

AN ORDINANCE AUTHORIZING THE MAYOR TO EXECUTE A PROFESSIONAL SERVICES AGREEMENT WITH LBJ INC. AND DECLARING AN EMERGENCY.

WHEREAS, the City Engineer has solicited quotations for engineering design services for the Heider Ditch Pedestrian Bridge Substructure and Retaining Wall; and

WHEREAS, the City Engineer has reviewed said quotations and recommended LBJ, Inc. of Miamisburg, Ohio; and

WHEREAS, Council coming now to consider said quotations has determined the quote submitted by LBJ, Inc. to be the best responsive quotation and is acceptable to this Council.

NOW THEREFORE, BE IT ORDAINED BY THE COUNCIL OF
THE CITY OF AVON LAKE, STATE OF OHIO:

Section No. 1: That the Mayor is hereby authorized and directed to enter into an agreement LBJ, Inc. of Miamisburg, Ohio, for surveying and engineering design services for the Heider Ditch Pedestrian Bridge Substructure and Retaining Wall. The agreement shall state among its terms that the cost of said personal services shall not exceed \$24,500.00 (Exhibit A).

Section No. 2: Upon completion of said engineering design services, the Director of Finance is hereby directed to deliver to LBJ, Inc. the warrant of this City in an amount not to exceed \$24,500.00 and to cause said warrant to be paid.

Section No. 3: That it is found and determined that all formal actions of this Council concerning and relating to the adoption of this Ordinance were adopted in an open meeting of this Council and that all deliberations of this Council and any of its committees which resulted in such formal actions, were in meetings open to the public, in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

Section No. 4: That this Ordinance is hereby declared to be an emergency measure, the emergency being the necessity of designing a retaining wall and the foundation for a pedestrian bridge that will be installed across the Heider Ditch behind the Old Firehouse, thus for the health, safety, and welfare of the public. Therefore, this Ordinance shall take effect and be in full force immediately after its passage and approval by the Mayor.

PASSED: 2/27/2023

/s/ Martin E. O'Donnell

President of Council

POSTED: 3/03/2023

APPROVED: 2/28/2023

ATTEST: /s/ Valerie E. Rosmarin
Clerk of Council

/s/ Gregory J. Zilka
Mayor

Fixed Fee Agreement for Consulting Services

between

City of Avon Lake

and



LJB Inc.

February 20, 2023

LJB Project Number: 0125685A.00

Fixed Fee Agreement for Consulting Services

This agreement is being executed as of the day of February 20, 2023, between City of Avon Lake, a [e.g. corporation, limited liability corporation, etc.], having its principal office at 150 Avon Belden Road, Avon Lake, OH 44012 ("Client"), and LJB Inc., an Ohio corporation having its principal office at 2500 Newmark Drive, Miamisburg, Ohio 45342 ("LJB"), under the following circumstances:

Client desires to engage LJB to assist in rendering services in connection with a project as set forth on Schedule 1 attached hereto.

Now, therefore, Client and LJB agree as follows:

1. Compensation for services.
 - a. For the services provided by LJB, LJB will bill Client, and Client will pay LJB, as shown on Schedule 1 attached hereto. In addition, Client will reimburse LJB for reimbursable expenses (as defined in the Terms and Conditions attached hereto) incurred by LJB. Invoices for services and reimbursable expenses will be submitted by LJB monthly.
 - b. All invoices for services rendered by LJB will be payable in full by Client upon receipt of LJB's invoice. With respect to services rendered by LJB, Client may not retain a percentage of the amount due. There also shall be no retention with respect to reimbursable expenses.
 - c. The estimates of LJB's charges for services set forth on Schedule 1 attached hereto represent LJB's good faith estimate of such charges. Such estimates are based upon the following assumptions: (i) LJB will proceed with a complete design of a single concept in each segment of the services; (ii) no unforeseen engineering or environmental problems increasing the scope of the services required will be encountered; (iii) the respective services and responsibilities of Client, LJB, contractors, and others will be well coordinated; (iv) all governmental and regulatory approvals and permits (including, without limitation, rezoning) will be obtained in due course without significant objection; and (v) the services will be performed within the time frame indicated on Schedule 1 attached hereto. LJB will inform Client if, as a result of the failure of any such assumptions or any changes in the scope of the services, actual charges by LJB will exceed the estimated amount. Except in the event of changes in the scope of such services, LJB's charges will not exceed the estimated amount.
1. Terms and Conditions: The terms and conditions attached hereto are hereby incorporated into this Agreement.

In witness whereof, Client and LJB have executed this agreement as of the day and year first written above.

CLIENTCity of Avon Lake**LJB**LJB Inc.By:

Name:

Title:

Date:

By:

Name: Cindy Yerky, PE

Title: Transportation Operations Leader

Date:

The person signing on behalf of their respective party represents that he or she is legally authorized to sign on behalf of said party.

Schedule 1

Description of the Project and Services to be provided by LJB

Heider Ditch Pedestrian Bridge Substructure & Retaining Wall – LJB engineering services per the scope and fee proposal dated February 19, 2023.

Lump Sum Fee of \$24,500.

Terms and Conditions

1. Client's Responsibilities

- 1.1. **Client Representative.** Client shall designate in writing a representative authorized to act on behalf of Client with respect to the Project and the services rendered by LJB. Such representative shall have authority to transmit instructions, receive information, grant approvals, and take such other action as may be necessary to avoid unreasonable delay in the progress of the performance of LJB's services.
- 1.2. **Client's Requirements.** Client shall provide full written information regarding Client's requirements for the Project, including design objectives and restraints, schedule, space requirements and relationships, flexibility, expandability, special equipment, systems and site requirements. Client will furnish to LJB copies of all design and construction standards, which Client will require to be included in drawings and specifications prepared by LJB.
- 1.3. **Ancillary Services.** Client will furnish to LJB, or allow LJB to obtain at Client's expense, such ancillary professional and other services as may be necessary or appropriate to proper performance of LJB's services and completion of the Project. Such ancillary services may include, without limitation thereto, those relating to environmental investigation and analysis; traffic flow and control; investigation of subsurface conditions; investigation of surface and subsurface water flow and the impact of the Project thereon; and surveying activities and preparation of property descriptions. Client agrees and acknowledges that such services may entail Client entering into an agreement with any such service provider (e.g. Drilling and Environmental Addendum), and in the event that Client refuses to do so, LJB may terminate this agreement. It shall be the Client's responsibility, together with the ancillary service provider, to ascertain the location of all utilities and other subsurface structures. In the event LJB is asked by Client or the ancillary service provider to mark any drawing or other document for drilling or other subsurface exploration purposes, Client acknowledges that such markings are only general guides. Therefore, it is the Client's responsibility, together with the ancillary service provider, to ascertain the exact location of the drilling or other subsurface exploration site that will not adversely impact any utility line or other subsurface structure.
- 1.4. **Access to Site.** Client shall secure rights of access for LJB to all property reasonably necessary to the performance of LJB's services.
- 1.5. **Governmental Permits and Approvals.** Client shall obtain (with LJB's assistance if so indicated in the description of LJB's services) all such governmental and regulatory permits and approvals as may be necessary for completion of the Project.
- 1.6. **Coordination.** Client shall effectively and efficiently coordinate the activities of Client, LJB, Architects, Contractors and others involved in the Project.

- 1.7. **Reliance Upon Client Information.** LJB shall have the right to rely upon any and all information supplied to LJB by or through Client, and LJB shall not have a duty to verify the accuracy of such information unless otherwise agreed in writing. Client shall hold harmless, indemnify and defend LJB as to any claims, liabilities or expenses related, directly or indirectly to LJB's use of or reliance upon such information.
- 1.8. **Timely Performance.** Client shall discharge its responsibilities, as set forth herein and as otherwise agreed, in a timely manner so as not to delay the services of LJB.

2. LJB's Responsibilities

- 2.1. **Time of Performance.** LJB will use its best efforts to complete its services in accordance with the mutually agreed upon schedule and to coordinate its services with other parties involved in the Project so as not to cause delay or interference with the work of such other parties. If Client requests modifications or changes in the scope or extent of LJB's services, the time of performance of such services shall be appropriately adjusted.
- 2.2. **Additional Services.** Services not expressly included within the description of the services to be rendered by LJB are not covered by this Agreement. In the event Client desires additional services and LJB is willing to provide such services, the parties shall execute a supplement to this Agreement describing such services and setting forth LJB's compensation for performing such services.
- 2.3. **Standards.** LJB will strive to perform services under this Agreement in a manner consistent with that level of care and skill ordinarily exercised by members of the profession currently practicing in the same locality under similar conditions. No other representation, express or implied, and no warranty or guarantee is included or intended in this Agreement, or in any report, opinion, document, or otherwise.
- 2.4. **Insurance.** LJB shall maintain the following insurance at all times during LJB's performance of services for Client and, upon request by Client, provide certification evidencing such insurance; Workers' Compensation and Employer's Liability Insurance in conformity with applicable law for its employees; and Comprehensive General Liability. Any additional insurance for the Project obtained by LJB at Client's request shall be at Client's expense.
- 2.5. **Record Drawings.** Any record drawings to be prepared by LJB will be developed based upon bid specifications and plans as modified by actual construction. Information related to such modifications may be provided by others, including the construction contractors who are to document such modifications as part of their performance. LJB may rely upon such information and is not responsible for the accuracy of such information as it affects the record drawings. Record drawings serve to document substantial alterations between

bid plans and actual construction and do not document minor alterations.

- 2.6. **Confidentiality.** LJB shall use reasonable efforts to preserve the confidentiality of any information identified by Client as confidential.
- 2.7. **Construction Services.** LJB is not responsible for the means, methods or sequences of construction or for the safety of workers or others at the construction site. Construction observation services are neither exhaustive nor continuous and consist of periodic visits to the Project site intended only to determine whether construction is in general conformance with the construction contract documents. LJB is not responsible for the performance or nonperformance of any contractor or other third party involved in the Project.
- 2.8. **No Third Party Responsibility.** Except for those subcontractors who contract directly with LJB pursuant to Section 5.5, LJB assumes no duty or responsibility, which may be construed as being for the benefit of, and therefore enforceable by, any contractors or subcontractors or their bonding companies. It is understood that LJB's obligations are solely to Client.

3. Compensation

- 3.1. **Progress Payments.** Client will be invoiced at the end of the first calendar month following the effective date of this Agreement and at the end of each calendar month thereafter. Such invoices shall reflect billing for work performed and Reimbursable Expenses incurred by LJB during the month involved. Payment of an invoice is due upon receipt of the invoice by Client. In the event of a dispute regarding an invoice, Client shall pay all undisputed amounts pending resolution of the dispute.
- 3.2. **Reimbursable Expenses.** Reimbursable Expenses are expenditures made by LJB, its employees or consultants in the interest of the Project. Reimbursable expenses include, but are not limited to, (i) expense of transportation, subsistence and lodging when traveling in connection with the Project; (ii) expense of long distance telephone charges, messenger service, field office expenses, and fees paid for securing approval of authorities having jurisdiction over the Project; (iii) expense of all reproduction, postage and handling of drawings, specifications, reports and other Project-related instruments of service; and (iv) expense of preparing perspectives, renderings and models.
- 3.3. **Late Payment.** LJB will assess a carrying charge of 1.5% per month on progress payments not made within 30 days of the date of invoice, which charge is payable by Client upon demand. LJB may, in its sole discretion and without notice, suspend or terminate its services in the event Client does not pay any amount invoiced within such 30-day period. LJB reserves the right to withhold from Client any drawings, specifications and other instruments of LJB's service developed for Client pending payment of Client's outstanding indebtedness.

- 3.4. **Estimates.** Estimates of construction cost, cost of LJB services, material quantities, and construction time provided by LJB are estimates only based upon LJB's opinion and are subject to change and are contingent upon factors over which LJB has no control. Except as may be otherwise specifically agreed in writing with respect to the cost of LJB's services, LJB does not guarantee the accuracy of such estimates.
- 3.5. **Changes.** The parties acknowledge that the nature of the Project is such that Client may wish to make changes in the Project. Client may at any time authorize changes in the services provided by LJB, issue additional instructions, request additional services, or direct omission of services previously ordered. After LJB reviews each change request made by Client, LJB shall advise Client in writing as to any necessary and appropriate fee adjustments for LJB's services arising from the change. After LJB receives Client's written authorization to proceed with such changes and Client's written approval of the corresponding fee adjustments, if any, LJB will proceed to implement such changes. LJB shall not be required to make changes to its work that it believes threatens the integrity or safety of such work.
- 3.6. **Other Adjustments.** Except as may be expressly provided otherwise in this Agreement, Client recognizes that LJB's compensation for services during construction contemplates one construction contract being let and construction completion within the time contemplated by this Agreement. If more than one construction contract is let, or if the period of construction is exceeded through no fault of LJB, LJB's compensation (including any estimate of such compensation) shall be appropriately increased for services rendered in relation to such additional contracts or beyond such time period.
- 3.7. **Serving as Witness or Consultant.** In the event any principal or employee of LJB serves or is required to serve as a witness or consultant for Client in any litigation, arbitration or other legal or administrative proceeding involving the Project, Client shall compensate LJB 200 percent of the standard hourly rates then in effect for hours devoted to giving testimony or providing consultative services and 150 percent of such rates for time devoted to preparation for such testimony or consultation. In addition, Client shall reimburse LJB for all related expenses.
4. **LJB's Liability**
- 4.1. **Limitation on Liability.** LJB's liability to Client which may arise from or be due directly or indirectly to the professional acts, errors and/or omissions, including negligence, of LJB, its agents, employees or consultants shall be limited so as not to exceed the portion of LJB's fees (as indicated in this Agreement) applicable to that segment of LJB's services to which the act, error, omission or negligence relates. If LJB's fees are not broken down by segment in this Agreement, LJB's liability shall not exceed the aggregate fees paid to LJB under this Agreement.

5. General

5.1. **Ownership of Documents.** All original tracings, notes, data and other documents prepared or furnished by LJB are instruments of professional service and shall be the property of LJB. Such instruments are prepared and intended only for use as an integrated set on the particular project and for the limited purposes specified. Modifications, or use on other projects, of such instruments of service, or copies thereof, without LJB's prior written consent shall be at Client's sole risk. Client shall hold harmless, indemnify and defend LJB as to any and all claims, damages, losses and expenses, including attorney's fees, arising out of any such modification or use.

5.2. **Disputes Resolution.** All claims, disputes, and other matters in controversy between LJB and Client arising out of or in any way related to this Agreement will be submitted to "alternative dispute resolution" (ADR) before and as a condition precedent to other remedies provided by law. If and to the extent Client and LJB have agreed on methods for resolving such disputes, then such methods will be set forth in the "Alternative Dispute Resolution Agreement" which, if attached, is incorporated into and made a part of this Agreement. If no specific ADR procedures are set forth in this Agreement, then it shall be understood that the parties shall submit disputes to mediation as a condition precedent to litigation.

If a dispute at law arises from matters related to the services provided under this agreement and that dispute requires litigation instead of ADR as provided above, then:

5.2.1. The claim will be brought and tried in judicial jurisdiction of the court of the county where LJB's principal place of business is located and Client waives the right to remove the action to any other county or judicial jurisdiction, and

5.2.2. The prevailing party will be entitled to recovery of all reasonable costs incurred, including staff time, court costs, attorneys' fees, and other claim related expenses.

5.3. **Termination.** This Agreement may be terminated by Client upon at least seven days written notice to LJB in the event that the Project is permanently abandoned. In the event that either party (the "Defaulting Party") shall breach or fail to comply with any provision of this Agreement and such breach or failure shall continue for a period of seven days after the giving of written notice thereof by the other party, such other party may terminate this Agreement immediately upon the giving of notice of such termination to the Defaulting Party. If this Agreement is terminated through no fault of LJB, Client shall pay LJB for services performed and Reimbursable Expenses incurred in accordance with this Agreement and, upon request, a Termination Adjustment equal to 15%

of the estimated fee remaining to be earned at the time of termination to account for LJB's rescheduling adjustments, reassignment of personnel, and related costs due to termination.

- 5.4. **Insolvency of Client.** In the event client becomes involved as a debtor, in any bankruptcy, insolvency, receivership or other similar proceedings, LJB may, at its discretion, suspend performance of its obligations under this Agreement.
- 5.5. **Assignment: Subcontracting.** Neither Client nor LJB shall assign its interest in this Agreement without the written consent of the other, except that LJB may subcontract any portion of its services without such consent.
- 5.6. **Force Majeure.** Any delay or default in the performance of any obligation of either party under this Agreement resulting from any cause(s) beyond such party's reasonable control shall not be deemed a breach of this Agreement. The occurrence of any such event shall suspend the obligations of such party as long as performance is delayed or prevented thereby.
- 5.7. **Attorney's Fees.** In the event of default hereunder, the defaulting party shall pay all costs incurred by the non-defaulting party in enforcing this Agreement, including reasonable attorneys' fees whether incurred in connection with initiation of legal proceedings or otherwise.
- 5.8. **Affirmative Action.** This contractor and subcontractor shall abide by the requirements of 41 CFR §§ 60-1.4(a), 60-300.5(a), and 60-741.5(a) and the posting requirements of 29 CFR Part 471, Appendix A to Subpart A. These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities and prohibit discrimination against all individuals based on their race, color, religion, sex, sexual orientation, gender identity, or national origin, **or for inquiring about, discussing, or disclosing information about compensation.** Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, protected veteran status, or disability.
- 5.9. **Miscellaneous.** This Agreement shall be interpreted and enforced according to the laws of the State of Ohio as applicable to agreements executed and entirely performed within the State of Ohio. The captioned headings contained in this Agreement are for convenience of reference only and shall in no way affect the meaning or interpretation of this Agreement. The invalidity of any clause or provision of this Agreement shall not affect the validity or enforceability of any other clause or provision contained herein. This Agreement supersedes all prior agreements, arrangements and understandings relating to the subject matter hereof. No oral representation, promise, inducement or statement of intention has been made by either party, which is not embodied in this Agreement or in the other documents delivered pursuant hereto. This Agreement may be

amended, modified, superseded or canceled only by a written instrument executed by both parties hereto. The failure of either party at any time or times to require performance of any provision of this Agreement shall in no manner affect the right at a later time to enforce the same. No waiver by either party of the breach of any term contained in this Agreement, whether by conduct or otherwise, shall be deemed to be or construed as a further or continuing waiver of such breach.

End of Terms and Conditions