

**RESOLUTION R-2018-16**

**A RESOLUTION AUTHORIZING THE EXECUTION OF AN AGREEMENT WITH LANDMARK CONTRACTORS, INC. FOR DOWNTOWN STREETScape PHASE ONE IMPROVEMENTS**

**WHEREAS**, the City of Wheaton, DuPage County, Illinois finds it reasonable and appropriate to enter into an agreement for downtown streetscape phase one improvements; and

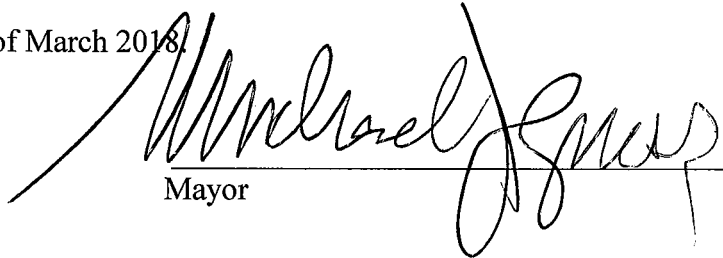
**WHEREAS**, the City conducted a bid process and received and reviewed four submittals for downtown streetscape phase one improvements; and

**WHEREAS**, it is determined by the City that the proposal received from Landmark Contractors, Inc., meets the City's needs; and

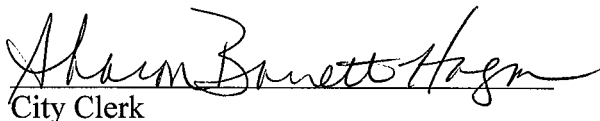
**WHEREAS**, it is necessary for the City to enter into an agreement with Landmark Contractors, Inc., for the purpose of providing downtown streetscape phase one improvements.

**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 an agreement between the City of Wheaton and Landmark Contractors, Inc., Huntley, Illinois, for downtown streetscape phase one improvements, incorporated herein as Exhibit 1.

ADOPTED this 5<sup>th</sup> day of March 2018.

  
\_\_\_\_\_  
Mayor

ATTEST:

  
\_\_\_\_\_  
City Clerk

Roll Call Vote:

Ayes: Councilman Prendiville  
Mayor Gresk  
Councilman Rutledge  
Councilman Scalzo  
Councilman Sues  
Councilman Barbier

Nays: None  
Absent: Councilwoman Fitch

Motion Carried Unanimously



**EXHIBIT 1**

This number must appear on the face of all invoices and documents related to this Agreement <b><u>No. C 37019</u></b>
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**CITY OF WHEATON, ILLINOIS  
2018 DOWNTOWN STREETScape—PHASE ONE  
AGREEMENT**

**THIS AGREEMENT** is made and entered this 5<sup>th</sup> day of March, 2018 by and between the **CITY OF WHEATON**, an Illinois municipal corporation (“**City**”), located at 303 W. Wesley Street, Wheaton, Illinois, 60187 and Landmark Contractors, Inc. (“**Contractor**”), located at 11916 W. Main Street, Huntley, Illinois, 60142.

WHEREAS, the City has determined that it is reasonable and appropriate to engage the Contractor to provide materials, labor, equipment, supervision and services required to provide streetscape improvements in the City of Wheaton (hereinafter, “**Downtown Streetscape—Phase One Project**”) consistent with the City’s Downtown Streetscape—Phase One Project Invitation to Bid package which is attached hereto and incorporated herein as if fully set forth as **Group Exhibit A**; and

WHEREAS, Contractor has submitted a cost proposal to provide the materials, labor, equipment, supervision and services required to provide streetscape improvements in the City of Wheaton, a copy of the Contractor’s proposal is attached hereto and incorporated herein as if fully set forth as **Group Exhibit B**, and Contractor represents that it has the necessary expertise and experience to provide streetscape improvements in the City, 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. PROJECT.**

**1.1 Recitals.** The recitals set forth above, including **Group Exhibit A** and **Group Exhibit 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 **Group Exhibit A** and the services as proposed by the Contractor in **Group Exhibit B** shall be controlled by the services as stated by the City in **Group Exhibit A**, unless specifically waived in writing. Where this Agreement is inconsistent with any provision of **Group Exhibit A** or **Group Exhibit B**, this Agreement shall control.

**1.2 Project Name.** The name of this project is **Downtown Streetscape—Phase One Project** (“**Project**”).

**1.3 Work To Be Done By Contractor.** For and in consideration of the payments indicated in the Bid hereto attached, the Contractor shall at its own cost and expense perform all the work and furnish all the labor, material, equipment and other property necessary to do, construct, install, and complete all the work and improvements required (hereinafter referred to as “**Work**”), all in full accordance with and in compliance with and as required by the hereinafter specified Contract Documents, including any and all Addenda for such work, and to do all other things required of the Contractor by the Contract Documents for such work.

**1.4 Contract Documents.** The Contract Documents listed here, all of which are as fully a part of this Agreement as if herein set out verbatim, or if not attached, as if attached hereto, constitute component parts of this Agreement:

1. This Agreement
2. Bid Invitation Package  
Notice  
Downtown Streetscape—Phase One Project Manual and drawings prepared by Primera Engineers, Ltd. for the City of Wheaton, dated January 19, 2018, in its entirety.
3. Contractor's Executed Bid Form
4. Contractor's Certificate of Insurance
5. Contractor's Executed Contractor Certifications
  - Certification of Compliance
  - Notice of Deviations
  - Contractor Certification Part I
  - Contractor Certification Part II
  - Equal Employment Opportunities Clause;
  - Drug Free Workplace Certification
6. Contract Drawings
7. All Bonds mentioned or referred to in the foregoing Documents
8. Any and all other Documents or Papers included or referred to in the foregoing Documents.
9. Any subsequent Written Amendments to any documents listed above and other documents amending, modifying, or supplementing the Contract Documents, which may be delivered or issued after the effective date of the Agreement and are not attached hereto.

all of which documents are on file with the City.

**1.5 Time of Performance.** The Contractor shall commence work within in ten (10) calendar days after receipt from the City of a formal Notice to Proceed and shall complete the Project by **August 30, 2018**. The Contractor agrees that time is of the essence.

**1.6 Independent Contractor Status.** The Contractor shall act as an independent contractor in providing and performing the Work. 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 Contractor; or (ii) to create any relationship between the City and any subcontractor of the Contractor. Contractor 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.

**1.7 Performance/Payment Bond.** Contractor shall furnish with the executed Agreement, a performance bond equal to one-hundred and ten percent (110%) of the full contract price, on forms approved by the City, as security for the faithful performance and completion of all the Contractor's obligations under the Contract Documents, and covering the payment of all materials used in the performance of this Agreement and for all labor and services performed under this Agreement. Such bond(s) shall be conditioned to save and keep harmless the City from any and all claims, demands, losses, suits, costs, expenses and damages which may be brought, sustained or recovered against the City by reason of any negligence, default or failure of the Contractor in building, constructing or completing the Work, and that the Work shall be free from all defects and remain in good order and

condition for one year from its completion and acceptance by the City; ordinary wear and tear, and damage resulting from accident or willful destruction excepted. Failure to provide the required bond(s) shall constitute a breach of Contractor's obligations under this Agreement. Each surety providing a bond must be licensed in Illinois and have an A.M. Best Company, Inc. financial strength rating of at least A-. All bonds signed by an agent must be accompanied by a certified copy of his or her authority to act. It shall be the duty of the Contractor to advise the surety or sureties of any Change Orders that result in an increase to Consultant's compensation and to ensure that the amounts of the bonds are updated to reflect and cover any such increases throughout the course of the Project. A copy of all bond certificates shall be attached to this Agreement and made a part hereof.

**1.8 Warranty and Maintenance Bond.** Any defective material, or workmanship, or any unfaithful or imperfect work, which may be discovered before the final acceptance of the Work and/or within one (1) year thereafter, shall be corrected immediately on the requirements of the City Engineer, without extra charge, notwithstanding that it may have been overlooked in the previous inspections and estimates. Failure to review construction shall not relieve the Contractor from any obligation to perform sound and reliable work as herein described.

To insure compliance with this provision, the Contractor shall provide the City with a Maintenance Bond for ten percent (10%) of the final contract amount. This Bond shall cover a period of one (1) year from the date of final acceptance, which shall be defined as the date of the final payment estimate. The Contractor warrants to the City that all materials and equipment furnished under the Contract will be new and, in the case of equipment, in good working order, that all materials, equipment and labor furnished under the Contract will be free from defects of any kind and shall be in strict conformance with the contract requirements. This warranty shall not be restricted by the limitations of any manufacturer's warranty. Work not conforming to these requirements, including substitutions nor properly approved and authorized, may be considered defective. Liability or refusal of a Subcontractor or equipment supplier responsible for the defective work or materials, to correct or replace same, shall not excuse the Contractor from performing under this warranty.

**1.9 Additional Work.** The Contractor shall provide only the Work specified in the Contract Documents. Additional work that is not part of the Work of the Contract Documents may be assigned subject to prior written approval or direction by the City. Payment for additional work shall be mutually agreed upon by the parties before the commencement of any additional work. Any additional work shall be subject to the terms and conditions of this Agreement.

## **SECTION 2. COMPENSATION AND METHOD OF PAYMENT.**

**2.1 Agreement Amount.** The total amount billed by the Contractor for the Work performed for the Project under this Services Agreement shall not exceed \$4,541,000, including reimbursable expenses, without the prior express written authorization of the City.

**2.2 Payment.** The Contractor shall receive and accept payments indicated in its Bid as full compensation for furnishing all materials and equipment and for doing all the work contemplated and embraced in this Agreement. City shall make payments to the Contractor on the basis of Contractor's Applications for Payment as recommended by the City Engineer, in conformance with the City of Wheaton's accounts payable schedule and the payment provisions contained in the General Terms and Conditions for Contractors contained in the Downtown Streetscape—Phase One Project Manual prepared by Primera Engineers, Ltd. for the City of Wheaton which is attached hereto in Group Exhibit A. All payments shall be based on the progress of the Work measured by the schedules provided in the Contract Documents. Notwithstanding anything to the contrary in any Contract Documents, City shall be entitled to withhold any payments pending the submission of partial or full waivers of lien and/or certifications verifying the receipt of payment for all work performed by all subcontractors and sub-subcontractors up to the date of Contractor's application for partial or final

payment in City's sole discretion. City shall further be entitled to make such payments directly to any subcontractors as may be necessary to obtain such lien waivers and/or certifications. In the event City makes any such payments directly to any subcontractors or sub-subcontractors, the amount of such payments shall be deducted from the total amount due to Contractor pursuant to this Agreement; and Contractor shall provide a written release to City in the amount of any such payments upon ten (10) days written demand. Concurrent with all applications for payment, Contractor shall provide City with a sworn certification of all work performed by all subcontractors and sub-subcontractors and amounts paid to all subcontractors and sub-subcontractors as of the date of application. The City shall not be required to make final payment prior to completion and acceptance of the Work by the City

**2.3 Unappropriated Funds.** The obligation of the City for payment to the Contractor 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.

**2.4 Taxes, Benefits, and Royalties.** The Agreement Amount includes all applicable federal, state and City taxes of every kind and nature applicable to the Work 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 Work, 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 Contractor.

**2.5 Interest Waiver.** Contractor hereby waives any and all claims or rights to interest on money claimed to be due pursuant to this Agreement, and all such rights to interest to which it may otherwise be entitled pursuant to law, including, but not limited to, pursuant to the Local Government Prompt Payment Act, (50 ILCS 505/1 *et seq.*) as amended or the Illinois Interest Act (815 ILCS 205/1, *et seq.*) as amended.

**2.6 Records.** The Contractor shall maintain records showing actual time devoted and costs incurred in connection with the Work performed under this Agreement, and shall permit the authorized representative of the City to inspect, audit and make copies of all data and records of the Contractor for the Work done under this Agreement. All such records shall be clearly identifiable. The records shall be made available to the City during normal business hours during the Agreement period, and for three years after the termination of the Agreement.

### **SECTION 3. REPRESENTATIONS OF CONTRACTOR.**

**3.1 Standard of Care.** The Contractor represents, certifies and warrants that it shall perform and complete the Work in a manner consistent with the level of care, skill, and diligence exercised by other recognized Contractors in the Wheaton area, under similar circumstances at the time the Work is 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.

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

### **SECTION 4. INDEMNIFICATION; INSURANCE; LIABILITY**

**4.1 Indemnification.** To the fullest extent permitted by law, the Contractor shall be responsible for any and all injuries to persons or damages to property due to the activities of the Contractor, subcontractors, suppliers, agents, or employees arising out of or resulting from performance of the contract, or any activity in connection therewith. The Contractor shall, without regard to the availability or unavailability of any insurance, indemnify, defend and hold harmless the City, its officers, employees, and agents from any and all claims, lawsuits, actions, costs, and fees (including reasonable attorney fees and expenses) of every nature or description, arising from, growing out of, or connected with the work, or on account of or in consequence of any neglect in safeguarding the work or on account of or in consequence of using unacceptable materials in constructing the work or because of any act or omission, neglect, or misconduct of the Contractor, its officers, employees, agents, its subcontractor, or subcontractors, anyone directly or indirectly employed by them, and/or anyone for whose acts they may be liable or because of any claims or amount recovered by reason of any infringement of any patent, trademark, or copyright or by reason of the violation of any law, ordinance, order or decree. This obligation is binding on the Contractor without regard to whether or not such claim, damage, loss, or expense is caused in part by the act, omission, or negligence of the City or its officers, employees, or agents.

In claims against the City or any individual indemnified under this paragraph by an employee of the Contractor, a subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, the indemnification herein shall not be limited by a limitation on amount or type of damages payable by or for the Contractor or subcontractor under any employee benefits act including but not limited to the Worker's Compensation Act.

In the event any such claim, lawsuit, or action is asserted, any such money due the Contractor under and by virtue of the contract as shall be deemed necessary by the City for the payment thereof, may be retained by the City for said purpose, or in case no money or insufficient money is due to satisfy such claim, lawsuit, or action, the Contractor's Surety shall remain liable for any payment therefore until any such lawsuit, action, or claim has been settled or has been fully judicially determined and satisfied.

No inspection by the City, its employees or agents shall be deemed a waiver by the City of full compliance with the requirements of the contract. This indemnification shall not be limited by the required minimum insurance coverages provided in the contract.

The obligation on the part of the Contractor to defend, hold harmless, and indemnify the City shall survive the expiration or termination of this Agreement. Nothing in this Agreement shall be construed as prohibiting the City, its officials, directors, officers, employees, agents or attorneys from defending, through the selection and use of their own agents, attorneys and experts, any claims, actions or suits brought against them arising out of the performance of this Agreement.

In the event that any claim for indemnification hereunder arises from the negligence or willful misconduct of both the Contractor 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.

**4.2 Insurance.** Contemporaneous with the Contractor's execution of this Agreement, the Contractor 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 **Document 002113.11 Insurance Coverage for Contractual Services** which is included in the Project Manual Volume 1 Downtown Streetscape – Phase One prepared by Primera Engineers, Ltd., for the City of Wheaton dated January 19, 2018. The insurance described herein as set forth in

Document 021113.11 Insurance Coverage for Contractual Services shall be maintained for the duration of the Agreement, including warranty period. All costs for insurance as specified herein will be considered as included in the cost of the contract.

**4.3 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 Contractor as the result of the execution, approval or attempted execution of this Agreement.

**4.4 No Liability to Any Third Party.** The City shall have no liability to any third party in contract, tort or otherwise for incidental or consequential damages of any kind, including, without limitation, punitive or economic damages or lost profits, regardless of whether the City shall be advised, shall have reason to know or in fact shall know of the possibility.

**4.5 Third Party Beneficiaries.** There are no third party beneficiaries of this Agreement.

## **SECTION 5. CONFIDENTIAL INFORMATION.**

**5.1 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 Contractor from a source other than the City prior to the time of disclosure of said information to the Contractor 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 Contractor or the City; or (iv) to have been supplied to the Contractor 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.

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

**5.3 Breach of Confidentiality.** In the event of breach of the confidentiality provisions of Section 5 of this Agreement, it shall be conclusively presumed that irreparable injury would result to the City and there would be no adequate remedy at law. The City shall be entitled to obtain temporary and permanent injunctions, without bond and without proving damages, to enforce this Agreement. The City shall be entitled to damages for any breach of the injunction, including but not limited to, compensatory, incidental, consequential, exemplary and punitive damages. The confidentiality provisions of this Agreement survive the termination or performance of this Agreement.

## **SECTION 6. TERMINATION; DEFAULT.**



**6.1 Termination.** Notwithstanding any other provision hereof, the City may terminate this Agreement, with or without cause, at any time upon fifteen (15) days prior written notice to the Contractor. In the event that this Agreement is so terminated, the City shall pay Contractor for the Work performed and reimbursable expenses actually incurred as of the effective date of termination, less any sums attributable, directly or indirectly, to Contractor'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 Contractor'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. Contractor shall provide the City with its Key Project Personnel's e-mail address upon its execution of this Agreement. On receiving such notice, Contractor shall, unless the notice directs otherwise, immediately discontinue all Work under this Agreement. As soon as practicable after receiving the termination notice, Contractor shall submit an invoice to the City showing in detail the Work performed under this Agreement up to the termination date. Contractor's receipt of payment for Work rendered upon City's termination of this Agreement, is Contractor's sole and exclusive remedy for termination for convenience by the City. City's termination for convenience does not constitute a default or breach of this Agreement. CONTRACTOR WAIVES ANY CLAIM (OTHER THAN ITS CLAIM FOR PAYMENT FOR WORK PERFORMED), IT MAY HAVE NOW OR IN THE FUTURE FOR FINANCIAL LOSSES OR OTHER DAMAGES RESULTING FROM CITY'S TERMINATION FOR CONVENIENCE.

**6.2 Default.** If it should appear at any time that the Contractor has failed or refused to perform, or has delayed in the performance of, the Work with diligence at a rate that assures completion of the Work in full compliance with the requirements of this Agreement, or has otherwise failed, refused, or delayed to perform or satisfy the Work requirements or any other requirement of this Agreement ("**Event of Default**"), 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 Contractor.** The City may require the Contractor, within a reasonable time, to complete or correct all or any part of the Work that is the subject of the Event of Default; and to take any or all action necessary to bring the Contractor and the Work into compliance with this Agreement.

**2. Termination of Agreement by City.** The City may terminate this Agreement as to any or all Work yet to be performed, effective at a time specified by the City, and shall pay Contractor for the Work performed or reimbursable expenses actually incurred as of the effective date of termination.

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

## **SECTION 7. COMPLIANCE WITH LAWS AND GRANTS.**

**7.1 Freedom of Information Act.** The Contractor shall, within four (4) business days of the City's request, provide any documents in the Contractor'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. Contractor agrees to not apply

any costs or charge any fees to the City regarding the procurement of records required pursuant to an FOIA request. Should Contractor request that the City utilize a lawful exemption under FOIA in relation to any FOIA request thereby denying that request, Contractor 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. Contractor 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 Contractor's request to utilize a lawful exemption to the City.

**7.2 Generally: Permits/Codes/Business Laws/Safety Standards/Grants.** Contractor 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 comply with all applicable municipal, county, state and federal statutes, ordinances, rules, and regulations, including without limitation all applicable building and fire codes, now in force or which may hereafter be in force, any statutes regarding qualification to do business, and all local, state and federal safety standards. Contractor shall comply with all conditions of any federal, state, or local grant received by Owner or Contractor with respect to this Agreement or the Services. Contractor 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 Contractor'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.

**7.3 No Delinquent Taxes.** The Contractor represents and certifies that the Contractor is not barred from contracting with a unit of state or local government as a result of a delinquency in the payment of any tax administered by the Illinois Department of Revenue unless the Contractor is contesting, in accordance with the procedures established by the appropriate revenue act, its liability for the tax, or has entered into an agreement with Department of Revenue for payment of all taxes due and is currently in compliance with that agreement, as set forth in 11-42.1-1 et seq. of the Illinois Municipal Code, 65 ILCS 5/11-42.1-1 et seq.

**7.4 No Collusion.** The Contractor represents and certifies that the Contractor is not barred from contracting with a unit of state or local government as a result of a violation of either Section 33E-3 or Section 33E-4 of Article 33E of the Criminal Code of 2012, 720 ILCS 5/33E-1 et seq. The Contractor 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 Contractor has, in procuring this Agreement, colluded with any other person, firm, or corporation, then the Contractor 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.

**7.5 Sexual Harassment Policy.** The Contractor shall certify 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).

**7.6 Patriot Act (USA Freedom Act) Compliance.** The Contractor 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 Contractor further represents and warrants to the City that the Contractor 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 Contractor 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.

**7.7 Anti-Discrimination Laws.** Contractor shall comply with all federal and state laws prohibiting discrimination because of, or requiring affirmative action based on race, color, religion, sex, sexual orientation, marital status, order of protection status, national origin or ancestry, citizenship status, age, physical or mental disability unrelated to ability, military status or an unfavorable discharge from military service, and shall execute the Equal Employment Opportunity Clause compliance certification attached to this Agreement in Group Exhibit A.

**7.8 Americans with Disabilities Act.** Contractor shall utilize standards and/or methods that do not discriminate against the disabled in compliance with the Americans with Disabilities Act, 42 U.S.C. §§12101 et seq.

**7.9 Drug Free Workplace Act.** Contractor shall comply with all conditions of the Illinois Drug Free Workplace Act, 30 ILCS 580/3 et seq.

**7.10 CDL Driver Controlled Substances and Alcohol Use and Testing.** To the extent that the Contractor and any employees, agents, or subcontractors thereof, will operate any commercial vehicles requiring the necessity for a state issued Commercial Driver's License, Contractor shall comply with Federal Highway Authority Rules on Controlled Substances and Alcohol Use and Testing, 49 CFR Parts 40 and 382 and shall notify the City of any employee, agent subcontractor driver participating in a drug and alcohol testing program pursuant to the aforementioned rules during the term of this Agreement.

**7.11 Employment of Illinois Workers on Public Works Projects Act.** When applicable, Contractor shall comply with the Illinois labor employment requirements as set forth in the Employment of Illinois Workers on Public Works Projects Act, 30 ILCS 570/1 et seq.

**7.12 Public Works Employment Discrimination Act.** Contractor shall comply with all conditions and requirements of the Illinois Public Works Employment Discrimination Act, 775 ILCS 10/0.01 et seq.

**7.13 Steel Products Procurement Act.** When applicable, any steel product used or supplied in the performance of the contract or any subcontract thereto, shall be manufactured or produced in the United States, as required by the Illinois Steel Products Procurement Act, 30 ILCS 565/1 et seq.

**7.14 Substance Abuse Prevention.** Pursuant to the Substance Abuse Prevention on Public Works Projects ("SAPPWP") 820 ILCS 265/1 et seq., employees of the Contractor and employees of any Subcontractor are prohibited from the use of drugs or alcohol, as defined in the SAPPWP, while performing work on any public works project. The Contractor certifies that it has a written Substance Abuse Prevention Program for the prevention of substance abuse among its employees which meets or exceeds the requirements of the SAPPWP or shall have a collective bargaining agreement in effect dealing with the subject matter.

**7.15 Prevailing Wage Act.** Some or all of the Work herein required under this Agreement may involve the construction of a "public work," within the meaning of the Illinois Prevailing Wage Act, 820 ILCS 130/0.01 et seq. ("the Act"). The Act requires contractors and subcontractors to pay laborers, workers and mechanics performing services on public works projects no less than the "prevailing rate of wages" (hourly cash wages plus fringe benefits) in the county where the work is performed. For information regarding current prevailing wage rates, please refer to the Illinois Department of Labor's website at: <http://www.state.il.us/agency/idol/rates/rates.HTM>. All contractors and subcontractors rendering work under this contract must comply with all requirements of the Act, including but not limited to, all wage, notice and record keeping duties, as more fully set forth in the "Special Provisions for: Wages of Employees on Public Works" contained in Group Exhibit A to this Agreement. The Contractor shall indemnify the City for any and all violations of the prevailing wage laws and any rules and regulations now and hereafter issued pursuant to said laws.

**7.16 Veterans Preference Act.** When applicable, Contractor shall comply with all employment preference requirements of the Illinois Veterans Preference Act, 330 ILCS 55/0.01 et seq.

**7.17 Execution of Certifications.** Contractor shall execute the legal certifications and compliance with laws documentation which is attached hereto and incorporated herein as if fully set forth as **Group Exhibit C**.

## **SECTION 8. GENERAL PROVISIONS.**

**8.1 Work Products.** Designs, drawings, plans, specifications, photos, reports, information, observations, calculations, notes, studies, logbooks, instructions, manuals, models, recommendations, printed and electronic files, and any other data or information, in any form, prepared, collected, or received by the Contractor in connection with any or all of the Work 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 Contractor shall cause the Documents to be promptly delivered to the City.

**8.2 News Releases.** The Contractor shall not issue any news releases or other public statements regarding the Work without prior approval from the City Manager.

**8.3 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.

**8.4 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.

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

**8.6 Limitation of Liability.** CITY SHALL NOT BE LIABLE TO CONTRACTORS FOR ANY INDIRECT, CONSEQUENTIAL, SPECIAL, INCIDENTAL, PUNITIVE, OR EXEMPLARY DAMAGES, INCLUDING WITHOUT LIMITATION, LOST PROFITS (DIRECT OR INDIRECT) AND LOST REVENUES HOWSOEVER ARISING, WHETHER OR NOT CHARACTERIZED IN NEGLIGENCE, TORT, CONTRACT OR OTHER THEORY OF

LIABILITY, EVEN IF CITY HAS BEEN ADVISED OF THE POSSIBILITY OF OR COULD HAVE FORESEEN ANY SUCH DAMAGES.

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

**8.8 Waiver.** Any failure of either the City or the Contractor 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.

**8.9 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.

**8.10 Governing Laws/Jurisdiction.** This Agreement shall be interpreted according to the laws 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.

**8.11 Force Majeure.** The determination and extension of contract time with respect to force majeure events, which for purposes of this paragraph are acts of God, acts of civil or military disturbance or war, shall be governed by Section 108.08 of the Illinois Department of Transportation "Standard Specifications for Road and Bridge Construction" adopted April 1, 2016, except as otherwise provided for in the Special Provisions under "Change Orders/Delays" or in other provisions of the Contract Documents. The City shall not be deemed to be in default or to have breached any provisions 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 the City.

**8.12 Headings.** The headings of the several paragraphs of this Agreement are inserted only as a matter of convenience and for reference and are in no manner 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.

**8.13 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.

**8.14 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.

**8.15 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 evidence 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:

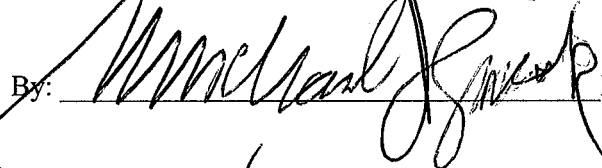
If to the Contractor:  
Landmark Contractors, Inc.  
Attn: Barry Borchart, President  
11916 W. Main Street  
Huntley, IL 60142  
E-Mail: [estimating@golandmark.com](mailto:estimating@golandmark.com)  
Fax#: 847-669-5529

If to the City:  
City of Wheaton  
Attn: City Clerk  
303 W. Wesley Street, Box 727  
Wheaton, IL 60187-727  
E-Mail: [cityclerk@wheaton.il.us](mailto:cityclerk@wheaton.il.us)  
Fax #: 630-260-2017

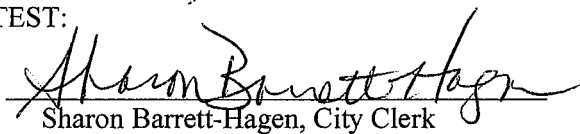
**8.16 Contract Numbering.** The faces of all invoices and documents shall contain the following contract number C 37019 for reference purposes.

IN WITNESS WHEREOF, the parties have entered into this Agreement this 5<sup>th</sup> day of March 2018.

**CITY OF WHEATON, an Illinois municipal corp.**

By:  Date: 3/5/18

ATTEST:

BY:   
Sharon Barrett-Hagen, City Clerk

BY: \_\_\_\_\_ Date: \_\_\_\_\_  
Signature

Its: \_\_\_\_\_

ATTEST:

BY: \_\_\_\_\_

Title: \_\_\_\_\_