consultant shall give all notices, pay all fees, and take all other action that may be necessary to ensure that the Services are provided, performed, and completed in accordance with all required governmental permits, licenses, or other approvals and authorizations that may be required in connection with providing, performing, and completing the Services, and will all applicable statutes, ordinances, rules, regulations, including without limitation:

- (i) the *Fair Labor Standards Act*; and
- (ii) any statutes regarding qualification to do business; and
- (iii) any statutes prohibiting discrimination because of, or requiring affirmative action based on race, creed, color, national origin, age, sex or other prohibited classification, as mandated by Presidential Executive Order No. 11,246, including without limitation:
 - (a) the *Americans with Disabilities Act* of 1990, 42 U.S.C. §§ 12101 et seq.;
 - and
 - (b) the *Illinois Human Rights Act*, 775 ILCS 5/1-101 et seq.

Consultant shall also comply with all conditions of any federal, state, or local grant received by Owner or Consultant with respect to this Agreement or the Services, including but not limited to compliance with the *Illinois Drug Free Workplace Act*, 30 ILCS 580/3 et seq.

Consultant shall be solely liable for any fines or civil penalties that are imposed by any governmental or quasi-governmental agency or body that may arise, or be alleged to have arisen, out of or in connection with Consultant's, or its subcontractors', performance of, or failure to perform, the Services or any part thereof.

Every provision of law required by law to be inserted into this Agreement shall be deemed to be inserted herein.

I. **News Releases.** The Consultant shall not issue any news releases or other public statements regarding the Services without prior approval from the City Manager.

J. **Work Products.** Designs, drawings, plans, specifications, photos, reports, information, observations, calculations, notes, studies, models, recommendation, and any other data or information, in any form, prepared, collected, or received by the Consultant in connection with any or all of the Services to be performed under this Agreement ("**Documents**") shall be and remain the exclusive property of the City. At the City's request, or upon termination of this Agreement, the Consultant shall cause the Documents to be promptly delivered to the City.

K. **Freedom of Information Act.** The Consultant shall, within four (4) business days of the City's request, provide any documents in the Consultant's possession related to this Agreement which the City is required to disclose to a requester under the Illinois Freedom of Information Act ("**FOIA**"). This provision is a material covenant of this Agreement. Consultant agrees to not apply any costs or charge any fees to the City regarding the procurement of records required pursuant to a FOIA request. Should Consultant request that the City utilize a lawful exemption under FOIA in relation to any FOIA request thereby denying that request, Consultant agrees to pay all costs connected therewith (such as reasonable attorneys' fees and witness fees, filing fees, and any other expenses) to defend the denial of the request. The defense shall include, but not be limited to, challenged or appealed denials of FOIA requests to either the Illinois Attorney General or a court of competent jurisdiction. Consultant agrees to defend, indemnify, and hold harmless the City, and agrees to pay all costs in connection therewith (such as reasonable attorneys' and witness fees, filing fees, and any other expenses) to defend any denial of a FOIA request by Consultant's request to utilize a lawful exemption to the City.

SECTION 7. GENERAL PROVISIONS.

A. **Integration.** The provisions set forth in this Agreement represent the entire agreement between the parties and supersede all prior agreements, promises, and representations, as it is the intent of the parties to provide for a complete integration within the terms of this Agreement.

B. **Amendment.** No amendment or modification to this Agreement shall be effective unless and until such amendment or modification is in writing, properly approved in accordance with applicable procedures, and executed.

C. **Assignment.** This Agreement, or any part, rights or interests hereof, may not be assigned by the City or by the Consultant to any other person, firm or corporation without the prior written consent of the other party.

D. **Binding Effect.** The terms of this Agreement shall bind and inure to the benefit of the parties hereto and their agents, successors, and assigns.

E. **Waiver.** Any failure of either the City or the Consultant to strictly enforce any term, right or condition of this Agreement, whether implied or express, shall not be construed as a waiver of such term, right or condition, nor shall it be deemed to or constitute a continuing waiver unless otherwise expressly provided in this Agreement.

F. **Severability.** If any term, covenant, condition, or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

G. **Time.** Time is of the essence in the performance of this Agreement.

H. **Governing Laws/Jurisdiction.** This Agreement shall be interpreted according to the internal laws, but not the conflict of laws rules, of the State of Illinois. Exclusive jurisdiction for any litigation involving any aspect of this Agreement shall be in the Eighteenth Judicial Circuit Court, DuPage County, Illinois.

I. **Force Majeure.** No party hereto shall be deemed to be in default or to have breached any provision of this Agreement as the result of any delay, failure in performance or interruption of services resulting directly or indirectly from acts of God, acts of civil or military disturbance, or war, which are beyond the control of such non-performing party.

J. **Headings.** The headings of the several paragraphs of this Agreement are inserted only as a matter of convenience and for reference and in no way are they intended to define, limit or describe the scope of intent of any provision of this Agreement, nor shall they be construed to affect in any manner the terms and provisions hereof or the interpretation or construction thereof.

K. **Rights Cumulative.** Unless expressly provided to the contrary in this Agreement, each and every one of the rights, remedies, and benefits provided by this Agreement shall be cumulative and shall not be exclusive of any other such rights, remedies and benefits allowed by law.

L. **Counterpart Execution.** This Agreement may be executed in several counterparts each of which, when executed, shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

M. **Notice.** Unless otherwise expressly provided in this Agreement, any notice or communication required or permitted to be given under this Agreement shall be in writing and shall be delivered (i) personally, (ii) by a reputable overnight courier, (iii) by certified mail, return receipt requested, and deposited in the U.S. Mail, postage prepaid, (iv) by facsimile, or (v) by electronic internet mail ("e-mail"). Facsimile notices shall be deemed valid only to the extent that they are (a) actually received by the individual to whom addressed and (b) followed by delivery of actual notice in the manner described in either (i), (ii), or (iii) above within three (3) business days thereafter at the appropriate address set forth below. E-mail notices shall be deemed valid and received by the addressee thereof when delivered by e-mail and (a) opened by the recipient on a business day at the address set forth below, and (b) followed by delivery of actual notice in the manner described in either (i), (ii), or (iii) above within three (3) business days thereafter at the appropriate address set forth below. Unless otherwise expressly provided in this Agreement, notices shall be deemed received upon the earlier of (a) actual receipt; or (b) one business day after deposit with an overnight courier as evidenced by a receipt of deposit; or (c) three business days following deposit in the U.S. mail, as evidenced by a return receipt. By notice complying with the requirements of this Subsection, each party shall have the right to change the address or the addressee, or both, for all

future notices and communications to such party, but no notice of a change of addressee or address shall be effective until actually received.

Notices and communications shall be addressed to, and delivered to as follows:

If to the Consultant:

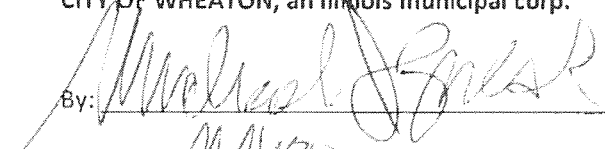
Engineering Resource Associates, Inc.
Attn: Brian Dusak
35701 West Avenue, Suite 150
Warrenville, IL 60555
Email: BDusak@eraconsultants.com
Fax #: 630-393-2151

If to the City:

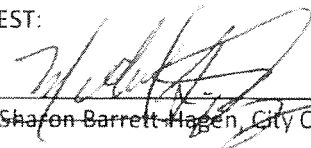
City of Wheaton
Attn: City Clerk
303 W. Wesley Street, Box 727
Wheaton, IL 60189-727
E-Mail: cityclerk@wheaton.il.us
Fax #: 630-260-2017

IN WITNESS WHEREOF, the parties have entered into this Agreement this 5th day of June, 2017.

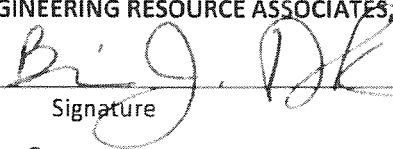
CITY OF WHEATON, an Illinois municipal corp.

By:  Date: 6/9/17
Title: MAYOR

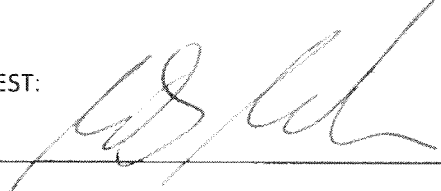
ATTEST:

By: 
Sharon Barrett Hagen, City Clerk

ENGINEERING RESOURCE ASSOCIATES, INC.

By:  Date: 6/27/17
Signature
Its: PROJECT MANAGER

ATTEST:

By: 
Title: PRINCIPAL

