

Lisa B. Hatfield  
Attorney  
City of Knoxville

Document No. C-17-0338

## **AGREEMENT**

This Agreement is made by and between the **City of Knoxville**, a municipal corporation organized and existing under the laws of the State of Tennessee, 400 Main Avenue, P.O. Box 1631, Knoxville, Tennessee 37901 (“City”), and **Ronald Franks Construction Company, LLC**, 80 Industrial Road, Savannah, Tennessee 38372 (“Contractor”).

## **WITNESSETH:**

**WHEREAS**, the City advertised for bids for the Fountain City Lake Phase II Project, No. SW-2017-002 (“Project”); and

**WHEREAS**, Contractor submitted the lowest, most responsive bid for said Project in the amount of Two Hundred Forty-Eight Thousand Eight Hundred Seventy and 00/100 Dollars (\$248,870.00); and

**WHEREAS**, Contractor has the necessary qualifications and expertise to perform said work and the Department of Engineering recommends that contract be awarded to it; and

**WHEREAS**, City Council by Resolution No. \_\_\_\_\_ on May 23, 2017, authorized the Mayor of the City of Knoxville to execute this Agreement on behalf of the City.

**NOW, THEREFORE**, the City and Contractor, for the mutual considerations and promises stated herein, agree as follows:

**1. Scope of Work.** Contractor will provide all supervision, technical personnel, equipment, labor, and materials, and perform and complete all work in a satisfactory manner necessary to construct two wetlands that each incorporate a linear gabion retaining structure, rip rap stone base, gravel filtration layer, specified wetland suitable soils and plants, and other work

as necessary to complete the Project all in strict accordance with the contract documents and specifications for the Fountain City Lake Phase II Project, No. SW-2017-002, prepared by the City of Knoxville Engineering Department.

**2. Contract Documents.** The executed Contract Documents will consist of the following:

- (a) This Agreement
- (b) Invitation for Bids and any Addenda thereto
- (c) Instructions to Bidders
- (d) Signed copy of Bid and Proposal
- (e) General Conditions
- (f) Supplemental General Conditions
- (g) Special Conditions
- (h) Technical Specifications
- (i) Drawings

Contract documents not appended to this agreement are located in the City of Knoxville Engineering Department Library at 3131 Morris Avenue, Knoxville, Tennessee. To the extent there is a conflict between the terms of any of the documents that constitute this Agreement, the terms that provide the greater benefit to the City and/or impose the greater obligation on Contractor shall control.

**3. Termination.** The City may terminate this Agreement at any time, with or without cause, by written notice of termination to Contractor. If the City terminates this Agreement, and such termination is not a result of a default by Contractor, Contractor shall be entitled to receive as its sole and exclusive remedy just compensation for all satisfactory, authorized services completed prior to the effective date.

**4. Term and Liquidated Damages.** The date of beginning and the time for completion of the work are essential conditions of this Agreement, and the work embraced shall be commenced on the date specified in a written Notice to Proceed. Contractor shall perform the

work with due and reasonable diligence and fully complete the Project within one hundred-twenty (120) days from the issuance of the Notice to Proceed. Contractor further agrees to pay liquidated damages to the City in the sum of Two Hundred Dollars (\$200.00) for each consecutive day thereafter as provided in the General Conditions.

**5. Contract Price.** The City shall pay to Contractor for the satisfactory performance of the contract subject to additions and deductions and in accordance with the bid as provided in the contract documents, unless modified by a Contract Change Order, an amount not to exceed Two Hundred Forty-Eight Thousand Eight Hundred Seventy and 00/100 Dollars (\$248,870.00).

Contractor shall submit invoices for services rendered to the City in a form approved by the City, shall indicate the time period during which the services were provided and shall be signed by Contractor to certify its accuracy.

The City will pay Contractor for services satisfactorily rendered within thirty (30) days of the receipt of Contractor's undisputed invoice. Payment for services rendered does not indicate the City's acceptance of such services as being fully in accord with all the provisions of this Agreement.

**6. Retainage.** The City will retain five percent (5%) of payment for all work covered by the contract documents. Upon completion of all work covered by the contract documents to the final satisfaction of the City, the retainage balance will be paid to the contractor.

**7. Changes in the Work.** The City may at any time, if the need arises, order changes within the scope of the services without invalidating the Agreement. If such changes increase or decrease the amount due under the Agreement, or in the time required for

performance of the services, an equitable adjustment shall be authorized by Change Order or Amendment. All Change Orders must be approved and signed by the City and Contractor.

**8. Notices.** Any notice required or permitted under this Agreement will be directed to the following representatives or such other address as either party may designate by written notice to the other:

City of Knoxville:

Boyce Evans, Purchasing Agent  
P.O. Box 1631  
Knoxville, TN 37901  
(865) 215-2070

Contractor:

Frank Milbourn, General Manager  
Ronald Franks Construction, LLC  
80 Industrial Road  
Savannah, TN 38372  
(615) 804-1515

cc: Chris Howley, P.E.  
Engineering Planning Chief  
City of Knoxville Dept. of Engineering  
P.O. Box 1631  
Knoxville, TN 37901  
(865) 215-2148

David McGinley, P.E.  
Stormwater Engineering Manager  
City of Knoxville Dept. of Engineering  
P.O. Box 1631  
Knoxville, TN 37901  
(865) 215-2148

Notices shall be in writing and shall be effective when actually delivered in person, received via facsimile transmission, or private carrier with signature confirmation, or when received in the U.S. Mail, certified with return receipt requested, postage pre-paid and addressed to the party as stated above.

**9. Indemnification.** Contractor shall defend, indemnify and hold harmless the City, its officers, employees and agents from any and all liabilities which may accrue against

the City, its officers, employees and agents or any third party for any and all lawsuits, claims, demands, losses or damages alleged to have arisen from an act or omission of Contractor in performance of this Agreement or from Contractor's failure to perform this Agreement using ordinary care and skill, except where such injury, damage, or loss was caused by the sole negligence of the City, its agents or employees.

Contractor shall save, indemnify and hold the City harmless from the cost of the defense of any claim, demand, suit or cause of action made or brought against the City alleging liability referenced above, including, but not limited to, costs, fees, attorney fees, and other expenses of any kind whatsoever arising in connection with the defense of the City; and Contractor shall assume and take over the defense of the City in any such claim, demand, suit, or cause of action upon written notice and demand for same by the City. Contractor will have the right to defend the City with counsel of its choice that is satisfactory to the City, and the City will provide reasonable cooperation in the defense as Contractor may request. Contractor will not consent to the entry of any judgment or enter into any settlement with respect to an indemnified claim without the prior written consent of the City, such consent not to be unreasonably withheld or delayed. The City shall have the right to participate in the defense against the indemnified claims with counsel of its choice at its own expense.

Contractor shall save, indemnify and hold City harmless and pay judgments that shall be rendered in any such actions, suits, claims or demands against City alleging liability referenced above.

The indemnification and hold harmless provisions of this Agreement shall survive termination of the Agreement.

**10. Insurance.** Contractor shall at its sole expense obtain and maintain in full force and effect for the duration of the Agreement and any extension hereof at least the following types and amounts of insurance for claims which may arise from or in connection with this Agreement. All insurance must be underwritten by insurers with an A.M. Best rating of A-VIII or better.

- (a) Commercial General and Umbrella Liability Insurance; occurrence version commercial general liability insurance, and if necessary umbrella liability insurance, with a limit of not less than \$2,000,000 each occurrence for bodily injury, personal injury, property damage, and products and completed operations. If such insurance contains a general aggregate limit, it shall apply separately to the work/location in this Agreement or be no less than \$3,000,000.

Such insurance shall:

- (1) Contain or be endorsed to contain a provision that includes the City, its officials, officers, employees, and volunteers as additional insureds with respect to liability arising out of work or operations performed by or on behalf of Contractor including materials, parts, or equipment furnished in connection with such work or operations. The coverage shall contain no special limitations on the scope of its protection afforded to the above-listed insureds. Proof of additional insured status up to and including copies of endorsements and/or policy wording will be required.

- (2) For any claims related to this project, Contractor's insurance coverage shall be primary insurance as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance programs covering the City, its officials, officers, employees, and volunteers shall be excess of Contractor's insurance and shall not contribute with it.
- (3) At the sole discretion of the City, dedicated limits of liability for this specific project may be required.
- (b) Automobile Liability Insurance; including vehicles owned, hired, and non-owned, with a combined single limit of not less than \$1,000,000 each accident. Such insurance shall include coverage for loading and unloading hazards. Insurance shall contain or be endorsed to contain a provision that includes the City, its officials, officers, employees, and volunteers as additional insureds with respect to liability arising out of automobiles owned, leased, hired, or borrowed by or on behalf of Contractor.
- (c) Workers' Compensation Insurance. Contractor shall maintain workers' compensation insurance with statutory limits as required by the State of Tennessee or other applicable laws and employers' liability insurance with limits of not less than \$500,000. Contractor shall require each of its subcontractors to provide Workers' Compensation for all of the latter's employees to be engaged in such work unless such employees are covered by contractor's workers' compensation insurance coverage.
- (d) Other Insurance Requirements. Contractor shall:

- (1) Prior to commencement of services, furnish the City with original certificates and amendatory endorsements effecting coverage required by this section and provide that such insurance shall not be cancelled, allowed to expire, or be materially reduced in coverage except on 30 days' prior written notice to the City Attorney of Knoxville, P.O. Box 1631, Knoxville, Tennessee 37901. Proof of policy provisions regarding notice of cancellation will be required.
- (2) Upon the City's request, provide certified copies of endorsements and policies in lieu of or in addition to certificates of insurance. Copies of policies will only be requested when contracts are deemed to be extremely or uniquely hazardous, include a dollar amount that is significant to the overall budget of the City or a City Department, or the coverage(s) may not follow standard insurance forms. A policy will only be requested after the City's Risk Manager has reviewed the contract and proof of coverage has been provided. Should the certificate of insurance refer to specific coverage wording or endorsement(s), proof of such policy wording or endorsement(s) will be required.
- (3) Replace certificates, policies, and endorsements for any such insurance expiring prior to completion of services.
- (4) Maintain such insurance from the time services commence until services are completed. Failure to maintain or renew coverage or



to provide evidence of renewal may be treated by the City as a material breach of contract.

- (5) If Contractor cannot procure insurance through an insurer having an A.M. Best rating of A-VIII, Contractor may, in the alternative, place such insurance with insurer licensed to do business in Tennessee and having A.M. Best Company ratings of no less than A. Modification of this standard may be considered upon appeal to the City Law Director.
- (6) Require all subcontractors to maintain during the term of the Agreement Commercial General Liability insurance, Business Automobile Liability insurance, and Workers' Compensation/Employer's Liability insurance (unless subcontractor's employees are covered by Contractor's insurance) in the same manner as specified for Contractor. Contractor shall furnish subcontractors' certificates of insurance to the City without expense immediately upon request.
- (7) Large Deductibles: Self-Insured Retentions. Any deductibles and/or self-insured retentions greater than \$50,000 must be disclosed to and approved by the City of Knoxville prior to the commencement of services. Use of large deductibles and/or self-insured retentions will require proof of financial ability as determined by the City.

- (8) Waiver of Subrogation Required. The insurer shall agree to waive all rights of subrogation against the City, its officers, officials, and employees for losses arising from work performed by Contractor for the City. Proof of waiver of subrogation up to and including copies of endorsements and/or policy wording will be required.
- (9) Occurrence Basis Requirement. All general liability policies must be written on an occurrence basis unless the Risk Manager determines that a claims made basis is reasonable in the specific circumstance. Use of policies written on a claims made basis must be approved by the Risk Manager and retroactive dates and/or continuation dates must be provided to the City prior to commencement of any work performed. Professional Liability and Environmental Liability (Pollution Coverage) are most commonly written on a claims made basis and are generally acceptable in that form.
- (10) Completed Operations Insurance. Contractor shall procure and shall maintain liability coverage that shall include completed operations coverage, and Contractor shall maintain such coverage for a period of two (2) years from the date of the City's final acceptance of the project.
- (11) Excess Liability Insurance: Contractor shall maintain excess liability insurance in addition to the insurance specified above with

a limit of not less than \$2,000,000.00, each occurrence. This coverage shall be on a follow form basis.

- (12) Builders' Risk Insurance: Contractor shall procure and shall maintain or shall cause to be procured and maintained Builders' Risk Insurance on a replacement cost basis during the construction of the project. Insurance is to be on an "all risks" basis and shall insure against the perils of fire and extended coverage and physical loss or damage including, but not limited to, theft, vandalism, malicious mischief, collapse, temporary building and debris removal including demolition occasioned by enforcement of any applicable legal requirements and shall cover reasonable compensation for architect's services and expenses required as a result of such insured loss. Insurance is to cover all property of Contractor (and its subcontractors) and the City of Knoxville at the construction site. Coverage shall cover the completed value of the construction including without limitation, slab on grade, excavations, foundations, caissons, tenant finish work, and retaining walls around the perimeter of the project. Any exclusion of so-called underground damage to pipes, collapse of structure, or damage resulting from explosion or blasting shall be deleted. This coverage shall be issued on a completed value form basis for 100% of the insurable replacement value of the project. Such policy shall provide that any loss thereunder shall be payable to Contractor, the

City of Knoxville, and others as their interests may appear and shall also have a replacement cost endorsement. The insurer shall waive all rights of subrogation against the city. Partial occupancy or use shall not commence until the insurance company or companies providing the insurance have consented to such partial occupancy or use by endorsement or otherwise. Contractor shall be responsible for the deductible in the event of a loss.

**11. Non-Discrimination.** Contractor:

- (a) will not discriminate against any employee or applicant for employment because of race, color, religion, sex, disability, familial status or national origin;
- (b) will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, age, disability or familial status or national origin;
- (c) will, in all solicitations or advertisements for employees placed by or on behalf of itself, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, age, disability, familial status or national origin; and
- (d) will include these provisions in every subcontract or sublease let by or for it.

**12. Ethical Standards.** Contractor hereby takes notice of and affirms that it is not in violation of, or has not participated, and will not participate, in the violation of any of the following ethical standards prescribed by the Knoxville City Code:

(a) Sec. 2-1048. Conflict of Interest.

It shall be unlawful for any employee of the city to participate, directly or indirectly, through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or purchase standard, rendering advice, investigation, auditing or otherwise, in any proceeding or application, request for ruling or other determination, claim or controversy or other matter pertaining to any contract or subcontract and any solicitation or proposal therefore, where to the employee's knowledge there is a financial interest possessed by:

- (1) The employee or the employee's immediate family;
- (2) A business other than a public agency in which the employee or a member of the employee's immediate family serves as an officer, director, trustee, partner or employee; or
- (3) Any other person or business with whom the employee or a member of the employee's immediate family is negotiating or has an arrangement concerning prospective employment.

(b) Sec. 2-1049. Receipt of Benefits from City Contracts by Councilmembers, Employees and Officers of the City.

It shall be unlawful for any member of Council, member of the Board of Education, officer or employee of the City to have or hold any interest in the profits for emoluments of any contract, job, work or service, either by himself or by another, directly or indirectly. Any such contract for a job,

work or service for the City in which any member of Council, member of the Board of Education, officer or employee has or holds any such interest is void.

(c) Sec. 2-1050. Gratuities and Kickbacks Prohibited.

Gratuities. It is unlawful for any person to offer, give or agree to give to any person, while a city employee, or for any person, while a city employee, to solicit, demand, accept or agree to accept from another person, anything of a pecuniary value for or because of:

- (1) An official action taken, or to be taken, or which could be taken;
- (2) A legal duty performed, or to be performed, or which could be performed; or
- (3) A legal duty violated, or to be violated, or which could be violated by such person while a city employee.

Anything of nominal value shall be presumed not to constitute a gratuity under this section.

Kickbacks. It is unlawful for any payment, gratuity or benefit to be made by or on behalf of a subcontractor or any person associate therewith as an inducement for the award of a subcontract or order.

(d) Sec. 2-1051. Covenant Relating to Contingent Fees.

- (a) Representation of Contractor. Every person, before being awarded a contract in excess of ten thousand dollars (\$10,000.00) with the city, shall represent that no other person has been retained to solicit or secure the contract with the city upon an agreement or

understanding for a commission, percentage, brokerage or contingent fee, except for bona fide employees or bona fide established commercial, selling agencies maintained by the person so representing for the purpose of securing business.

(b) Intentional violation unlawful. The intentional violation of the representation specified in subsection (a) of this section is unlawful.

(e) Sec. 2-1052. Restrictions on Employment of Present and Former City Employees.

Contemporaneous employment prohibited. It shall be unlawful for any city employee to become or be, while such employee, an employee of any party contracting with the particular department or agency in which the person is employed.

(f) Remedies for Violations. For violations of the ethical standards outlined in the Knoxville City Code, the City has the following remedies:

- (1) Oral or written warnings or reprimands;
- (2) Cancellation of transactions; and
- (3) Suspension or debarment from being a Contractor or subcontractor under city or city-funded contracts.

The value of anything transferred in violation of these ethical standards shall be recoverable by the City from such person. All procedures under this section shall be in accord with due process requirements, included but not limited to a right to notice and hearing prior to imposition of any

cancellation, suspension or debarment from being a Contractor or subcontractor under a city contract.

**13. ADA Compliance.** With regard to the services performed under this Agreement, Contractor will comply with all applicable requirements of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., (“ADA”). Contractor agrees that it will defend, indemnify and hold the City harmless against any and all claims, demands, suits or causes of action which arise out of any negligent and/or intentional act or omission by Contractor, its employees, agents or representatives which violates the ADA. Contractor agrees that the City will not be responsible for any costs or expenses arising from Contractor’s failure to comply with the ADA.

**14. Independent Contractor.** Contractor and its agents and employees shall perform all work and render all services as an independent contractor; neither it nor its employees shall be considered employees, partners or agents of the City, nor shall it or its employees be entitled to any benefits, insurance, pension, or workers’ compensation as an employee of the City.

**15. Assignment.** The Contractor shall not assign or transfer any interest in this Agreement without obtaining the prior written approval of the City.

**16. Subcontractors.** Contractor shall not enter into a subcontract for any of the services performed under this Agreement without obtaining the prior written approval of the City.

**17. Written Amendments.** This Agreement may be modified only by a written amendment or addendum that has been executed and approved by the appropriate officials shown on the signature page of this Agreement.



**18. Required Approvals.** Neither Contractor nor the City is bound by this Agreement until it is approved by the appropriate officials shown on the signature page of this Agreement.

**19. Article Captions.** The captions appearing in this Agreement are for convenience only and are not a part of this Agreement; they do not in any way limit or amplify the provisions of this Agreement.

**20. Severability.** If any provision of this Agreement is determined to be unenforceable or invalid, such determination will not affect the validity of the other provisions contained in this Agreement. Failure to enforce any provision of this Agreement does not affect the rights of the parties to enforce such provision in another circumstance, nor does it affect the rights of the parties to enforce any other provision of this Agreement at any time.

**21. Federal, State and Local Requirements.** Contractor is responsible for full compliance with all applicable federal, state, and local laws, rules and regulations.

**22. No Benefit for Third Parties.** The services to be performed by the Contractor pursuant to this agreement with the City are intended solely for the benefit of the City, and no benefit is conferred hereby, nor is any contractual relationship established herewith, upon or with any person or entity not a party to this Agreement. No such person or entity shall be entitled to rely on the Contractor's performance of its services hereunder, and no right to assert a claim against the City or the contractor, its officers, employees, agents or contractors shall accrue to the Contractor or to any subcontractors, independently retained professional consultant, supplier, fabricator, manufacturer, lender, tenant, insurer, surety or any other third party as a result of this Agreement or the performance or non-performance of the Contractor's services hereunder.

**23. Non-Reliance of Parties.** Parties explicitly agree that they have **not** relied upon any earlier or outside representations other than what has been included in this Agreement. Furthermore, neither party has been induced to enter into this Agreement by anything other than the specific written terms set forth herein.

**24. Force Majeure.** Neither party shall be liable to the other for any delay or failure to perform any of the services or obligations set forth in this Agreement due to causes beyond its reasonable control, and performance times shall be considered extended for a period of time equivalent to the time lost because of such delay plus a reasonable period of time to allow the parties to recommence performance of their respective obligations hereunder. Should a circumstance of force majeure last more than ninety (90) days, either party may by written notice to the other terminate this Agreement. The term “force majeure” as used herein shall mean the following: acts of God; strikes, lockouts or other industrial disturbances; acts of public enemies; orders or restraints of any kind of the government of the United States or of the State or any of their departments, agencies or officials, or any civil or military authority; insurrections, riots, landslides, earthquakes, fires, storms, tornadoes, droughts, floods, explosions, breakage or accident to machinery, transmission pipes or canals; or any other cause or event not reasonably within the control of either party.

**25. EEO/AA.** The City of Knoxville is an EEO/AA/Title VI/Section 504/ADA/ADEA Employer.

**26. Governing Law and Venue.** This Agreement will be governed and construed in accordance with the laws of the State of Tennessee. Any action for breach of this Agreement or to enforce or nullify any provision of this Agreement shall be instituted only in a court of appropriate jurisdiction in Knox County, Tennessee.

**27. Entire Agreement.** This Agreement forms the entire Agreement between the City and Contractor. Any prior representations, promises, agreements, oral or otherwise, between the parties, which are not embodied in this writing, will be of no force or effect.

**IN WITNESS WHEREOF,** the City and Contractor have executed this Agreement in two (2) copies as of the below-written date.

**APPROVED AS TO FORM:**

**CITY OF KNOXVILLE**

\_\_\_\_\_  
**CHARLES W. SWANSON**  
**LAW DIRECTOR**

**BY:** \_\_\_\_\_  
**MADELINE ROGERO**  
**MAYOR**

**DATE:** \_\_\_\_\_

**FUNDS CERTIFIED:**

**RONALD FRANKS CONSTRUCTION  
COMPANY, LLC**

\_\_\_\_\_  
**JAMES YORK**  
**FINANCE DIRECTOR**

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

**TITLE:** \_\_\_\_\_

**Required Documents:**  
Certificate of Insurance \_\_\_\_\_  
Performance Bond \_\_\_\_\_  
Payment Bond \_\_\_\_\_