



MARICOPA ASSOCIATION OF GOVERNMENTS
ARTERIAL LIFE CYCLE PROGRAM

PROJECT AGREEMENT

Ellsworth Road: Germann Road to Ray Road
Project Agreement No. 21-ELL-20-03
RTP Project # ACI-ELL-20-03
MAG TIP Projects # MES22-166DZ, MES22-166DRB, MES22-166DRB2,
MES23-166RWZ, MES23-166RRB, MES24-166CZ, MES24-166CRB

This Agreement (Agreement) by and between the Maricopa Association of Governments (MAG) and the City of Mesa (City), an Arizona Municipal Corporation, will become effective on the day that it is executed by the MAG Executive Director. MAG and the City are referred to in this Agreement each individually as a "Party" and collectively as the "Parties."

RECITALS

A. MAG is the regional planning agency for Maricopa County. MAG is governed by a regional council, which includes the mayor or chief executive of each member agency (Regional Council). Pursuant to state law, MAG has developed, and the necessary parties have approved, a twenty-year comprehensive, performance based, multimodal and coordinated Regional Transportation Plan (RTP) in the County. The arterial street component of the RTP includes major arterial streets and intersection improvements (Arterial Street Improvements) with a revenue allocation.

B. In November 2004, the voters of Maricopa County approved a transaction excise tax for the purpose of implementing the RTP. Federal Highway Administration (FHWA) Surface Transportation Block Grant Program (STBGP) and Congestion Mitigation and Air Quality (CMAQ) Funds are also allocated to the MAG region and administered by the Arizona Department of Transportation (ADOT) and are eligible to be used to implement the RTP.

C. MAG is required by state law to adopt a program that provides for life cycle management for the funding and programming of the Arterial Street Improvements (Arterial Life Cycle Program). On January 27, 2021 the Regional Council approved the Fiscal Year 2021 Arterial Life Cycle Program (ALCP) and on February 24, 2021 the Regional Council approved the ALCP Policies and Procedures. The February 24, 2021 Policies and Procedures, as they may from time to time be amended by the MAG Regional Council (henceforth, the "Policies and Procedures"), are incorporated into this Agreement as fully as if set forth in this Agreement.

Copies of the Policies and Procedures are available from MAG. Capitalized terms that are not defined in this Agreement have the meaning set forth in the Policies and Procedures

D. Funds for ALCP are administered by ADOT through its Regional Arterial Road Fund (RARF) sub-account for arterial streets, and through allocations of FHWA STBGP and CMAQ Funds that are allocated to the MAG region and administered by ADOT. Funds will be disbursed by ADOT once federal requirements are satisfied, as applicable, and upon the presentation of an invoice approved or reviewed with concurrence by MAG as provided in this Agreement.

E. The ALCP includes an arterial capacity improvement project on Ellsworth Road between Germann Road and Ray Road. The Project is described in greater detail in the Project Overview submitted by the City, dated April 8, 2021 and on file in the offices of the City and MAG. The regional share in this agreement and the Project Overview are subject to change in the annually adjusted ALCP.

F. The Project will be designed and constructed in accordance with the standards adopted by the City.

G. When applicable, the regional reimbursement schedule will reflect the current ALCP that Regional Funds are first programmed. The current funding schedule for the Project is as follows:

Type of Work	Fiscal Year for Work	Regional Reimbursement	Type of Reimbursement Funds	Fiscal Year for Reimbursement
Design	2022	\$ 1,270,760.20	RARF	2022
Right of Way	2023	\$ 298,258.80	RARF	2023
Construction	2024	\$3,291,301.30	RARF	2024
Total Programmed for Reimbursement		\$4,860,320.30		

H. The regional reimbursement is expressed in 2020 dollars. Adjusted costs will be incorporated into the ALCP and by reference into this Agreement. Cost adjustments as specifically provided in the ALCP Policies and Procedures, do not require a modification of this Agreement.

I. The Parties are authorized to enter into this agreement by the provisions of Arizona Revised Statutes Section 28-6301 et seq.

AGREEMENTS

NOW, THEREFORE, for good and sufficient consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

A. Purpose. The purpose of this Agreement is to identify and define the responsibilities of the City and MAG for the design, acquisition of right of way, construction and financing of the Project, as established in the ALCP.

B. Responsibilities of the Parties.

1. MAG's Responsibilities. MAG agrees to:

- a. Administer the ALCP, pursuant to the Policies and Procedures as approved by the MAG Regional Council;
- b. Provide to the City the required format for submitting requests for payment, invoices, progress reports, and backup documentation;
- c. Review and approve invoices for projects to be reimbursed with Regional Area Road Funds or review and concur with invoices for projects to be reimbursed with federal funds, subject to the terms of this Agreement;
- d. Submit the approved Request for Payment form to ADOT for payment by ADOT to the City. The payments from ADOT to the City will be based on the reimbursement amounts and schedule as noted in the Recitals, Section G. The basis for payment to City shall be reimbursement for costs in conformance with the ALCP and the Policies and Procedures.

2. City's Responsibilities. The City agrees to:

- a. Be responsible for all project costs and submit invoices to MAG for reimbursement. The City will: 1) be responsible for the completion of all surveys, design, plans and specifications, including contractor selection documents; 2) conduct contractor selection process(es), award contract(s) for construction pursuant to the applicable laws, and provide necessary construction management and inspection; 3) if necessary, purchase or condemn right of way required for the completion of the Project; 4) be responsible for all utility relocations, and 5) review and approve invoices from its contractors and subcontractors before submitting an invoice to MAG;

- b. Abide by the Policies and Procedures as approved by the MAG Regional Council throughout the completion of the Project;
- c. Be responsible for meeting all applicable project development requirements for the Project;
- d. Obtain appropriate indemnifications and insurance from all contractors and subcontractors involved in the Project;
- e. Be responsible for all Project costs in excess of the maximum amount of the regional funds allocated for the Project in the amount of \$4,860,320.30 (Allocated Regional Funds). The amount of funds to be paid to the City pursuant to this Agreement will not exceed the Allocated Regional Funds. The allocated regional funds are expressed in current year dollar amount in which the Regional Funds are first programmed. The Regional Funds may be adjusted annually for inflation pursuant to the procedure set forth in the Policies and Procedures and the current Regional Council-approved ALCP;
- f. Provide invoices and progress reports to MAG pursuant to the project schedule provided in the Project Overview;
- g. Otherwise comply with all requirements of this Agreement; and
- h. Have the City's authorized representative, the City's Public Works and Utilities Director or designee, sign, approve and submit invoices to MAG.

C. Records and Audit Rights. The City's work and accounting records (hard copy, as well as computer readable data), and any other supporting evidence deemed necessary by MAG to substantiate charges and claims related to this Agreement shall be open to inspection and subject to audit and/or reproduction by authorized representatives of MAG, the Arizona Department of Transportation and the Auditor General of the State of Arizona (Auditors), as applicable, to the extent necessary to adequately permit evaluation and verification of the performance and cost of the work, and to conduct and prepare all audits and reports required by law. Auditors shall be afforded access, at reasonable times and places, to all of the City's records and personnel, pursuant to the provisions of this Section, throughout the term of this Agreement, and for a period of five (5) years after last or final payment.

D. Term and Termination. The Agreement is valid through the payment of the final invoice for completion of construction, as noted in the regional reimbursement schedule of the

Recitals, section G, subject to change based on the current Regional Council-approved ALCP unless terminated earlier as specifically provided herein.

1. Termination by MAG. MAG reserves the right to terminate this Agreement in the event that MAG determines, in its reasonable discretion, that local or regional funds are not available to meet the City's financial responsibilities in regard to the Project or in the event of an act of God or act of war or terror that makes continuation of work pursuant to this Agreement no longer in the public interest. MAG will give sixty (60) days advance notice of such termination, unless such notice is impracticable, in which case MAG will provide such notice as is practicable under the circumstances. In the event of such termination, MAG will recommend to ADOT that it reimburse the City as provided in this Agreement, for work satisfactorily performed to the date of termination.

MAG also reserves the right to terminate this Agreement in the following circumstances: 1) no Material Project Reimbursement Request (MPRR) has been submitted to MAG for a period of at least eighteen (18) months from the date of the last Project Reimbursement Request (PRR) or the effective date of this Agreement, whichever is later; 2) no Substantial Project Reimbursement Request (SPRR) has been submitted to MAG for a period of thirty (30) months from the date of the last PRR or the effective date of this Agreement, whichever is later; 3) in the event of a Substantial Project Change, or 4) if the City fails to observe or perform any of the material covenants, conditions or provisions of this Agreement to be observed or performed by the City, where such failure shall continue for a period of thirty (30) days after the City receives written notice of such failure from MAG, however, such failure shall not be a default if the City has commenced to cure the default within such 30-day period and thereafter is diligently pursuing such cure to completion, but the total aggregate cure period shall not exceed ninety (90) days unless the Parties agree in writing that additional time is reasonably necessary under the circumstances to cure such default. In the event the City fails to perform any of its material obligations under this Agreement and is in default pursuant to this Section, MAG, at its option, may terminate this Agreement. Further, upon the occurrence of any default and at any time thereafter, MAG may, but shall not be required to, exercise any remedies now or hereafter available to it at law or in equity.

2. Termination by the City. The City reserves the right to terminate this Agreement in the event that the City determines, in its reasonable discretion, that local funds are not available to meet the City's financial responsibilities in regard to the Project or in the event of an act of God or act of war or terror that makes continuation of work pursuant to this Agreement no longer in the public interest. The City will give sixty (60) days advance written notice of such termination, unless

such notice is impracticable under these circumstances, in which case the City will provide such notice as is practicable. If MAG fails to observe or perform any of the material covenants, conditions or provisions of this Agreement to be observed or performed by MAG, where such failure shall continue for a period of thirty (30) days after MAG receives written notice of such failure from the City, however, such failure shall not be a default if MAG has commenced to cure the default within such thirty (30)-day period and thereafter is diligently pursuing such cure to completion, but the total aggregate cure period shall not exceed ninety (90) days unless the Parties agree in writing that additional time is reasonably necessary under the circumstances to cure such default. In the event MAG fails to perform any of its material obligations under this Agreement and is in default pursuant to this Section, the City, at its option, may terminate this Agreement. Further, upon the occurrence of any default and at any time thereafter, the City may, but shall not be required to, exercise any remedies now or hereafter available to it at law or in equity.

3. Termination by Mutual Consent. The Parties may terminate this Agreement by mutual consent in the event that they determine that such termination is in furtherance of the goals of the ALCP and is in the best interests of the Parties.
 4. In the event of termination pursuant to this Section "D," the City agrees that it will leave the Project in condition that is safe for use by the public.
- E. Availability of Funds. Each Party's obligations under this Agreement are conditioned upon the availability of funds, appropriated or allocated, for the payment of such obligation. No liability shall accrue to MAG in the event MAG declines to review and/or approve invoices for payment on the basis that funds are not available for payment of such invoices and MAG terminates the Agreement in accordance with section D.1.
- F. Indemnification. Each Party to this Agreement (Indemnitor) agrees to defend, indemnify and hold harmless the other Party, and such Party's officers, officials, employees, agents, and directors (collectively, the Indemnitee) from and against any and all claims, demands, losses, liabilities, causes of action and costs (including expert witness fees, attorney's fees and costs of defense and appellate appeal) (collectively, Claims), which may be imposed upon, incurred by or asserted against the Indemnitee, attributable (directly or indirectly) to, or arising in any manner by reason of, the negligence, error, or omission of any agent, officer, servant, or employee of the Indemnitor, or anyone for whom Indemnitor may be legally liable, in the performance of this Agreement.
- G. Conflict of Interest. This Agreement is subject to termination for conflict of interest, pursuant to the provisions of A.R.S. § 38-511.

H. Ownership of Improvements upon Termination. Upon the expiration or other termination of this Agreement, ownership of the Project and the improvements constructed under this Agreement shall be vested in the City.

I. General Provisions.

1. INCORPORATION OF RECITALS. The Recitals are acknowledged by the Parties to be substantially true and correct, and hereby incorporated as agreements of the Parties.
2. ENTIRE AGREEMENT. This Agreement constitutes the entire understanding of the Parties and supersedes all previous representations, written or oral, with respect to the services specified herein. This Agreement may not be modified or amended, except by a written document, signed by authorized representatives of each Party.
3. OFFICIAL COPIES. Upon date of execution by the MAG Executive Director, the City of Mesa shall receive a signed copy of the agreement within 14 days of execution.
4. ARIZONA LAW. This Agreement shall be deemed to be made under, shall be construed in accordance with, and shall be governed by the laws of the State of Arizona, without reference to choice of law or conflicts of laws principles thereof.
5. MODIFICATIONS. Except as otherwise specifically provided in this Agreement, any amendment, modification or variation from the terms of this Agreement shall be in writing and shall be effective only after written approval of all Parties.
6. ATTORNEY'S FEES. In the event either Party brings any action for any relief, declaratory or otherwise, arising out of this Agreement, or on account of any breach or default of this Agreement, the prevailing Party shall be entitled to receive from the other Party reasonable attorneys' fees and reasonable costs and expenses, as determined by the arbitrator or court sitting without a jury, which shall be deemed to have accrued on the commencement of such action and shall be enforceable, whether or not such action is prosecuted to judgment.
7. NOTICES. All notices or demands required to be given, pursuant to the terms of this Agreement, shall be given to the other Party in writing, delivered in person, sent by facsimile transmission, deposited in the United States mail, postage prepaid, registered or certified mail, return receipt requested or deposited with any commercial air courier or express service at the addresses set forth below, or to such other address as the Parties may substitute by written notice, given in the manner prescribed in this Section.

If to the City of Mesa:

Transportation Department Director
City of Mesa, Transportation Department
PO Box #1466
Mesa, Arizona 85211-1466
Tel: (480) 644-2160
Fax: (480) 644-3130

If to MAG:

Executive Director
Maricopa Association of Governments
302 No. First Avenue
Suite 300
Phoenix, Arizona 85003
Tel: (602) 254-6300
Fax: (602) 254-6490

A notice shall be deemed received on the date delivered, if delivered by hand, on the day it is sent by facsimile transmission, on the second day after its deposit with any commercial air courier or express services or, if mailed, three (3) working days (exclusive of United State Post Office holidays) after the notice is deposited in the United States mail as above provided, and on the delivery date indicated on receipt, if delivered by certified or registered mail. Any time period stated in a notice shall be computed from the time the notice is deemed received. Notices sent by facsimile transmission shall also be sent by regular mail to the recipient at the above address. This requirement for duplicate notice is not intended to change the effective date of the notice sent by facsimile transmission. E-mail is not an acceptable means for meeting the requirements of this section unless otherwise agreed in writing.

8. FORCE MAJEURE. Neither Party shall be responsible for delays or failures in performance resulting from acts beyond their control. Such acts shall include, but not be limited to, acts of God, riots, acts of war, epidemics, governmental regulations imposed after the fact, fire, communication line failures or power failures.

9. ADVERTISING. No advertising or publicity concerning MAG using any contractor's or subcontractor's services shall be undertaken without prior written approval of such advertising or publicity by MAG's Executive Director.
10. COUNTERPARTS. This Agreement may be executed in one or more counterparts, and each originally executed duplicate counterpart of this Agreement shall be deemed to possess the full force and effect of the original.
11. CAPTIONS. The captions used in this Agreement are solely for the convenience of the Parties, do not constitute a part of this Agreement and are not to be used to construe or interpret this Agreement.
12. SEVERABILITY. If any term or provision of this Agreement shall be found to be illegal or unenforceable, then notwithstanding such illegality or unenforceability, this Agreement shall remain in full force and effect, and such term or provision shall be deemed to be deleted.
13. AUTHORITY. Each Party hereby warrants and represents that it has full power and authority to enter into and perform this Agreement, and that the person signing on behalf of each has been properly authorized and empowered to enter this Agreement. Each Party further acknowledges that it has read this Agreement, understands it, and agrees to be bound by it.
14. E-VERIFY.
 - a. Warrant of Compliance. Pursuant to the provisions of A.R.S. §41-4401, each Party warrants to the other that the Party and the Party's subcontractors are in compliance with all Federal Immigration laws and regulations that relate to its employees and with the E-Verify Program under A.R.S. §23-214(A).
 - b. Breach of Warranty. A breach of this warranty by a Party or any of its subcontractors will be considered a material breach of this Agreement and may subject the breaching party to penalties up to and including termination of this Agreement or any subcontract.
 - c. Right to Inspect. Each Party retains the legal right to inspect the papers of any employee who works on this Agreement or any subcontractor to ensure compliance with the warranty given above.
 - d. Random Verification. Either Party may conduct a random verification of the employment records of the other and any of the Party's subcontractors to ensure compliance with this warranty.

- e. Federal Employment Verification Provisions – No Material Breach. A Party will not be considered in material breach of this Agreement if it establishes that it has complied with the employment verification provisions prescribed by 8 USCA §1324(a) and (b) of the Federal Immigration and Nationality Act and the E-Verify requirements prescribed by A.R.S. §23-214(A).
- f. Inclusion of Article in Other Contracts: The provisions of this Article must be included in any contract either Party enters into with any and all of its contractors or subcontractors who provide services pursuant to this Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused these presents to be executed by their duly authorized officers. (The order for obtaining the signatures is as follows: the appropriate representative of the City, the MAG General Counsel, and the MAG Executive Director).

MAG:
Maricopa Association of Governments, an
Arizona non-profit Corporation

Date By: Eric J. Anderson
Executive Director

City of Mesa:
Jurisdiction of Mesa, an Arizona Municipal
Corporation

Date By: Christopher J. Brady
Its: City Manager

ATTEST:

DeeAnn Mickelsen, City of Mesa Clerk

Approved as to form:
Approved as to form:

By: _____
MAG General Counsel By: _____
Jim Smith, Attorney for City of Mesa