

HABERSHAM COUNTY BOARD OF COMMISSIONERS

EXECUTIVE SUMMARY

SUBJECT: W&A Engineering Master Service Agreement

DATE: August 8, 2023

(X) RECOMMENDATION

() POLICY DISCUSSION

BUDGET INFORMATION:

() STATUS REPORT

ANNUAL -

() OTHER

CAPITAL -

SPLOST VII -

REQUESTED BY: Jerry Baggett, Public Works Director

COMMISSION ACTION REQUESTED ON: August 21, 2023

PURPOSE: To request ratification by the Board of the W&A Engineering Master Service Agreement to provide on-call engineering services and fill role as County Engineer on behalf of Habersham County.

BACKGROUND / HISTORY: Recent activities in the County have increased the need for an engineer to fill the role of the County Engineer. Brent Cook, of W&A Engineering, recently assisted the Public Works Department in this role by reviewing a traffic study for Harvest Church Road in accordance with Code Section 68, Division 3 - Roadways, Streets, and Right-of-Way Standards. This review resulted in recommendations which were included in the development agreement with A&R Homes. Mr. Cook is also currently providing a construction cost estimate and design review of the road improvements required for the Harvest Church Road development. Mr. Cook will be utilized as well by the Public Works Department to perform traffic studies at J Warren Road and Level Grove Road, and J Warren Road and US 441/SR 105.

FACTS AND ISSUES:

- There are about a half dozen references to a County Engineer in the County Code.
 - A County Engineer provides review and approval of design drawings submitted by developer's engineering firms, as well as providing engineering services required to County safety improvement projects.
 - Currently there is no in-house resource for the role of County Engineer.
 - A Budget of \$50,000 was approved in the FY2024 Budget for this Service.
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OPTIONS:

- 1) Approve ratification of the Master Service Agreement with M&A Engineering.
 - 2) Deny ratification of the Master Service Agreement with M&A Engineering.
 - 3) Commission defined alternative.
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RECOMMENDED SAMPLE MOTION: Motion to ratify the Master Service Agreement with M&A Engineering.

DEPARTMENT:

Prepared by: C. McGrew

Director: J. Baggett _____

ADMINISTRATIVE COMMENTS: _____

_____ **DATE:** _____

County Manager

MASTER SERVICES AGREEMENT

W&A Engineering Georgia, LLC ("W&A") and Habersham County ("Client"), are entering into this Master Services Agreement ("Agreement") as of the last signature date below (the "Effective Date"). In this Agreement, "Party" means Client or W&A, as the case may be, and "Parties" means Client and W&A, collectively.

1.0 Services.

1.1 W&A shall perform services as provided in the form of a mutually executed Work Order ("WO") attached hereto as Exhibit 1 (as modified from time to time) and incorporated herein by this reference, to the Client in order to begin the work process described in the WO. Such WO shall be executed by the Parties and in-force on the terms and subject to the conditions of this Agreement.

1.2 Prior to providing the Client with a WO and upon receipt of the Scope of Services ("Scope of Services") and any ancillary documents needed to evaluate the same from the Client, W&A shall, within a commercially reasonable time, inform the Client with W&A's estimated fee for the project and return the Scope of Services to the Client with the estimate. The parties acknowledge and agree that the estimate will be based on the Scope of Services provided for each project by the Client. Notwithstanding any provided estimate, all work performed by W&A shall be on a Fixed Fee basis or a unit rate basis as described in the WO. The unit rates shall be provided in accordance with the Unit Rates Table attached hereto as Attachment A. W&A reserves the right to review and update the rates on an annual basis, and in the form of an amendment, as mutually agreed to and signed by the parties.

1.3 If, after receiving the estimate from W&A, the Client is still desirous to engage W&A on the project described in the Scope of Services, W&A will submit a WO which includes, but not limited to the Scope of Services, fees, and schedule, and signed by the parties.

1.4 The services of W&A are to commence as soon as reasonably practical after the execution of the WO and shall be undertaken and completed in a commercially reasonable or mutually agreeable time period, unless specified more particularly in the specific WO.

2.0 Invoices: Invoices are due and payable within thirty (30) days after date of invoice. Client shall have ten (10) days from date of invoice to review and dispute an invoice or any portion thereof. If the Client does not identify a discrepancy or error in the invoice during the ten (10) day review period, it shall be deemed "undisputed". Undisputed invoices with unpaid balances thirty (30) days after date of invoice will accrue finance charges at a rate of 1.5 percent per month (annual percentage rate of 18 percent; 18 % APR) from the delinquency date until paid in full. All payments received shall be credited to the payment of delinquent interest first and then to the principal balance due.

2.1 Prompt Payment: Unless otherwise specifically provided in the WO, Client shall promptly review and pay invoices within thirty (30) days after date of invoice. W&A's right to cease work or terminate the Agreement or WO in accordance to Section 7.2 (Termination for Cause), and without waiving any rights, if the account is past due, W&A shall have the right to request and receive commercially reasonable, objectively verifiable adequate assurances of Client's ability to pay past and present amounts owed or to be owed under the Agreement.

2.2 Reimbursable Expenses: Client shall pay the actual cost incurred due to miscellaneous expenses, including, but not limited to delivery charges, postage, fax transmissions, long-distance telephone calls, reproductions and copies, photographic enlargements and reductions, film

processing and supplies, mileage. Automobile mileage shall be invoiced at Standard Mileage Rate as provided by the IRS.

Direct costs such as filing fees, will be paid by the Client. In the event W&A pay such charges on behalf of Client, then the charges shall be invoiced at the actual cost-plus ten percent (10%) administrative fee.

2.3 Travel Expenses: Unless otherwise specifically provided in the WO, Client shall be responsible for paying the cost of travel to and from the worksite in the performance of services under a WO. Travel expenses include, but are not limited to airfare, hotel, car rental and food. Travel shall be conducted at the request or concurrence of Client. W&A will invoice expenses based on actual costs incurred.

3.0 Collections and Attorney Fees: W&A shall have the right to utilize and consult with its attorney or collection agency for undisputed past due amounts, and Client shall be liable and responsible for all fees and costs of collection, including, but not limited to, attorney fees or cost of collections.

4.0 Delays: W&A shall not be responsible for delays caused by Client, its agents or employees, or any other delays beyond W&A's reasonable control. If W&A is delayed at any time due to events beyond W&A reasonable control, the time of completion shall be extended for a period equal to the number of days the work has been prevented, interrupted, or delayed. If the interruption is in excess of ninety (90) days, the parties will agree to any cost and/or schedule impacts, if applicable.

5.0 Governmental or Regulatory Changes: In the event any governing agency or entity, including local, state, federal agencies or regulatory bodies, amend, change or alter any rule, law, ordinance, statute, or requirement, or any interpretation or application of same as applied to this Agreement or the WO, after services have begun, the compensation quoted in the WO will be subject to renegotiation for additional services caused or related to such change, and in the event the parties cannot agree on an increase, W&A shall be entitled to an equitable adjustment that fairly reflects the time and costs associated with and incurred by such change.

6.0 Claims: Any claims, demands, lawsuits, or causes of action by Client against W&A related to or arising out of the services performed under this Agreement, or for acts, error and omissions arising out of or relating to this Agreement, shall be filed, and served within 12 months from the date services were last performed by W&A for the Client under this Agreement.

7.0 Termination

7.1 Termination for Convenience. Either party may terminate this Agreement without cause by providing the other party thirty (30) days written notice. In the event either party cancels and/or terminates this Agreement without cause, any active WO shall be completed and not be affected by such termination unless specifically stated in the written notice. In the event of termination of the Agreement and any active WO, Client agrees to pay all amounts due plus the remaining balance on all work started and/or completed through the date of termination.

7.2 Termination for Cause. Either party may terminate this Agreement for cause in the event either party fails to honor a material obligation of the Agreement which remains uncured seven (7) calendar days after receipt of the written notice by the non-breaching party of such material breach. Client's undisputed invoice(s) (or any portion thereof) remain past due by more than 60 days from invoice date.

7.3 Either party declares Chapter 7 bankruptcy or otherwise becomes insolvent.

In the event W&A terminates for cause, W&A shall be paid for services rendered and costs incurred hereunder through the date of termination, all expenses, fees, and costs through the date of the termination, plus estimated anticipated profit on the remaining balance of work that was to be performed under the Agreement along with all costs, expert fees, and attorney fees actually incurred in relation to the claim.

8.0 Confidential Information. Each party recognizes that during the term of this Agreement there may be required access to information which is Confidential or of a proprietary nature to the other party. Each party agrees that all Confidential Information disclosed shall remain strictly confidential and shall not be used by or disclosed to third parties. "Confidential Information" shall mean all technical or business information of a proprietary nature whether patentable, copyrightable, or otherwise, that under the circumstances a party should know is reasonably deemed confidential. Notwithstanding anything to the contrary provided herein, in no event shall "Confidential Information" include any information which (i) is already in the public domain at the time of disclosure; (ii) enters the public domain after disclosure through no fault of a party; (iii) is already known to a party at the time of disclosure; (iv) was independently developed by a party without regard to any Confidential Information being disclosed; or (v) is subsequently disclosed by third parties having no obligation of confidentiality.

9.0 Warranties: W&A is not liable or responsible for the accuracy of any information or data furnished by Client, its agents, or other persons with whom Client has contracted or hired, including but not limited to plans, specifications, reports, or any other data. regardless of whether W&A was involved in coordinating, engaging, or advancing payment to the person supplying the information or data for Client. W&A warrants that its services will be performed within the standard degree of care ordinarily exercised under similar conditions as applicable to the actual services to be rendered hereunder by landscape architects, engineers and surveyors, as the case may be, if said service is deemed to be a professional service, or otherwise with reasonable and due care. No other warranty or representation, either expressed or implied, is included or intended in this Agreement, or in W&A's proposals, letters, communications, contracts, plans, surveys, or reports, either written or oral.

10.0 Ownership: These services are for Client, but also to the extent they are services related to the real property, W&A has a right to be kept informed as to the true and rightful owner, whether of record or based on unrecorded deeds, at all times during while W&A is performing services for the Client under a WO. Unless otherwise noted, Client is the sole owner of the property where the W&A services are being provided. If the owner is a different entity, Client shall so specify in writing the owner and include a written owner authorization for W&A to perform the services for the Client as described in A WO. Client hereby indemnifies and holds harmless W&A for any claim or cause of action in any way related to the lack of authority or permission or consent of the owner of record for W&A to perform services for or in relation to the property, including but not limited to any claim of trespass to property if Client is not the owner of record and the owner of record asserts that these services were done without its knowledge or consent.

11.0 Ownership of Documents: All sketches, drawings, tracings, computations, notes, reports, plans, and other original documents, in any medium now known or later developed, that are produced, developed, or supplemented by W&A are "Instruments of Service" and shall remain the property of W&A, subject only to applicable requirements of public agencies. These Instruments of Service are to be used solely for this specific project. W&A shall retain all legal rights and use of the Instruments of Service and shall retain full protection under United States copyright law. At Client's additional expenses, Client may retain reproducible copies of all plans for their file, provided all fees associated with the requested material were paid by Client and all invoices are current. Client agrees that any work furnished to Client or Clients' agents, for which full payment has not been received by W&A, will be returned to W&A upon demand and will not be used by Client for any purpose whatsoever or disseminated to any third parties by Client. W&A reserves the right to refuse to stamp, sign, countersign, seal, print, copy, reissue, transmit, disseminate, or release any design documents, plans, specifications, etc., unless and until Client's account is completely paid current and all outstanding invoices, statements, and reimbursable expenses have been paid in full.

12.0 Indemnification: W&As' responsibilities in performing services hereunder shall be limited to the scope of services to be performed solely for Client as set forth in the WO. W&A, its officers, shareholders, agents and employees, shall have no liability of any kind to Client, its agents or any persons having express or implied contractual, business, or financial relationship with Client, for any acts, errors, and omissions of W&A which do not fall within the scope of services set forth in the WO. Client hereby covenants and agrees that the total limit of W&A's liability to Client, and any liability of W&A's officers, shareholders, agents, and

employees, from a claim caused in whole or in part from W&A's negligent acts, errors, or omissions, shall not exceed the total price associated with the applicable and specific category of services set forth in the WO. In the event there is no specific category of services for which an errors or omissions claim falls within, the total liability of W&A shall not exceed the price actually paid or to be paid W&A under the WO. Client agrees to waive all claims against W&A resulting from unauthorized changes or reuse of the drawings and data provided under a WO by anyone other than W&A. In addition, Client shall indemnify and hold harmless W&A from any damage, liability or costs, including reasonable attorney's fees and costs of defense, arising from changes made to the Instruments of Service by anyone other than W&A.

13.0 Limitation of Liability: Notwithstanding anything to the contrary herein, W&A's total liability to Client for any damages arising from or related to the Agreement, WO, for any reason whatsoever and irrespective of form or forum, shall be limited to the total amounts paid under a WO. Client acknowledges that the remedies provided for herein are exclusive and in lieu of all other remedies. The foregoing limitations on liability shall apply even if the above stated remedy fails of its essential purpose.

14.0 Waiver of Consequential Damages: Both parties waive consequential, incidental, and indirect damages that may flow from, relate to, or arise from any claim for breach of contract and/or a claim for negligence of the other party in relation to this Agreement. Such consequential, incidental, and indirect damages include, but are not limited to, lost profits (except if W&A is terminated without cause), loss of production, loss of revenue, loss of use, business interruption, and lost goodwill, as well as any special or punitive damages.

15.0 Construction Cost and Earthwork Estimate(s): In the event W&A has already supplied or does hereafter provide any opinion of the possible construction costs, Client understands that W&A has no control over W&A's method or amount of pricing, or the cost of labor, equipment, or materials and that such opinion is made without warranty, express or implied, as to the accuracy of its opinion or probable construction costs, or in relation to whether bids or actual costs shall approximate same. Additionally, in the event W&A has already provided or does hereafter provide any opinion as to any earthwork estimates, such as estimates concerning a balance of cut and fill on the site, Client acknowledges that the accuracy of the estimate(s) is dependent on many factors that are highly variable, and such opinion is made without warranty, express or implied, as to the accuracy of its opinion or probable construction costs, or in relation to whether bids or actual costs shall approximate same. W&A shall not be held liable for any harm, damages, claims, or costs to Client or others by any error in providing the cost estimate(s) unless shown by clear and convincing evidence to have been done by W&A willfully and in bad faith.

16.0 Force Majeure: Neither Party is liable for any default or delay in the performance of its obligations under this Agreement (other than Client's obligations to make payments under this Agreement) if and to the extent caused, directly or indirectly, by any event or circumstances beyond its reasonable control, provided that the other Party is promptly notified in writing, and the affected Party uses reasonable commercial efforts to resume performance. W&A and their subcontractors are not liable for any default or delay in the performance of their obligations under this Agreement if and to the extent caused, directly or indirectly, by the acts or omissions of Client, its agents, contractors or other third parties.

17.0 Severability: Any provision herein that shall prove to be invalid, void, or illegal shall in no way effect, impair, or invalidate any other provision of this Agreement, and such other provisions shall remain in full force and effect.

18.0 Dispute Resolution: If a dispute arises from or relates to the Agreement, or the alleged breach thereof, and if the dispute cannot be settled through direct discussions, both W&A and Client agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association ("AAA") under its Construction Industry Mediation Procedures before resorting to arbitration. If mutually agreed by the parties, the mediation may be conducted with a mutually selected mediator, with no need for a AAA filing and administration of the mediation. The parties agree that any mediation proceedings will be held in Athens, Nashville. Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Both W&A and Client agree that failure or refusal of a party to pay its required share of



the deposits for arbitrator compensation or administrative charges shall constitute a waiver by that party to present evidence or cross-examine witnesses. In such event, the other party shall be required to present evidence and legal argument as the arbitrator(s) may require for the making of an award. Such waiver shall not allow for a default judgment against the non-paying party in the absence of evidence presented as provided for above. Except as may be required by law, neither W&A, Client, nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both W&A and Client.

19.0 Choice of Law. This Agreement is to be construed pursuant to the laws of the State of Nashville without giving effect to any conflict of laws principle. Jurisdiction and venue for any claim arising out of this Agreement shall be made in the State of Nashville in the County of Athens-Clarke.

20.0 Authority to Sign: Each signer to this Agreement represents by signing this agreement that said person has the capacity, competency, and authority to enter into the same and bind each and every party, their heirs, successors, assigns, fellow beneficiaries in trust, and/or partners, to the terms and conditions as herein set forth. If Client is a corporation, company, partnership, or joint venture, the signer shall clearly indicate the full legal name of the corporation, company, partnership, joint venture, or entity for which he is signing and specify his capacity in signing, otherwise the signer is signing in his or her individual capacity.

21.0 Modifications or Amendments. No amendment, change order or modification of this Agreement shall be valid unless in writing and signed by both parties hereto with the same degree of formality as this Agreement.

22.0 Publicity and Media: Client agrees to include W&A's name on the job sign at the construction site and in any publication or press coverage relating to W&A's work. All media releases, public announcements, and public disclosures by either Party relating to this Agreement or the subject matter of this Agreement, shall be reviewed and approved in writing by the other Party prior to release. Notwithstanding the foregoing, W&A reserves the right to include photographs of the work performed, descriptions of projects performed by W&A for the purpose of marketing, promotional, or business development materials, including but not limited to website materials, social media publications, quarterly newsletters, etc... Such information will not include announcements intended solely for internal distribution or disclosures to the extent required to meet legal or regulatory requirements beyond the reasonable control of the disclosing Party. In the event Client opposes any information or materials during its review, Client shall provide written communication of the requested restrictions.

23.0 Non-Solicitation: During the period commencing on the effective date of the Agreement and ending one year following the termination date of the Agreement, the Client and its owners, employees, agents, or any person or entity having contractual relationships with Client shall not, without W&A's prior written consent, directly or indirectly:

23.1 solicit or encourage any person to leave the employment or other services of W&A, or

23.2 hire, on behalf of the Client or its affiliates, any other person or entity, any person who is employed by W&A. during the period commencing on the effective date through and ending two years following the termination date of the Agreement, the Client will not, whether for its own account or for the account of any other person, intentionally interfere with the relationship of W&A, with, or endeavor to entice away from W&A, any person who during the term of the Agreement is, or during the preceding two-years period, was co-investor, co-developer, joint ventures or other customer of W&A.



This Agreement contains the entire agreement between the Parties hereto, and it may not be altered, amended, or modified in any respect or whatsoever, except by writing duly executed by the Parties.

W&A Engineering Georgia, LLC	Client Name:	Habersham County
<u>Brent E. Cook, P.E., PTOE, RSP1</u>		<u></u>
(Authorized Signature)		(Authorized Signature)
<u>Brent E. Cook</u>		<u>Ty Akins</u>
(Print Name)		(Print Name)
<u>Director of Traffic & Transportation</u>		<u>Commission Chairman</u>
(Title)		(Title)
<u>June 2, 2023</u>		<u>7/26/23</u>
(Date)		(Date)



W&A ENGINEERING

A BETTER COMMUNITIES COLLABORATIVE COMPANY

EXHIBIT 1 – WORK ORDER

WORK ORDER NO. _____

This Work Order, including any attachments hereto ("WO"), is entered into and shall be effective as of the last signature date below by and between W&A Engineering Georgia, LLC ("W&A") and _____ ("Client"), having an address at _____. Unless otherwise stated herein, the terms and conditions of the Master Services Agreement No. _____ between the parties (the "Agreement") dated _____ shall apply to this WO.

PROJECT INFORMATION	
Project Name: _____	
Project Address: _____	
Parcel Number: _____	County: _____
W&A	CLIENT
Project Manager: _____	Project Manager: _____
Phone: _____	Phone: _____
Email: _____	Email: _____

BILLING INFORMATION
Billing Contact Name: _____
Billing Address: _____
Phone / Email Billing Contact: _____

Project Description. Refer to Scope of Services attached hereto as Exhibit 1.

Estimated Fees. Refer to the Fee Table attached hereto as Exhibit 2.

IN WITNESS WHEREOF, the parties hereto have executed this WO.

W&A Engineering Georgia, LLC

Client Name _____

(Authorized Signature)

(Authorized Signature)

(Print Name)

(Print Name)

(Date)

(Date)

EXHIBIT 1

Scope of Services

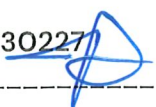


Exhibit 2

Fee Table

Description	Hourly Rate
Director/Principal QA/QC	\$210.00
Sr. Project Manager, Sr. Traffic/Roadway Engineer/Designer	\$190.00
Project Manager, Traffic/Roadway Engineer/Designer	\$165.00
Staff Engineer (EIT)	\$125.00
Engineering Specialist/Technician	\$100.00
Administrative	\$80.00

