

**RESOLUTION R-2018-32**

**A RESOLUTION AUTHORIZING A CONTRACT WITH ROBERT W. DONHAM, II, FOR ENGINEERING DESIGN AND CONSTRUCTION MANAGEMENT SERVICES FOR THE WINDHAM ROAD IMPROVEMENTS PROJECT AND DECLARING AN EMERGENCY.**

**WHEREAS**, after discussion on how to best meet the ongoing street infrastructure needs throughout the whole of the Village, the Village Council applied for and received a grant from the Ohio Public Works Commission (OPWC) to repair and repave portions of the roads within the Village of Windham, specifically Blanton Drive, Beldon Drive and Bright Drive, which repair and repaving are hereinafter referred to as the Windham Road Improvements Project; and

**WHEREAS**, an engineering firm is needed to perform design professional and construction management services for the Windham Road Improvements Project; and

**WHEREAS**, pursuant to the applicable provisions of ORC 153.71(A)(1) the Council finds that Robert W. Donham, II has submitted a current Statement of Qualifications within the immediately preceding year; and

**WHEREAS**, Robert W. Donham, II has provided a proposed contract which allows the Village Council to make a determination of compliance with the requirements set forth in Ohio Revised Code sections 153.69(B).

NOW THEREFORE, BE IT RESOLVED, by the Council of the Village of Windham, Portage County, Ohio, two thirds or more of the members thereto concurring that:

Section 1: The Council finds that in compliance with ORC 153.71(A)(1) that Robert W. Donham, II is the engineer most qualified to provide the required professional design services and subsequent construction management oversight for the Windham Road Improvements Project.

Section 2: Council also finds that Robert W. Donham, II has negotiated appropriately and in compliance with ORC 153.69(B) to enter into a contract to provide the required professional design services and subsequent construction management oversight for the Windham Road Improvements Project.

Section 3: The Mayor and the Fiscal Officer are hereby authorized to enter into an agreement with Robert W. Donham, II for engineering and design services for the Windham Road Improvements Project in substantial conformity with the contract attached hereto and incorporated herein and marked for identification as Exhibit A.

Section 3: This Resolution is declared an emergency measure becoming effective immediately upon its passage and execution by the Mayor for the reason that the design services for the Windham Road Improvements Project must begin as soon as possible so as to have the specifications ready to competitively bid the Windham Road Improvements Project in time to have the improvements completed in the summer of 2019.

Section 4: It is hereby found and determined that all formal actions of this Council concerning and relating to the adoption of this Resolution were adopted in an open meeting of this Council and that the deliberations of the Council and any of its committees that resulted in such formal action were in meetings open to the public in compliance with all legal requirements including Section 121.22 of the Revised Code of the State of Ohio.

Passed as an Emergency on First Reading: November 27, 2018

Vote of Council:      Ayes: 5  
                                 Nays: 0

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Mayor Scott Garrett

ATTEST:

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Fiscal Officer Cheree Taylor

Approved as to form:

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Solicitor Thomas Reitz

**SHORT FORM OF AGREEMENT  
BETWEEN OWNER AND ENGINEER  
FOR PROFESSIONAL SERVICES**

THIS IS AN AGREEMENT effective November 27, 2018 (“Effective Date”) between the Village of Windham, Ohio (“Owner”) and Robert W. Donham II, P.E. (“Engineer”).

Owner’s Project, of which Engineer’s services under this Agreement are a part, is generally identified as follows: Windham Road Improvements Project (“Project”).

Engineer’s services under this Agreement are generally identified as follows: final design, bidding phase services and construction phase services (“Services”). See Exhibit A.

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Owner and Engineer further agree as follows:

*1.01 Basic Agreement and Period of Service*

- A. Engineer shall provide or furnish the Services set forth in this Agreement. If authorized by Owner, or if required because of changes in the Project, Engineer shall furnish services in addition to those set forth above (“Additional Services”).
- B. Engineer shall complete its Services within the following specific time period: **See Exhibit A**. If no specific time period is indicated, Engineer shall complete its Services within a reasonable period of time.
- C. If, through no fault of Engineer, such periods of time or dates are changed, or the orderly and continuous progress of Engineer’s Services is impaired, or Engineer’s Services are delayed or suspended, then the time for completion of Engineer’s Services, and the rates and amounts of Engineer’s compensation, shall be adjusted equitably.

*2.01 Payment Procedures*

- A. *Invoices:* Engineer shall prepare invoices in accordance with its standard invoicing practices and submit the invoices to Owner on a monthly basis. Invoices are due and payable within 30 days of receipt. If Owner fails to make any payment due Engineer for Services, Additional Services, and expenses within 30 days after receipt of Engineer’s invoice, then (1) the amounts due Engineer will be increased at the rate of 1.0% per month (or the maximum rate of interest permitted by law, if less) from said thirtieth day, and (2) in addition Engineer may, after giving seven days written notice to Owner, suspend Services under this Agreement until Engineer has been paid in full all amounts due for Services, Additional Services, expenses, and other related charges. Owner waives any and all claims against Engineer for any such suspension.
- B. *Payment:* As compensation for Engineer providing or furnishing Services and Additional Services, Owner shall pay Engineer as set forth in Paragraphs 2.01, 2.02 (Services), and 2.03 (Additional Services). If Owner disputes an invoice, either as to amount or entitlement, then Owner shall promptly advise Engineer in writing of the specific basis for doing so, may withhold only that portion so disputed, and must pay the undisputed portion.

## 2.02 Basis of Payment—Lump Sum

- A. Owner shall pay Engineer for Services as follows:
  - 1. A Lump Sum amount of **\$19,000**.
  - 2. In addition to the Lump Sum amount, reimbursement for the following expenses: see costs included in Appendix 1.
- B. The portion of the compensation amount billed monthly for Engineer's Services will be based upon Engineer's estimate of the percentage of the total Services actually completed during the billing period.

2.03 *Additional Services:* For Additional Services, Owner shall pay Engineer an amount equal to the cumulative hours charged in providing the Additional Services by each class of Engineer's employees, times standard hourly rates for each applicable billing class; plus reimbursement of expenses incurred in connection with providing the Additional Services and Engineer's consultants' charges, if any. Engineer's standard hourly rates are attached as Appendix 1.

## 3.01 Termination

- A. The obligation to continue performance under this Agreement may be terminated:
  - 1. For cause,
    - a. By either party upon 30 days written notice in the event of substantial failure by the other party to perform in accordance with the Agreement's terms through no fault of the terminating party. Failure to pay Engineer for its services is a substantial failure to perform and a basis for termination.
    - b. By Engineer:
      - 1) upon seven days written notice if Owner demands that Engineer furnish or perform services contrary to Engineer's responsibilities as a licensed professional; or
      - 2) upon seven days written notice if the Engineer's Services are delayed for more than 90 days for reasons beyond Engineer's control, or as the result of the presence at the Site of undisclosed Constituents of Concern, as set forth in Paragraph 5.01.l.
    - c. Engineer shall have no liability to Owner on account of a termination for cause by Engineer.
    - d. Notwithstanding the foregoing, this Agreement will not terminate as a result of a substantial failure under Paragraph 3.01.A.1.a if the party receiving such notice begins, within seven days of receipt of such notice, to correct its substantial failure to perform and proceeds diligently to cure such failure within no more than 30 days of receipt of notice; provided, however, that if and to the extent such substantial failure cannot be reasonably cured within such 30 day period, and if such party has diligently attempted to cure the same and thereafter continues diligently to cure the same, then the cure period provided for herein shall extend up to, but in no case more than, 60 days after the date of receipt of the notice.
  - 2. For convenience, by Owner effective upon Engineer's receipt of written notice from Owner.

- B. In the event of any termination under Paragraph 3.01, Engineer will be entitled to invoice Owner and to receive full payment for all Services and Additional Services actually performed or furnished through the date of termination in accordance with this Agreement, plus reimbursement of expenses incurred through the effective date of termination in connection with providing the Services and Additional Services, and Engineer's consultants' charges, if any.

#### 4.01 *Successors, Assigns, and Beneficiaries*

- A. Owner and Engineer are hereby bound and the successors, executors, administrators, and legal representatives of Owner and Engineer (and to the extent permitted by Paragraph 4.01.B the assigns of Owner and Engineer) are hereby bound to the other party to this Agreement and to the successors, executors, administrators, and legal representatives (and said assigns) of such other party, in respect of all covenants, agreements, and obligations of this Agreement.
- B. Neither Owner nor Engineer may assign, sublet, or transfer any rights under or interest (including, but without limitation, money that is due or may become due) in this Agreement without the written consent of the other party, except to the extent that any assignment, subletting, or transfer is mandated by law. Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under this Agreement.
- C. Unless expressly provided otherwise, nothing in this Agreement shall be construed to create, impose, or give rise to any duty owed by Owner or Engineer to any Constructor, other third-party individual or entity, or to any surety for or employee of any of them. All duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of Owner and Engineer and not for the benefit of any other party.

#### 5.01 *General Considerations*

- A. The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with any services performed or furnished by Engineer. Subject to the foregoing standard of care, Engineer and its consultants may use or rely upon design elements and information ordinarily or customarily furnished by others, including, but not limited to, specialty contractors, manufacturers, suppliers, and the publishers of technical standards.
- B. Engineer shall not at any time supervise, direct, control, or have authority over any Constructor's work, nor shall Engineer have authority over or be responsible for the means, methods, techniques, sequences, or procedures of construction selected or used by any Constructor, or the safety precautions and programs incident thereto, for security or safety at the Project site, nor for any failure of a Constructor to comply with laws and regulations applicable to such Constructor's furnishing and performing of its work. Engineer shall not be responsible for the acts or omissions of any Constructor.
- C. Engineer neither guarantees the performance of any Constructor nor assumes responsibility for any Constructor's failure to furnish and perform its work.
- D. Engineer's opinions (if any) of probable construction cost are to be made on the basis of Engineer's experience, qualifications, and general familiarity with the construction industry. However, because

Engineer has no control over the cost of labor, materials, equipment, or services furnished by others, or over contractors' methods of determining prices, or over competitive bidding or market conditions, Engineer cannot and does not guarantee that proposals, bids, or actual construction cost will not vary from opinions of probable construction cost prepared by Engineer. If Owner requires greater assurance as to probable construction cost, then Owner agrees to obtain an independent cost estimate.

- E. Engineer shall not be responsible for any decision made regarding the construction contract requirements, or any application, interpretation, clarification, or modification of the construction contract documents other than those made by Engineer or its consultants.
- F. All documents prepared or furnished by Engineer are instruments of service, and Engineer retains an ownership and property interest (including the copyright and the right of reuse) in such documents, whether or not the Project is completed. Owner shall have a limited license to use the documents on the Project, extensions of the Project, and for related uses of the Owner, subject to receipt by Engineer of full payment due and owing for all Services and Additional Services relating to preparation of the documents and subject to the following limitations:
  - 1. Owner acknowledges that such documents are not intended or represented to be suitable for use on the Project unless completed by Engineer, or for use or reuse by Owner or others on extensions of the Project, on any other project, or for any other use or purpose, without written verification or adaptation by Engineer;
  - 2. any such use or reuse, or any modification of the documents, without written verification, completion, or adaptation by Engineer, as appropriate for the specific purpose intended, will be at Owner's sole risk and without liability or legal exposure to Engineer or to its officers, directors, members, partners, agents, employees, and consultants;
  - 3. Owner shall indemnify and hold harmless Engineer and its officers, directors, members, partners, agents, employees, and consultants from all claims, damages, losses, and expenses, arising out of or resulting from any use, reuse, or modification of the documents without written verification, completion, or adaptation by Engineer; and
  - 4. such limited license to Owner shall not create any rights in third parties.
- G. Owner and Engineer may transmit, and shall accept, Project-related correspondence, documents, text, data, drawings, information, and graphics, in electronic media or digital format, either directly, or through access to a secure Project website, in accordance with a mutually agreeable protocol.
- H. Engineer shall maintain Professional Liability Insurance in the amount no less than \$1,000,000, and Owner shall maintain general liability insurance in an amount no less than \$1,000,000 and each shall be added to the other's policy as an additional insured for the purpose of this project. To the fullest extent permitted by law, Owner and Engineer (1) waive against each other, and the other's employees, officers, directors, members, agents, insurers, partners, and consultants, any and all claims for or entitlement to special, incidental, indirect, or consequential damages arising out of, resulting from, or in any way related to this Agreement or the Project, and (2) agree that Engineer's total liability to Owner under this Agreement shall be limited to \$50,000 or the total amount of compensation received by Engineer, whichever is greater.
- I. The parties acknowledge that Engineer's Services do not include any services related to unknown or undisclosed Constituents of Concern. If Engineer or any other party encounters, uncovers, or reveals an

unknown or undisclosed Constituent of Concern, then Engineer may, at its option and without liability for

consequential or any other damages, suspend performance of Services on the portion of the Project affected thereby until such portion of the Project is no longer affected, or terminate this Agreement for cause if it is not practical to continue providing Services.

- J. Owner and Engineer agree to negotiate each dispute between them in good faith during the 30 days after notice of dispute. If negotiations are unsuccessful in resolving the dispute, then the dispute shall be mediated. If mediation is unsuccessful, then the parties may exercise their rights at law.
- K. This Agreement is to be governed by the laws of the State of Ohio.
- L. Engineer's Services and Additional Services do not include: (1) serving as a "municipal advisor" for purposes of the registration requirements of Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) or the municipal advisor registration rules issued by the Securities and Exchange Commission; (2) advising Owner, or any municipal entity or other person or entity, regarding municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, or other similar matters concerning such products or issuances; (3) providing surety bonding or insurance-related advice, recommendations, counseling, or research, or enforcement of construction insurance or surety bonding requirements; or (4) providing legal advice or representation.

#### 6.01 *Total Agreement*

- A. This Agreement (including any expressly incorporated attachments), constitutes the entire agreement between Owner and Engineer and supersedes all prior written or oral understandings. This Agreement may only be amended, supplemented, modified, or canceled by a duly executed written instrument.

#### 7.01 *Definitions*

- A. *Constructor*—Any person or entity (not including the Engineer, its employees, agents, representatives, and consultants), performing or supporting construction activities relating to the Project, including but not limited to contractors, subcontractors, suppliers, Owner's work forces, utility companies, construction managers, testing firms, shippers, and truckers, and the employees, agents, and representatives of any or all of them.
- B. *Constituent of Concern*—Asbestos, petroleum, radioactive material, polychlorinated biphenyls (PCBs), hazardous waste, and any substance, product, waste, or other material of any nature whatsoever that is or becomes listed, regulated, or addressed pursuant to (a) the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601 et seq. ("CERCLA"); (b) the Hazardous Materials Transportation Act, 49 U.S.C. §§5101 et seq.; (c) the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 et seq. ("RCRA"); (d) the Toxic Substances Control Act, 15 U.S.C. §§2601 et seq.; (e) the Clean Water Act, 33 U.S.C. §§1251 et seq.; (f) the Clean Air Act, 42 U.S.C. §§7401 et seq.; or (g) any other federal, State, or local statute, law, rule, regulation, ordinance, resolution, code, order, or decree regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic, or dangerous waste, substance, or material.

#### 8.01 *Attachments: Appendix 1, Engineer's Standard Hourly Rates.*

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, the Effective Date of which is indicated on page 1.

Owner: Village of Windham, Ohio

Engineer: Robert W. Donham II, P.E.

By: \_\_\_\_\_

By: \_\_\_\_\_

Print name: \_\_\_\_\_

Print name: Robert W. Donham II, P.E.

Title: Mayor

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

Date Signed: \_\_\_\_\_

Date Signed: \_\_\_\_\_

By: \_\_\_\_\_

Print name: \_\_\_\_\_

Title: Fiscal Officer

Address for Owner's receipt of notices:

Address for Engineer's receipt of notices:

\_\_\_\_\_  
\_\_\_\_\_

107 Gage Drive  
Mooresville, NC 28115

This is **Appendix 1, Engineer's Standard Hourly Rates**, referred to in and part of the Short Form of Agreement between Owner and Engineer for Professional Services dated [REDACTED].

## **Engineer's Standard Hourly Rates**

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### *A. Standard Hourly Rates:*

1. Standard Hourly Rates are set forth in this Appendix 1 and include salaries and wages paid to personnel in each billing class plus the cost of customary and statutory benefits, general and administrative overhead, non-project operating costs, and operating margin or profit.
2. The Standard Hourly Rates apply only as specified in Paragraphs 2.01, 2.02, and 2.03, and are subject to annual review and adjustment.

### *B. Schedule of Hourly Rates:*

<b>Billing Class</b>	<b>Rate</b>
Principal/Project Manager	\$ 155.00/hour
Senior Engineer	\$ 135.00/hour
Project Engineer	\$ 125.00/hour
Staff Engineer	\$ 100.00/hour
Administration	\$ 55.00/hour
Sr. Resident Project Representative	\$ 80.00/hour
Resident Project Representative	\$ 70.00/hour
Printing	Cost x 1.1
Mileage	\$0.60 per mile
Meals & Lodging	Federal Per Diem

**Attachment A**  
**Village of Windham**  
**Road Improvement Project**  
**Scope of Work for Engineering Services**

## **Introduction**

The Village of Windham seeks to perform upgrades and maintenance on 3 roads, Blanton Drive, Beldon Drive, and Bright Drive, in order to protect the health and safety of the traveling public and maintain the useful life of the roads. Project background, proposed improvements and engineering scope are detailed below.

## **Background**

The Village of Windham is a municipal owner of roads for residents of the Village of Windham,. The road network maintained by the Village is varies from small residential subdivision streets, to up to major State Route thoroughfares. The Village has 3 distinct and transportation asset classed that were built at different times and have unique maintenance needs. First area consists of rural routes, primary through routes with sporadic large acre residential homes on the them and date back to the early 1800's, the second is older subdivision routes built in the 1940's and 1950's to serve multifamily and commercial properties, and the third is relatively newer residential subdivision routes constructed in the 1970's.

Windham has on ongoing inspection and maintenance responsibility to ensure these roads continue to operate as designed. According to Village staff and engineering analysis, these roads are in need of resurfacing and some full depth repairs, and the last major renovation was more than 15 years ago. Left unaddressed the Village risks deterioration of the roads with possible total replacement being necessary. In April 2018, Robert Donham, P.E. volunteered engineering services the Village of Windham to complete preliminary engineering, engineering cost estimate, Grant writing and fund procurement on the behalf of the Village. Robert Donham, P.E. submitted on behalf of the Village a grant application to the Ohio Public Works Commission in June of 2018 which was awarded to the Village of Windham in the amount of \$280,000. The Village has requested this proposal from Robert Donham, P.E. to design, bid, and construct the Road Improvements.

## **Scope of Work**

Village of Windham has asked Robert W. Donham II, P.E to provide engineering services to design, Bid, and construct the proposed Road Improvements. Donham engineering's scope of work is expected to include the following:

## Task 1 Final Design

Complete the following tasks as part of the Final Roadway design:

- Coordinate with Village staff to confirm project needs;
- Complete Final Engineering analysis;
- Complete Final Engineers Estimate.
- Complete contract documents and specifications;

Please note that Task 1 scope is not anticipated to include engineering drawings or any outside permitting as they are not anticipated to be needed to complete this project.

**Proposed Lump Sum Fee: \$7,000**

## Task 2 Bidding Phase

Robert W. Donham II, P.E. will provide all assistance and technical capacity for bidding services as described below. The work will be competitively bid, and there will be one bidding phase. Robert W. Donham II, P.E. will see that contract documents are provided in electronic form to the Village of Windham for copying and the Village will distribute to contract documents to interested prospective bidder. Robert W. Donham II, P.E. will respond to questions, provide clarification and issue addenda as necessary, compile and tabulate bids, review of bids, make recommendation for award, and issue the notice of award as part of bidding services. It is assumed that the project will have a bid phase lasting at least one month. Bid opening, and delivery of Bids to Robert W. Donham II, P.E. is anticipated to be conducted by the Village, however; if needed can be competed by Robert W. Donham II, P.E. under "Additional Services" if needed.

**Proposed Lump Sum Fee: \$3,000**

## Task 3 Engineering and Construction Services

Robert W. Donham II, P.E. will provide general engineering and administration and the Village will supply 1 part-time inspector from existing staff to verify compliance with contract requirements and act as the Owner's representative during the anticipated two-month (60 day) construction duration. No public meetings are assumed during Phase 3. Scope of work does not include a warranty inspection.

### Task 4.1 – General Engineering & Administrative Services

Robert W. Donham II will provide general engineering services during construction such as review and approval of shop drawings, pay applications, respond to requests for information/clarification; respond to public concerns and questions; and address unforeseen conditions, handle claims and issue any field orders and change orders that may arise during the course of the construction; develop a punch list for construction closeout and final payment. These services will commence beginning with the notice to proceed (NTP) and will continue through project closeout. We anticipate conducting a pre-construction meeting and will provide meeting minutes therefor. It is anticipated that the Village of Windham will complete all forms and applications necessary to submit any grant

reimbursement requests to the Ohio Public Works Commission, however this may be completed by Robert W. Donham II, P.E. under "Additional Services" if needed

#### Task 4.2 Construction Inspection

- The Village construction inspector shall make periodic site visits to the Project as directed by Donham to review the construction progress and quality of construction and verify that the design requirements are being followed and be under the Engineers responsible charge as it relates to inspection. The inspector will also be responsible for coordinating weekly with the Contractor and Engineer and discussing planned work and work progress. In addition, the inspector shall prepare daily reports for each day the inspector is on site and deliver reports to the Engineer on a weekly basis in electronic (.PDF) format via email, including detailed photos of the work being completed. The inspector shall also conduct the punch list inspection in coordination with the Engineer. Engineer will complete final inspection and certify construction at end of the project.

**Proposed Lump Sum Fee: \$9,000**

### Engineering Fee

A summary of proposed fees is presented in Table 1 below.

Phase	Description	Total Cost
1	Final Design	\$7,000
2	Bidding	\$3,000
3	Construction & Certifications	\$9,000
<b>Grand Total:</b>		<b><u>\$19,000</u></b>

We hope that you find this proposal sufficient to your needs and look forward to working with you on this important project. Please feel free to call me with any questions you may have as you consider this proposal.

Sincerely,

*Robert W. Donham II, P.E.*