

## RESOLUTION NO. 19-84

**Resolution Of The City Council Of The City Of Emeryville Determining that the Bid Protest Filed By Bay Construction, Is Without Merit, Authorizing The City Manager To Execute A Contract With Marina Landscape Inc. In An Amount Not To Exceed \$567,849 For Construction Of The 40<sup>th</sup> Street/San Pablo Avenue Median Rehabilitation Project, Project No. EPW 105-18, CIP No. 16475033, And Appropriating In Fiscal Year 2018/2019 Amounts Of \$200,000 From The General Capital Fund (Fund 475) From The 2019/2020 Project Budget**

**WHEREAS**, on May 5, 2015, the City Council adopted Resolution No. 15-39 authorizing the City and EAH Housing (EAH) to jointly apply for Affordable Housing and Sustainable Communities (AHSC) funding which included \$100,000 for median improvements at 40<sup>th</sup> Street and San Pablo Avenue; and

**WHEREAS**, Capital Improvement Program adopted by the City Council in June 2016 includes funding for the 40<sup>th</sup> Street/San Pablo Avenue Median Rehabilitation Project (CIP No. 16475033) ("Project") and as described this Project proposes to replace the existing trees and landscaping on the 40<sup>th</sup> Street medians and to replace the existing groundcover and other understory plantings without impacting the existing trees on the San Pablo Avenue medians; and

**WHEREAS**, on July 10, 2018, the City Council adopted Resolution 18-99 authorizing the City Manager to enter into a Professional Services Agreement with Callander and Associates in the amount of \$66,565 for design services for the Project; and

**WHEREAS**, on April 16, 2019, City Council authorized the City Engineer to advertise the Project (also referred to as the 40<sup>th</sup> Street/San Pablo Avenue Median Rehabilitation Project, Project No. EPW 105-18) for public bidding, and which will rehabilitate five median islands on 40<sup>th</sup> Street and four median islands on San Pablo Avenue; and

**WHEREAS**, the City received four (4) responsive bids on May 28, 2019, with Marina Landscaping Inc. submitted the lowest bid in the amount of \$567,849; and

**WHEREAS**, on May 30, 2019, Public Works Department staff received a bid protest from Bay Construction, the third lowest bidder, contending that the two lowest bidders were not qualified to perform the directional boring work for the Project because they did not identify any sub-contractors who would perform the work ("Bid Protest"); and

**WHEREAS**, as indicated in the attached correspondence between Bay Construction and Public Works Department staff (Exhibits B and C), the basis of the protest was founded in the assertion that irrigation lines must be installed by directional bore method and that Marina Landscape Inc. did not list a boring subcontractor to perform the directional boring; and

**WHEREAS**, the newly adopted Capital Improvement Program identifies \$900,000 as appropriated to the budget for this Project (Project No. 16475033) with \$300,000 in General Capital Funds (Fund 475) becoming available in fiscal year 2019/2020; and

**WHEREAS**, the full contract amount must be appropriated at the time of contract award so it is necessary at this time to make the \$200,000 in 2019/2020 General Capital funds available in fiscal year 2018/2019; now, therefore, be it

**RESOLVED**, by the City Council of the City of Emeryville that the finds that the Bid Protest is without merit because the lowest responsible bidder can perform the directional boring work with its Class A license, and the plans provide that alternative means and methods besides directional boring may be used; and be it further

**RESOLVED**, by the City Council of the City of Emeryville that City Manager is hereby authorized to execute into a contract with Marina Landscape Inc. in an amount not to exceed \$567,849 for construction of the 40th Street/San Pablo Avenue Median Rehabilitation Project, Project No. EPW 105-18, CIP No. 16475033 (Project); and be it further


**RESOLVED**, the City Council of the City of Emeryville hereby appropriates in fiscal year 2018/2019 amounts of \$200,000 from the General Capital Fund (Fund 475) from the 2019/2020 Project Budget.

**ADOPTED**, by the City Council of the City of Emeryville at a regular meeting held Tuesday, June 18, 2019, by the following vote:

AYES:	5	Mayor Medina, Vice Mayor Patz, and Council Members Bauters, Donahue, and Martinez
NOES:	0	
ABSTAIN:	0	
ABSENT:	0	

  
MAYOR

ATTEST:

  
CITY CLERK

APPROVED AS TO FORM:

  
CITY ATTORNEY

## CONTRACT

This Contract is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_ 2019, between **CITY OF EMERYVILLE**, a municipal corporation ("City") and **Marina Landscape Inc.** ("Contractor").

### WITNESSETH:

**WHEREAS**, by Resolution No. **19-36**, the City Council of the City of Emeryville gave permission to advertise for the **40<sup>TH</sup> STREET/SAN PABLO AVENUE MEDIAN REHABILITATION PROJECT** ("EPW 18105"); and

**WHEREAS**, the City has conducted a public bidding procedure in compliance with all applicable laws; and

**WHEREAS**, **Marina Landscape Inc.** of **Orange, CA** submitted the lowest responsible bid in the amount of \$ **567,849**; and

**WHEREAS**, the City has determined that the Contractor is qualified by training and experience to render such services; and

**WHEREAS**, by Resolution No. \_\_\_\_\_, the City Council of the City of Emeryville approved the award of this agreement.

**NOW, THEREFORE**, the parties mutually agree as follows:

#### 1. Contract Documents

The following documents are by this reference incorporated in and made a part of this Agreement: - the State of California Department of Transportation Standard Plans and Standard Specifications dated 2006, the Part A General Provisions, the Part B General Provisions, the Part C Special Provisions for Project No. EPW 18-102, the Project Plans (Contract Drawings) for Project No. EPW 18-102, all addenda to the above plans and specifications, the Standard Plans and Specifications for Public Works Construction including Amendment A, the Notice to Contractors, Contractor's Bid and Proposal, and all required bonds. These documents are referred to herein as the "Plans and Specifications".

#### 2. Scope of Work

In conformance with the Contract Documents, Contractor will furnish, all labor, materials, equipment, incidentals, transportation and disposal for services required in order to perform and complete the **40<sup>TH</sup> STREET/SAN PABLO AVENUE MEDIAN REHABILITATION PROJECT** ("EPW 18105").

FOR CITY USE ONLY			
Contract #:		CIP #:	
Reso. #:		EPW #:	

EPW-18105

A-18

### **3. Price**

The total amount to be paid under this Contract for all of the work set forth in Section 2 above is \$ **567,849** ("Total Contract Price"). This price includes all costs for labor, materials, tools, equipment, services, warranty, taxes, insurance, overhead, profit and all other costs necessary to perform the work in accordance with this Contract.

### **4. Time for Completion**

After the Contract has been executed by City, Contractor shall begin work within 7 calendar days after the effective date of the Notice to Proceed issued by City and shall diligently prosecute the work to completion within **thirty (30) working days** from the effective date of the Notice to Proceed.

### **5. Liquidated Damages**

The Contractor shall pay to the City of Emeryville the sum of **\$1,500 per day**, for each and every calendar day's delay in finishing the work in excess of the number of working days prescribed above.

### **6. Blank**

### **7. Contract Bonds**

Attention is directed to Section 3-1.05 of the Part B General Provisions. Contractor shall provide bonds issued by a sufficient and admitted surety insurer authorized to do business in the State of California, and shall be maintained at the expense of Contractor. With the submission of any of these bonds, Contractor shall provide a current certificate from the Alameda County Clerk's Office indicating that the surety is a sufficient and admitted insurer.

- a. Performance Bond.  
Before beginning the work, Contractor shall submit a Performance Bond to City for one hundred percent (100%) of the Total Contract Price and shall guarantee the faithful performance of the Contract.
- b. Payment Bond.  
Before beginning the work, Contractor shall submit a Payment Bond to City if the Contract Price exceeds \$25,000, as required by Division Third, Part 4, Title 15, Chapter 7, of the Civil Code of the State of California. The Payment Bond shall be for one hundred percent (100%) of the Total Contract Price. Any alteration or alterations made in the Plans and Specifications which are

a part of this Contract or in any provision of this Contract shall not operate to release any surety from liability on any required bond and the consent to make such alterations is hereby given. Any surety on such bonds hereby waives the provisions of Section 2819 of the Civil Code.

## **8. Responsibility for Damage**

Contractor shall be responsible for any loss or damage that may happen to the work; for any loss or damage to any of the materials of other things used or employed in performing the work; for injury to or death of any person (including but not limited to workers or the public) from any cause whatsoever; or damage to property from any cause whatsoever.

Contractor shall indemnify, defend and save harmless City, and its officials, officers, employees, volunteers and agents against all suits, claims or losses (including attorneys' fees and expenses) that may be based on any injury or damage to, or death of any person or any damage to property that may occur, or that may be alleged to have occurred, arising from the performance of this Contract by Contractor, its subcontractors or employees, whether or not it shall be claimed that the injury was caused through a negligent act or omission of Contractor, its subcontractors, employees or other agents, except for the active negligence, sole negligence or willful misconduct of City. Contractor shall, at its own expense, pay all charges of attorneys and all cost and other expenses arising or incurred in connection with such suits, claims or losses. If any judgment shall be rendered against City in connection with any such suit, claim or loss, Contractor shall at its own expense satisfy and discharge it.

## **9. Insurance**

Contractor shall procure and maintain for the duration of the Contract insurance against claims for injuries to persons or damages to property of the work hereunder by Contractor, his agents, representatives, employees.

- a. Minimum Scope and Limits of Insurance. Coverage shall be placed with insurers admitted in California with a current A.M. Best's rating of not less than A: VII:
  - (1) Contractor shall maintain general liability insurance with limits no less than \$2,000,000 per occurrence for bodily injury, personal injury and property damage and a general aggregate limit of at least \$2,000,000. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
  - (2) Contractor shall maintain automobile liability insurance with limits of no less than \$2,000,000 per accident for bodily injury and property damage.

- (3) Workers' Compensation limits as required by the Labor Code of the State of California, and Employers Liability limits of no less than \$2,000,000 per accident.
- (4) (blank)
- (5) (blank)

b. Other Insurance Provisions.

- (1) As to the general liability, automobile liability and builder's risk property insurance policies, the City of Emeryville and its officers, officials, employees, agents and volunteers are to be covered as additional insured pursuant to an endorsement to the policy. The coverage shall contain no special limitations on the scope of protection afforded to the City of Emeryville, its officers, officials, employees, agents or volunteers.
- (2) For any claims related to this project, Contractor's insurance coverage shall be endorsed to be primary insurance as respects the City of Emeryville, and its officers, officials, employees, agents or volunteers. Any insurance or self-insurance maintained by the City of Emeryville, and its officers, officials, employees, agents or volunteers shall be excess of Contractor's insurance and shall not contribute with it.
- (3) For worker's compensation coverage, the insurer agrees by endorsement to waive all rights of subrogation against the City of Emeryville, and its officials, employees, and volunteers for losses arising from the work.
- (4) Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City of Emeryville, its officers, officials, employees, agents or volunteers.
- (5) Contractor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respects to the limits of the insurer's liability.
- (6) Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail, return receipt requested has been given to the City.

- (7) Any deductibles or self-insured retentions must be declared to and approved by the City.
- (8) Contractor affirms and agrees that the referenced policies will not include a limitation that the self-insured retention or deductible may only be paid or exhausted by the named insured thereby restricting an additional insured from paying/exhausting the self-insured retention or deductible and realizing the benefit of the additional insured status.

## **10. Payment of Taxes**

The Contract prices paid for the work shall include full compensation for all taxes which Contractor is required to pay, whether imposed by Federal, State or local government, including, without being limited to, Federal excise tax. No tax exemption certificate nor any document designed to exempt Contractor from payment of any tax will be furnished to Contractor by City, as to any tax on labor, services, materials, transportation, or any other items furnished pursuant to the Contract. Contractor shall withhold and pay any and all sales and use taxes, withholding taxes, whether State or Federal, Social Security taxes, State Unemployment Insurance charges and all other taxes which are now or hereafter may be required to be paid or withheld under any laws.

To the extent reasonably feasible, Contractor will use sales tax reporting procedures which will provide City of Emeryville the greatest benefit from California sales/use tax revenue. Such procedures may include, when applicable, designating City of Emeryville as the point of sale/use of product where there is no clearly determinable point of sale/use, self-reporting tax on out of state purchases of goods used in City of Emeryville and reporting City of Emeryville as the origin of construction costs as allowed by the State Board of Equalization pursuant to their December 1994, Resolution pertaining to allocation of local tax by construction contractors. Notwithstanding the above, Contractor shall not be obligated to adopt any procedures pursuant to this section if such procedures result in significantly increased costs to Contractor (including loss of profits or risk of liability for taxes in multiple jurisdictions), or if such procedures are contrary to the sales and use tax laws or regulations of California or any other state.

## **11. Permits and Licenses**

Contractor covenants and declares that it has obtained all diplomas, certificates, licenses, permits or the like required of Contractor by any and all national, state, regional, county, city or local boards, agencies, commissions, committees or other regulatory bodies in order to perform the services contracted for under this Contract. Contractor shall comply with all permits applicable to the work. Contractor has and shall maintain the appropriate State Contractor's License, pursuant to Chapter 9 of Division 3 of the California Business and Professions Code.



Contractor has and shall maintain a current Business License with City of Emeryville during the term of this contract. Contractor shall insert in each of its subcontract Contracts a provision which requires its subcontractors to present proof that the subcontractor has obtained a current Business License with City of Emeryville during the term of this contract.

The California Environmental Quality Act (Public Resources Code, Section 21000 to 21176) may be applicable to permits, licenses and other authorizations which Contractor must obtain from State or local agencies in connection with performing the work of the Contract. Contractor shall comply with the provisions of that Act in obtaining such permits, licenses and other authorizations and they shall be obtained in sufficient time to prevent delays to the work.

## **12. Labor Code Requirements**

Contractor's attention is directed to Section 7-1.01A "Labor Code Requirements" of the Standard Specifications:

## **13. Living Wage**

If this Agreement provides for compensation to Contractor of \$25,000 or more within a single fiscal year for providing services to the City, then Consultant shall comply with the requirements of the City's Living Wage Ordinance set forth in Chapter 31 of Title 5 of the Emeryville Municipal Code, unless (i) Consultant is a governmental entity, (ii) this Agreement is subject to a higher prevailing wage rate as defined in the California Labor Code, or (iii) this Agreement is subject to federal or state laws or regulations that would preclude the application of the City's laws.

Compliance with the Living Wage Ordinance, if applicable, shall be required during the term of the Agreement for all employees of Consultant who perform at least twenty-five percent (25%) of the work arising from this Agreement, unless said employees are otherwise exempt from the application of the Living Wage Ordinance pursuant to Section 5-31.08. Consultant shall promptly provide to the City documents and information verifying compliance with the requirements of the Living Wage Ordinance within ten (10) working days following a written request for such documentation and information from the City.

Failure to comply with the Living Wage Ordinance provides that a person claiming a violation thereof may bring an action against Consultant for back pay, reinstatement and compensatory damages, as well as a penalty up to three times the amount of damages for a willful violation, plus reasonable attorney's fees and costs. In addition, the City may terminate the Agreement and pursue any other remedies available to the City, including debarment, for violations of the Living Wage Ordinance.

Contractor shall notify each of its affected employees with regards to wages that are required to be paid pursuant to this Agreement. "Living Wage" means no less than \$15.73



per hour (as of July 1, 2018, subject to increase annually on July 1st to reflect the twelve month average increase to the Consumer Price Index for all urban consumers in the San Francisco-Oakland-San Jose Metropolitan Statistical Area for the preceding year from May to April, not to exceed three percent (3%) in any one year) including wages and health benefits. If employer contributions for health benefits are not paid on an hourly basis, the employer must demonstrate to the City the hourly value of such benefits in order to receive credit for such payments to covered employees.

#### **14. Antitrust Claims**

Contractor's attention is directed to the following provision of Public Contract Code Section 7103.5(b) which shall be applicable to Contractor and his subcontractors:

"In entering into a public works contract or a subcontract to supply goods, services or materials pursuant to a public works contract, Contractor or subcontractor offers and agrees to assign to the awarding body all right, title and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) or under the Cartwright Act (Chapter 2 [commencing with Section 16700] of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, services or materials pursuant to the public works contract or the subcontract. This assignment shall be made and become effective at the time the awarding body tenders final payment to Contractor, without further acknowledgment by the parties."

#### **15. Warranty**

Contractor warrants that all materials and work furnished (1) shall meet all requirements and conditions of City's Contract and manufacturer's warranty if any; (2) shall be free from defects in design, material; workmanship and methods of installation; and (3) shall be fit for the purposes intended. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective and nonconforming. This warranty by the Contract is in addition to any warranties or guarantees required or provided by the manufacturer or supplier.

If within one (1) year after the date of final acceptance of the work by City, any of the work is found not in compliance with this section, Contractor shall correct the work at its own expense promptly after written notice from City to do so and pay for any damage to other property resulting from such nonconforming work. If Contractor fails to do so promptly, or in an emergency when delay could cause risk of damage or loss, then City may take whatever actions are necessary to have the nonconforming work removed, replaced or corrected at the expense of Contractor and to recover its damages, costs and expenses, including withholding the amount from any payment that is due or to commencing an action against the performance bond. Nonconforming work that is remedied under this section shall be subject to an extended warranty obligation for the period of two (2) years after the nonconformity has been remedied.

Nothing in this section shall be construed to establish a period of limitation with respect to other obligations that Contractor may have under these Contract Documents.

#### **16. Independent Contractor Status**

Contractor shall independently perform all work under this Contract and shall not be considered an agent or employee of City; nor shall Contractor's subcontractors or employees be considered as subagents of the Owner.

#### **17. Hazardous Chemicals and Wastes**

Should any release, discharge, leakage, spillage, emission or pollution of any hazardous chemicals or wastes occur due to Contractor's work, then Contractor at its sole cost, shall clean all affected property to the satisfaction of City and any governmental body with jurisdiction. Contractor shall immediately report any such release to the Director of Public Works.

If the performance of the work outlined by these Contract Documents creates any hazardous wastes, Contractor shall properly dispose of such wastes in full accordance with federal, state and local laws, at its expense. Contractor shall provide City with written proof of its or its subcontractor's registration as a hazardous waste transporter.

#### **18. Conflicts of Interest**

Contractor covenants and declares that other than this Contract, it has no holdings or interests within the City of Emeryville or business holdings or agreements with any official, employee or representative of City and shall disclose any such holdings or interests to City in writing.

#### **19. Discrimination Prohibited**

Contractor covenants and agrees that in performing the services required under this Contract, Contractor shall not discriminate against any person on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, ancestry, age or disability.

#### **20. No Waiver**

Failure of City to insist upon strict performance of any of the terms and conditions hereof, or failure or delay to exercise any rights or remedies or to properly notify Contractor in the event of breach, or the acceptance of or payment for any good hereunder, shall not release Contractor of any of the warranties or obligations of this Contract and shall not be deemed a waiver of any right of City to insist upon strict performance hereof.

#### **21. No Personal Liability**

No member, official or employee of City shall be personally liable to Contractor or any successor in interest in the event of any default or breach by City or for any amount which may become due to Contractor or successor on any obligation under this Contract.

## **22. Entire Agreement**

This Contract contains the entire agreement of the parties with respect to the subject matter of this Contract. Any modifications to this Agreement shall be in writing.

## **23. Authority to Contract**

Contractor covenants and declares that it has obtained all necessary approvals to bind Contractor to this Contract and that the representative signing the Contract is authorized to do so.

**IN WITNESS HEREOF**, City and Contractor have caused this Agreement to be executed as of the date first above written.

CITY OF EMERYVILLE

\_\_\_\_\_  
Christine Daniel, City Manager

Approved as to form:

\_\_\_\_\_  
City Attorney

Contractor  
Firm Name: \_\_\_\_\_

Address: \_\_\_\_\_

Tel.: \_\_\_\_\_

FAX No: \_\_\_\_\_

Email Address: \_\_\_\_\_

**SIGN HERE >>>**

by: \_\_\_\_\_

its: \_\_\_\_\_

COPY

## PERFORMANCE BOND

KNOW ALL PERSONS BY THESE PRESENTS that,

WHEREAS, the City of Emeryville, a municipal corporation located in Alameda County, State of California (hereinafter referred to as "City"), has entered into a Contract with \_\_\_\_\_, (hereinafter referred to as "Principal"), to construct the **40<sup>TH</sup> STREET/SAN PABLO AVENUE MEDIAN REHABILITATION PROJECT**, Project No. EPW-18105; and

WHEREAS, the Principal is required under the terms of the Contract to furnish a bond for the faithful performance of said Contract.

NOW, THEREFORE, we, the Principal and \_\_\_\_\_, as Surety, are held and firmly bound unto the City in the penal sum of (\$ \_\_\_\_\_), lawful money of the United States of America, being not less than one hundred percent (100%) of the Contract Amount, to be paid to the City or its successors and assigns; for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, that if the above-bound Principal, or its heirs, executors, administrators, successors, transferees, or assigns approved by the City, shall promptly and faithfully perform the covenants, conditions, and agreements in the Contract until completion, during the original term and any extensions thereof as may be granted by the City, with or without notice to Surety, and shall also promptly and faithfully perform all covenants, conditions, and agreements of any alteration of the Contract made as therein provided, notice of which alterations to Surety being hereby waived, provided on the Principal's part to be kept and performed at the time and in the manner therein specified, and in all respects according to their true intent and meaning, and shall indemnify and save harmless the City, its officers employees and agents, as therein stipulated, then this obligation shall become null and void; otherwise it shall be and remain in full force and effect.

FURTHERMORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that upon Final Completion of the Contract, the above obligation shall be reduced to the amount of \_\_\_\_\_ Dollars, (\$ \_\_\_\_\_), being not less than twenty percent (20%) of the Contract Amount, and shall hold for a period of two (2) years, during which time if the above bound Principal, or its heirs, executors, administrators, successors, transferees, or assigns shall fail to make full, complete and satisfactory repair and replacements or totally to protect the City from loss or damage made evident during said period from the date of Final Completion of the Contract, and resulting from or caused by defective materials or faulty workmanship in the prosecution of the work done, or failure to satisfy the warranty as set forth in the Contract, the above obligation in said sum of \$ \_\_\_\_\_, shall remain in full force and effect, otherwise the above obligation shall be void.

Whenever Principal shall be declared by the City to be in default under the Contract, Surety shall promptly remedy the default, or shall promptly do one of the following at the City's election:

1. Undertake through its agents or independent Contractors, reasonably acceptable to the City, to complete the Contract in accordance with its terms and conditions and to pay and perform all obligations of Principal under the Contract, including without limitation, all obligations with respect to warranties, guarantees, and the payment of liquidated damages.

2. Reimburse the City for all costs the City incurs in completing the Contract, and in correcting, repairing or replacing any defects in materials or workmanship and/or materials and workmanship which do not conform to the specifications in the Contract.

Further, the Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Contract or to the Work to be performed thereunder or the Specifications accompanying the same shall release or exonerate the Surety on this bond or in any way affect its obligations under this bond; and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the Contract, or to the Work, or to the Contract Documents.

The Surety's obligations hereunder are independent of the obligations of any other surety for the performance of the Contract, and suit may be brought against the Surety and such other sureties, jointly and severally, or against any one or more of them, or against less than all of them without impairing the City's rights against the others.

No right of action shall accrue on this bond to or for the use of any person or corporation other than the City or its successors or assigns.

In the event the City, or its successors or assigns, shall be the prevailing party in an action brought upon this bond, then in addition to the penal sum hereinabove specified, Principal and the Surety, jointly and severally, agree to pay to the City or its successors or assigns, a reasonable sum on account of its attorney's fees incurred in such action, which sum shall be fixed by the court.

IN WITNESS WHEREOF, the above bound parties have executed this instrument under their seals this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative pursuant to authority of its governing body.

Principal

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Signature

(SEAL)

Surety

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Signature

(SEAL)

*\*Note: To be considered complete, both the Principal and an admitted Surety Insurer authorized by the California Insurance Commissioner to transact surety business in the State of California must sign the Performance Bond. In addition, the Surety's signature must be notarized and a copy of the Surety's Power of Attorney*



## PAYMENT BOND

KNOW ALL PERSONS BY THESE PRESENTS, that

WHEREAS, the City of Emeryville, a municipal corporation located in Alameda County, State of California (hereinafter "City"), has awarded a contract to \_\_\_\_\_, (hereinafter "Principal"), to construct the **40<sup>TH</sup> STREET/SAN PABLO AVENUE MEDIAN REHABILITATION PROJECT**, Project No. EPW-18105; and

WHEREAS, the Principal is required to furnish a bond in connection with the Contract, providing that if Principal, or any of it or its subcontractors, shall fail to pay for any materials, provisions, or other supplies or teams used in, upon, for or about the performance of the Work contracted to be done, for any work or labor thereon of any kind, or claims to which reference is made in Section 9554 of the Civil Code, the Surety of this bond will pay the same to the extent hereinafter set forth.

NOW, THEREFORE, we, the undersigned Principal, and \_\_\_\_\_, as Surety, are held and firmly bound unto the City in the penal sum of \_\_\_\_\_ Dollars, (\$ \_\_\_\_\_), lawful money of the United States of America, being not less than one hundred percent (100%) of the Contract Amount, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, that if said Principal, or its heirs, executors, administrators, successors, transferees, assigns, or subcontractors, shall fail to pay any of the persons named in Section 9100 of the Civil Code, or amounts due under the Unemployment Insurance Code with respect to work or labor performed under this Contract, or any amounts required to be deducted, withheld and paid over to the Employment Development Department from the wages of employees of the Contractors and his subcontractors pursuant to Section 13020 of the Unemployment Insurance Code with respect to such work and labor, the Surety will pay for the same, in an amount not exceeding the sum specified in this bond and will also pay, in case suit is brought upon this bond, a reasonable attorney's fee, to be fixed by the court.

This bond shall inure to the benefit of any and all persons named in Section 9100 of the Civil Code so as to give a right of action to them or their assigns in any suit brought upon this bond.

This bond is given to comply with Sections 9550 and 9554 of the Civil Code. The liability of the PRINCIPAL and SURETY hereunder is governed by the provisions of said Code, all acts amendatory thereof, and all other statutes referred to therein, including Section 8152 of the Civil Code.

And the said Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Contract, or to the work to be performed thereunder, or the Specifications accompanying the same shall in any way affect its obligations on this bond; and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the Contract or to the Work or to the Contract Documents.

IN WITNESS WHEREOF, the above bounded parties have executed this instrument under their seals this \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

Principal

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Signature

(SEAL)

Surety

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Signature

(SEAL)

*\*Note:*

*To be considered complete, both the Principal and an admitted Surety Insurer authorized by the California Insurance Commissioner to transact surety business in the State of California must sign the Payment Bond. In addition, the Surety's signature must be notarized and a copy of the Surety's Power of Attorney must be attached.*

## **GUARANTEE**

TO THE CITY OF EMERYVILLE for construction of the following Project:

**40<sup>th</sup> Street/San Pablo Avenue Median Rehabilitation Project,  
Project No. EPW-18105**

By signing below, Contractor hereby warrants and guarantees to City of Emeryville all ("City") construction performed on this Project, including all material and equipment incorporated therein, as set forth below:

1. Pursuant to this Guarantee, Contractor agrees to unconditionally guarantee 1) the quality and adequacy of all of work provided on the Project including, without limitation, all labor, materials, workmanship, methods of installation, and equipment provided by Contractor and/or its Subcontractors (of all tiers) in connection with the Work under normal application, installation, and use and service conditions (collectively "Work"); and 2) that the work is fit for the purposes intended. The Guarantee provided hereunder shall become effective on the date of Substantial Completion; or where applicable, the Guarantee shall become effective on the first day following Substantial Completion of a specifically defined phase of the Project; or on such other date as may be specified elsewhere in the Contract Documents; and once effective, the Guarantee shall remain operative and shall bind Contractor as further described herein for a period of two (2) years, or such longer period of time as may be prescribed by laws or regulations, or by the terms of Contract Documents ("Warranty Period").

This Guarantee is in addition to any warranties or guarantees required or provided by the manufacturer or supplier or otherwise provided at law with respect to Contractor's duties, obligations and performance under the Contract Documents.

2. Neither final payment nor use or occupancy of the Work performed by the Contractor shall constitute an acceptance of Work not done in accordance with this Guarantee or relieve Contractor of liability with respect to any express warranties or responsibilities for faulty materials or workmanship. Contractor shall remedy any defects in the Work and pay for any damage resulting therefrom, which shall appear within the Warranty Period.

3. If, within the Warranty Period, the Work, or any portion thereof, is found to be defective, the City shall have the unqualified option to make any needed replacements or repairs itself or to have such replacements or repairs performed by Contractor. Such repairs or replacements shall include, without limitation, removal of any such defective Work and replacement of such Work with Work that is not defective, and satisfactory correction, or removal and replacement of any damage to other Work or the work of others resulting therefrom.

If City elects to have said repairs or replacements performed by Contractor, Contractor shall promptly, without cost to City, and in accordance with City's written instructions, correct such defective Work. If City elects to perform the repairs or replacements, Contractor agrees to pay for all claims, costs, losses and damages caused by or resulting from such removal and replacement by City. While carrying out correction, or removal and replacement of defective or nonconforming Work the Contractor must provide the same insurance specified before Contract acceptance. Nonconforming Work that is remedied pursuant to this Warranty shall be subject to an extended warranty obligation for the period of two (2) years after the acceptance of the repairs to the nonconforming work.

4. Inspection of the Work shall not relieve Contractor of any of its obligations under the Contract Documents. Even though Work required to be provided under the Contract Documents has been

inspected, accepted, and estimated for payment, Contractor shall, at its own expense, replace or repair any such equipment, material, or Work found to be defective or otherwise not to comply with the requirements of the Contract Documents up to the end of the applicable Warranty Period.

5. This Guarantee is not in lieu of any other liability imposed on Contractor under the Contract Documents and at law with respect to Contractor's duties, obligations, and performance under the Contract Documents, and is in addition to any warranties or guarantees required or provided by manufacturers or suppliers. In the event of any conflict or inconsistency between the terms of this Guarantee and any obligation of the Contractor under the Contract Documents or at law, such inconsistency or conflict shall be resolved in favor of the higher level of obligation of the Contractor.

6. If the Contractor fails or refuses to comply with its obligations under this Guarantee, City shall be entitled to all costs and expenses, including attorneys' fees, reasonably incurred by reason of the said failure or refusal.

\_\_\_\_\_  
Contractor

\_\_\_\_\_  
Date

\_\_\_\_\_  
Contractor's Name (print)

\_\_\_\_\_  
Address

\_\_\_\_\_  
City/State/Zip

\_\_\_\_\_  
Phone

\_\_\_\_\_  
Fax No:

END OF DOCUMENT

EXHIBIT B

Bay Construction Co.  
4026 Martin Luther King Jr. Way  
Oakland, CA 94609  
Phone: 510-658-7225  
Fax: 510-658-4890

May 30, 2019

via electronic mail

Public Works Department  
Engineering Division  
1333 Park Avenue, Emeryville, CA 94608  
Tel. (510) 596-4330

RE: Project no. 18105, 40th Street/San Pablo Avenue Median Rehabilitation Project, bid date: May 28, 2019, at 10:00 AM

With this letter, Bay Construction Co. is protesting Marina Landscape and Bortolussi & Watkin, Inc.'s bid for Project no. 18105, 40th Street/San Pablo Avenue Median Rehabilitation Project. Marina Landscape will be referred to as Marina for the remainder of this letter and Bortolussi & Watkin, Inc. will be referred to as Bortolussi for the remainder of this letter. Marina and Bortolussi did not list a boring subcontractor for the 300 linear feet of directional boring at 40<sup>th</sup> Street median (drawing L3.1). Directional boring is necessary for the installation of irrigation and completion of the project because hand digging will not be considered the safe procedure for the nearby multiple utilities. Marina listed Columbia electric and the scope of work included was only for the electrical power work at \$19,600. Bortolussi listed Columbia electric and the scope of work included was only for the electrical power work at \$19,600. Per CA PCC 4014 (a) (1) regulations, all subcontractors more than half of 1% of the bid value must be listed on document A-13 section 6 of the subcontractor's list. The estimated scope of work for the directional boring is valued at more than half of 1% of Marina and Bortolussi's bids. Marina Landscape's bid should be rejected because they did not list a boring subcontractor. Bortolussi & Watkin, Inc. should be rejected because they did not list a boring subcontractor. Bay Construction Co. should be considered the lowest responsible bidder as Bay Construction had listed Columbia Electric for both electrical power and directional boring work. We are a certified small Oakland-based disadvantaged business and we will be able to perform the work safely and economically for the city of Emeryville. Please let us know if you have questions.

Sincerely,



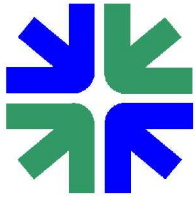
Yong Kay  
President  
BAY CONSTRUCTION CO.  
510-658-7225 Office

Bay Construction Co.  
4026 Martin Luther King Jr. Way  
Oakland, CA 94609  
Phone: 510-658-7225  
Fax: 510-658-4890

510-658-4890 Fax  
510-867-1294 Cell  
4026 Martin Luther King Jr. Way  
Oakland, CA 94609

[www.BayConstructionCo.com](http://www.BayConstructionCo.com)

CC: City of Emeryville – Michael Roberts, Marina Landscape and Bortolussi & Watkin, Inc.



## CITY OF EMERYVILLE

INCORPORATED 1896

1333 PARK AVENUE  
EMERYVILLE, CALIFORNIA 94608-3517

TEL: (510) 596-4330 FAX: (510) 596-4389

Bay Construction Co.  
4026 Martin Luther King Jr. Way  
Oakland, CA 94609

Attn: Yong Kay

May 31, 2019

Email: yongkay@yahoo.com

Subject: 40<sup>th</sup> Street/San Pablo Avenue Median Rehabilitation Project (EPW105-18)  
Bid Protest

Mr. Kay;

We are in receipt of your letter dated and received May 30, 2019 protesting the May 28, 2019 bid results for the above referenced project. Your protest of the project bid results and subsequent award is hereby found to be without merit for the following reasons.

Bay Construction's contention that that irrigation pipeline installation must be done by directional bore method contradicts the Sheet L3.1 notation that allows "directional bore under road or other approved method". Because the project documents allow the Contractor to propose the method of pipeline installation it is erroneous to conclude that Marina Landscape cannot perform the installation. Furthermore Marina Landscape's Class A-General Engineering Contractor License does not preclude it from performing directional bore work as your letter asserts.

Please feel free to contact me at 510-596-4333 if you have any questions or require any additional information.

Sincerely,

Michael Roberts  
Senior Civil Engineer  
Public Works Department  
City of Emeryville



## **SECTION 2-1.47 BID RELIEF**

### **Replace Section 2-1.47 Bid Relief with the following:**

The City may grant bid relief under Pub Contract Code § 5100 et seq. Submit any request for bid relief to the Director within five (5) calendar days after the opening of the bids.

## **SECTION 2-1.48 RESERVED**

### **Add Section 2-1.48 BID PROTESTS as follows:**

1. Any protest of the proposed Project award must be submitted in writing to the City no later than 5:00 PM on the third business day following the date of the bid opening.
2. The protest must contain a complete statement of the basis for the protest.
3. The protest must state the facts and refer to the specific portion of the document or the specific statute that forms the basis for the protest. The protest must include the name, address, and telephone number of the person representing the protesting party.
4. The party filing the protest must concurrently transmit a copy of the protest to the proposed awardee.
5. The party filing the protest must have submitted a bid for the Project. A subcontractor of a party filing a bid for the Project may not submit a bid protest. A party may not rely on the bid protest submitted by another bidder but must timely pursue its own protest.
6. The procedure and time limits set forth in these Instructions to Bidders are mandatory and are the bidders' sole and exclusive remedy in the event of a bid protest. Any bidder's failure to fully comply with these procedures shall constitute a waiver of any right to further pursue a bid protest, including filing of a challenge of the award pursuant to the California Public Contract Code, filing of a claim pursuant to the California Government Code, or filing of any other legal proceedings.
7. The City shall review all timely protests prior to award of the Project. The City shall not be required to hold an administrative hearing to consider any protests but may do so at its option. At the time of the City Council's consideration of the Project award, the City Council shall also consider the merits of any timely protests. The City Council may either reject the protest and award to the lowest responsible bidder or accept the protest and award the bid to the next lowest responsible bidder. Nothing in this section shall be construed as a waiver of the City Council's right to reject all bids.

