



## **THE CITY OF FOLEY, ALABAMA**

**AGREEMENT BETWEEN THE CITY OF FOLEY AND McNAIR HISTORIC PRESERVATION, INC., MOBILE, ALABAMA TO PROVIDE PROFESSIONAL CONSULTING AND RELATED SERVICES TO UPDATE THE FOLEY DOWNTOWN HISTORIC DISTRICT DESIGN REVIEW GUIDELINES.**

**AGREEMENT TO UPDATE THE FOLEY DOWNTOWN HISTORIC DISTRICT DESIGN REVIEW GUIDELINES.**

**THIS AGREEMENT** is entered into by and between the City of Foley, Alabama, a Municipal Corporation, 407 East Laurel Avenue, Foley, AL 36535 (hereinafter referred to as the "CLIENT" OR "CITY" and McNair Historic Preservation, Inc., 2151 Government Street, Mobile, AL 36606 (hereinafter referred to as "CONSULTANT" OR "CONTRACTOR" on this 14 day of 2017, as follows:

**WHEREAS**, the client desires to have performed an update of the Foley Downtown Historic District Design Review Guidelines; and,

**WHEREAS**, Consultant has made a proposal to the Client to provide such professional consulting services and has represented to the Client that it is staffed with personnel knowledgeable and experienced in such matters as to be able to provide those services to the Client in a professional and competent manner; and,

**WHEREAS**, heretofore, the Client duly enacted a resolution authorizing execution of an agreement between the Client and Consultant, and the Client now desires to enter into a contract with Consultant as more particularly set forth herein; as follows:

**WITNESSETH:**

**NOW, THEREFORE, this agreement is made and entered into on the date first above written by and between the Client and Consultant, by which Consultant will provide professional consulting and related services to the Client as hereinafter specified, through individuals possessing a high degree of professional skill where the personality of the individual will play a decisive role and which is thereby exempt from the Alabama Competitive Bid Law, AL Code 41-16-51(a)(3) (1975); for the consideration as set forth herein as follows:**

**I. SCOPE OF SERVICES**

**Consultant agrees, for the consideration as stated herein, to provide professional consulting and related services to the Client in regard to Professional Services Related to the update of the Foley Downtown Historic District Design Review Guidelines as more particularly set forth in Consultant's proposal to Client of January 17, 2017, which is adopted herein by reference except to the extent of a conflict with the terms and conditions herein, in which case the provisions herein shall prevail. Generally the Project services shall include but not be limited to the following:**

- 1. The Consultant will meet with the City of Foley Historical Commission, staff and community members throughout the process;**
- 2. The Consultant will provide a draft of the updated Foley Downtown Historic District Design Review Guidelines that are in keeping with the Secretary of the Interior Standards for Rehabilitation;**
- 3. These Guidelines, along with the needs and concerns of the City of Foley Historical Commission, will be used for the update;**
- 4. The Consultant will participate in a public hearing with the City of Foley Historical Commission to answer any questions from the public;**
- 5. The Consultant will finalize the Foley Downtown Historic District Design Review Guidelines and provide in a format with illustrations to help explain proper application of guidelines.**
- 6. The Consultant will provide twenty (20) paper copies along with a Microsoft Word copy and pdf copy for the City of Foley website.**

## **II. TIME OF PERFORMANCE**

Consultant shall commence providing services pursuant to this agreement as of the date first above written and diligently and expeditiously conduct its works in such a manner as to complete its commitments by or before June 1, 2017.

Consultant shall commence, carry on and complete the project with all practicable dispatch, in a sound, economical and efficient manner, in accordance with the provisions hereof and applicable laws. In accomplishing the project, Consultant shall take such steps as are appropriate to insure that the work involved is properly coordinated with related work and policies being carried on within the City.

Consultant shall provide services in the order indicated by the Client.

## **III. COMPENSATION**

The Client agrees to pay Consultant for the services as set forth herein, a total maximum amount not to exceed \$4,500.

Unless otherwise indicated above, Consultant will invoice Client detailing the services performed on an hourly basis on behalf of Client. The invoice format shall be satisfactory to Client.

Client will remit payment to Consultant within forty-five (45) days from receipt of invoice.

Provided, however, the Client may delay payment for a reasonable time on all or any portion of an invoice, without the accrual of any interest or charges, on the basis of improper, contested or inadequate explanation of invoices by Consultant.

In the event of such disputed or contested invoice, only that portion so contested shall be withheld by the Client, and the undisputed portion shall be paid in accordance with the provisions herein. The Client will exercise reasonableness in contesting any invoice or portion thereof.



In the event Consultant is required by the scope of services to provide documents or testimony on behalf of the Client in response to claims, demands or actions against the Client, its officers, agents or employees by third parties, Consultant shall bill the Client for services rendered based on the then current professional fees and expenses incurred. Provided, however, in the event of a final adjudication by a court of competent jurisdiction that the services or any portion thereof provided by Consultant was not properly performed, then Consultant will refund to Client all sums paid Consultant for all work related to the testimony. No task will be undertaken by Consultant without prior notification to the Client. The provisions hereof are intended to apply only to third party actions based upon the Client's implementation of Consultant's report and findings and not in regard to claims or actions by or between the Client and Consultant.

Provided, however, nothing herein contained shall prevent the Client from utilizing any document studies, forms or other data or information otherwise resulting from the performance of this agreement by Consultant, in bringing, defending or otherwise assisting in litigation, claims, actions or demands undertaken or defended by the Client, without any additional cost to the Client.

In no event shall the making by the Client of any payment to Consultant constitute or be construed as a waiver by the Client of any breach of covenant, or any default which may exist on the part of Consultant and the making of any such payment by the Client while any such breach or default exists shall in no way impair or prejudice any rights or remedies available to the Client in respect to such breach or default.

#### **IV. CLIENT RESPONSIBILITIES**

In addition to paying Consultant for services according to the preceding paragraph, the Client shall have the following responsibilities to Consultant:

The Client shall provide for Consultant: access to its personnel, facilities and materials including, but not necessarily limited to all documents related to the Foley Downtown Historic District Design Review Guidelines in the City's possession will be made available to the consultant.

**V. LEVEL OF COMPETENCE**

Consultant represents and warrants to the City that it and all of its employees that will be working on the Project for the Client are fully qualified and competent to perform all services required herein and that to the extent required, Consultant has or will secure at its own expenses, all personnel required in performing the services under this agreement. Such personnel shall not be employees of or have any contractual relationship with the Client. All of the services required hereunder will be performed by Consultant or under its supervision and all personnel engaged in the work shall be fully qualified to perform such services.

Consultant represents and warrants to the Client that its Project Director for the performance of services by Consultant pursuant to the terms and conditions of this agreement shall be and remain Stephen McNair, of Consultant's organization and there shall be no change in the Project Director without the prior written consent of the Client's representative.

**VI. FEDERAL ASSISTANCE**

Federal funds are involved and compliance with all applicable Federal, State and local laws, rules and regulations is required.

**VII. BASIC REQUIREMENTS FOR HISTORIC PRESERVATION FUND GRANTS**

The Contractor shall conform within the text of 18 U.S.C. 1913 and no contract will be processed which does not include the text of 18 U.S.C. 1913 as set forth in the following paragraph.

"The Contractor shall be responsible to see that no part of this money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United State of its Department or agencies from



communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, request for legislation or appropriations which they deem necessary for the efficient conduct of the public business." NPS Grants Manual Chapter 5.

#### **VIII. MATERIALS/CONFIDENTIALITY**

The Client agrees to cooperate with and provide Consultant with access to facilities and information within its reasonable possession and control, requested by Consultant for its review and use in performing the services herein. Provided, however, all such documents, information, results, memoranda and all other written or verbal information ("information") shall be held confidential by Consultant and any of its subconsultants and shall not, without the prior written consent of the Client, be used for any purpose other than the performance of this agreement nor be disclosed to any other entity not connected with performance of this agreement. Upon completion of services, Consultant shall return all such information to the City. The City shall retain ownership of all such information and the same shall not be used by the Consultant for any purpose or purposes without the express written permission of the City. Consultant shall not use the City's name or insignia in any magazine, trade paper, newspaper or other medium without first obtaining the written consent of the City.

#### **IX. INTELLECTUAL PROPERTY**

The City and Consultant, jointly and separately, acknowledge and agree that the intellectual property of both parties shall remain owned by the respective party. With the exception of Consultant's periodic and final reports generated for performance of this agreement to or for the City, reports, memorandums, electronic mail, facsimile transmissions and other written and prepared documents shall be owned by the party who authored, generated or who originally possessed the same and nothing in this agreement shall contravene said rights.

The Consultant shall not, either for or without compensation, engage in teaching, lecturing or writing that is dependent on information obtained as a result of his/her employment with the grantee, except when that information has been made available to the general public or will be made available upon request, or when the SHPO (State Historic Preservation Office) given written authorization

for the use of nonpublic information on the basis that the use is in the public interest.

**X. INFORMATION AND REPORTS**

Consultant shall, at such time and in such format as the Client's representative may require, furnish a final written report and such periodic reports concerning the status of the Project as may be requested by the Client's representative. Consultant shall furnish the Client, upon request, with copies of all documents and other material prepared or developed in relation with or as part of the Project. Such requests shall be reasonable and within normal business practices for such work. The City shall own and acquire all rights to the periodic and final report of Consultant.

The Contractor shall acknowledge National Park Service support, include the required disclaimer statement, and the required Nondiscrimination statement in all publications developed under this agreement including audio visual and workshop materials, when applicable as follows:

"This program receives federal funds from the National Park Service administered through the Alabama Historical Commission. Regulations of the U.S. Department of the Interior strictly prohibit unlawful discrimination in departmental federally assisted programs on the basis of race, color, national origin, age or disability. Any person who believes he or she has been discriminated against in any program, activity, or facility operated by a recipient of federal assistance should write to: Office of Equal Opportunity, U.S. Department of the Interior, National Park Service, 1849 C Street, NW, Washington, D.C. 20240."

And, if applicable, the following statement:

"Contents and opinions do not necessarily reflect the views or policies of the U.S. Department of the Interior or the Alabama Historical Commission, nor does the mention of trade names or commercial products constitute endorsement or recommendation."



**XI. RECORD KEEPING**

The Contractor shall allow access by the Alabama Historical Commission, the federal grantor agency (original source of funding), the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the Contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts and transcriptions.

**XII. RECORD RETENTION**

The Contractor shall retain all required records for three years after Contractor makes final payment and all pending matters are closed.

**XIII. COPYRIGHT INFORMATION**

No reports, maps or other documents produced in whole or in part under this contract shall be the subject of any application for copyright without the express written consent of the Alabama Historical Commission. No such copyright shall prevent the Alabama Historical Commission or the Federal Government and its officers, agents and employees from acting within the scope of their official duties, to reproduce, publish or otherwise use and to authorize others throughout the world, to publish, translate, reproduce and use for Government purposes.

**XIV. APPLICABLE LAWS**

Consultant shall register and comply with all State or Federal laws and/or regulations as they may relate to the services or activities of the Consultant to the City. Any conflicts resulting from noncompliance with federal compliance guidelines, acts of an illegal nature or any additional resulting conflicts shall make this contract null and void.

**XV. INDEMNIFICATION**

To the extent allowed by Alabama law and without waiver or any sovereign, municipal or other immunity, including Article 1, Section 14 of the Constitution of Alabama (1901), consultant agrees to indemnify, hold harmless and defend the City of Foley its officers, employees, servants and agents from and against any

and all loss, damage or liability resulting from demands, claims, suits or actions of any character presented or brought for any injuries, including death, to persons or for damages to property caused by or arising out of any negligent (including strict liability), wanton, reckless or intentional act or omission of such Indemnifying Party, and of its contractors, invitees, guests, employees or agents, or which otherwise arises out of, relates to, or is attributable to the same. This indemnity shall apply whether the same is caused by or arises out of the joint, concurrent or contributory negligence of any third person or entity. The foregoing indemnity shall include, but not be limited to, court costs, attorney's fees, costs of investigation, costs of defense, settlements and judgments associated with such demands, claims, suits or actions.

**XVI. TERMINATION**

The Client reserves the right with or without cause, to terminate this agreement by giving written notice to Consultant of such termination at least fifteen (15) days before the effective date thereof. In the event of termination pursuant to this paragraph, Consultant shall cease performing any work pursuant to this agreement and be entitled to compensation for services rendered through the effective date of termination.

**XVII. LOSS OF GRANT FUNDS**

It is understood and agreed to by and between the parties that to the extent any of the compensation to is payable from the proceeds of any Grant, if the City loses its eligibility to receive or continue to receive Grant funds or for any reasons the City no longer can receive or obtain Grant funds, then the City agrees it shall immediately terminate the provision of any services on the Project upon notification from the City of this fact. While the City shall compensate the Consultant for services rendered and expenses incurred, it will not be liable to for any services rendered subsequent to the date of notice, nor will the loss of Grant funds and termination of services constitute the basis of any claim whatsoever against the City of Foley. However, if the City loses Grant funding due to a failure of the Consultant to perform services, then the Consultant shall be liable to City for all such Grant funds and shall refund to City any compensation and expenses paid by City for such services.



**XVIII.        INSURANCE**

The parties acknowledge that the Consultant is self-insured, and will keep such self-insurance in place for liabilities associated with the services as provided herein. Consultant shall forward to the City a verification of general liability coverage.

**XIX.        CONFLICTS OF INTEREST**

The Consultant represents and warrants to the City that neither it nor its Project Director are aware of any conflict of interest which exists or could arise by means of its provision of services to the City pursuant to the terms and conditions of this agreement. Consultant further warrants that during the course of providing services to the City pursuant to this agreement it will not represent or receive compensation from any vendor, supplier or contractor to the City. This is an exclusive personal service agreement and Consultant will not represent the interest of any other person, firm, or entity that conflicts with the interest of the City of Foley in regard to the subject matter of this agreement or the performance of services pursuant to the terms and conditions thereof.

The Contractor covenants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under this agreement. The Contractor further covenants that in the performance of this agreement no person having any such interest shall be employed. The Contractor warrants that it now has or will secure, at its own expense, all personnel required to perform the services under this contract. Such personnel shall not be employees of nor have any contractual relationship with the Alabama Historical Commission.

No officer, member or employee of the Alabama Historical Commission, and no member of the governing body of the locality or localities in which the project is situated or being carried out who exercises any functions or responsibilities in the review or approval of the undertaking or carrying out of this project shall (a) participate in any decision relating to this agreement which affects his personal interest or the interest of any corporation, partnership or association in which he is directly or indirectly interested; or (b) have any interest, direct or indirect, in this agreement or the proceeds, thereof.



No member of, or Delegate to, the Congress of the United States of America and no Resident Commissioner shall be admitted to any share or part thereof or to any benefit to arise therefrom.

It is understood by and between the parties hereto that neither the Consultant, nor any of its officers, agents or employees nor any subconsultant to the Consultant nor any subsidiary, parent entity, principal officers nor any entity having a beneficial interest in any of the same, may submit a bid or proposal in response to any request for proposals or advertisement for bids resulting from the services provided in whole or in part pursuant to this agreement.

**XX.            NOTICES/PARTIES REPRESENTATIVES**

The representative of the City of Foley for this agreement shall be Miriam Boutwell.

All notices, bills, invoices and reports required by this agreement shall be sufficient if sent by the parties hereto in the United States Mail, postage prepaid thereon to the addresses noted below:

Client:            City of Foley  
                      Attn: Miriam Boutwell  
                      200 North Alston Street  
                      Foley, AL 36535

Consultant: McNair Historic Preservation, Inc.  
                      Attn: Stephen McNair  
                      2151 Government Street  
                      Mobile, AL 36606

**XXI.           REPRESENTATIVE CAPACITY**

While Consultant's role will be that of consultant to the City, Consultant shall be and remain an independent contractor and not act in the role of an agent or legal representative on behalf of the City. Consultant shall not have the authority to bind or obligate the City, its officers, agents or employees.

**XXII. MISCELLANEOUS**

**Capacity:** Each party to this Agreement represents and warrants to the other as follows:

A. That it is an individual of the age of majority or otherwise a legal entity duly organized and in good standing pursuant to all applicable laws, rules and regulations.

B. That each has full power and capacity to enter into this agreement, to perform and to conclude the same including the capacity, to the extent applicable, to grant, convey and/or transfer areas, assets, facilities, properties (both real and personal), permits, consents and authorizations and/or the full power and right to acquire and accept the same.

C. That to the extent required, each party has obtained the necessary approval of its government body or board and a resolution or other binding act has been duly and properly enacted by such governing body or board authorizing this agreement and said approval has been reduced to writing and certified or attested by the appropriate official of the party.

D. That each party has duly authorized and empowered a representative to execute this agreement on their respective behalf and the execution of this agreement by such representative fully and completely binds the party to the terms and conditions hereof.

E. That absent fraud, the execution of this agreement by a representative of the party shall constitute a certification that all such authorizations for execution exist and have been performed and the other party shall be entitled to rely upon the same. To the extent a party is a partnership, limited liability company or joint venture, the execution of this agreement by any member thereof shall bind the party and to the extent that the execution of agreement is limited to a manager, managing partner or specific member then the person so executing this agreement is duly authorized to act in such capacity for the party.

F. That each party represents and warrants to the other that there is no litigation, claim or administrative action threatened or pending or other proceedings to its knowledge against it which would have an an adverse

impact upon this transaction or upon either's ability to conclude the transaction or perform pursuant to the terms and conditions of this agreement.

G. That each party has obtained any and all required permits, approvals and/or authorizations from third parties to enable it to fully perform pursuant to this agreement.

H. Under the provisions of the Constitution and laws of the State of Alabama, each party has the power to consummate the transactions contemplated by this agreement.

I. Each party represents and warrants that the execution and delivery of this agreement and the consummation of the transactions contemplated herein will not conflict with, be in violation of, or constitute (upon notice or lapse of time, or both) a default under the laws of the State of Alabama, any resolution, agreement, or other contract agreement, or instrument to which a party is subject, or any resolution, order, rule, regulation, writ, injunction, decree or judgment of any governmental authority or court having jurisdiction over the party.

J. This agreement constitutes the legal, valid and binding obligation of each party and is enforceable against each party in accordance with its terms, except in so far as the enforceability thereof may be limited by:

(1) Bankruptcy, insolvency or other similar laws affecting the enforcement of creditors' rights;

(2) General principles of equity, regardless of whether such enforceability is considered as a proceeding at equity or at law.

K. Neither party will enter into any agreement to do anything prohibited in this agreement or enter into any agreement or take any action which would in any way impair the ability of the other party to faithfully and fully perform its obligations hereunder.

L. Under the provisions of the Constitution and laws of the State of Alabama, each party has the power to consummate the transactions contemplated by this agreement.



**Ownership of Contract Documents:** The Contract Documents, and copies of parts thereof, are furnished and owned by the City. All portions of the Contract Document, and copies of parts thereof, are the instruments of serve for this project. They are not to be used on other work and are to be returned to the City on request at the completion of the work. Any reuse of these materials without specific written verification or adaptation by the City will be at the risk of the user and without liability or legal expense to the City. Such user shall hold the City harmless from any and all damages, including reasonable attorneys' fees, from any and all claims arising from any such reuse. Any such verification and adoption shall entitle the City to further compensation at rates to be agreed upon by the user and the City.

**City Logo and Name:** The Consultant shall not use the City of Foley name or insignia or logo in any magazine, trade paper, newspaper, advertisement or other medium without first obtaining the written consent of the Owner.

**Waiver:** Non enforcement of any provision of this Agreement by either party shall not constitute a waiver of that provision, nor shall it affect the enforceability of that provision or of the remaining terms and conditions of the Agreement.

**Prohibition on Assignment and Delegation:** No party to this aGreement may assign or delegate its interests or obligations hereunder without the written consent of all other parties hereto obtained in advance of any such assignment or delegation. No such assignment or delegation shall in any manner whatsoever relieve any party from its obligations and duties hereunder and such assigning or delegating party shall in all respects remain liable hereunder irrespective of such assignment or delegation.

**Third Party Beneficiaries:** It is the intent of the parties hereto that there shall be no third party beneficiaries to this Agreement.

**Final Integration:** This Agreement, together with any amendments, constitutes the entire agreement of the parties, as a complete and final integration thereof with respect to its subject matter. In the event of a direct conflict between the provisions hereof and any prior agreement or amendment, the latter shall supersede the former. All written or oral understandings and agreements heretofore had between and among the parties are merged into this Agreement, which alone fully and completely expresses their understandings. No

representation, warranty, or covenant made by any party which is not contained in this Agreement or expressly referred to herein has been relied on by any party in entering into this Agreement.

**Force Majeure:** Neither party to this Agreement shall hold the other party responsible for damages or delay in performance caused by acts of God, strikes, lockouts or other circumstances beyond the reasonable control of the other or the other party's employees, agents or contractors.

**Amendment in Writing:** This Agreement may not be amended, modified, altered, changed, terminated or waived in any respect whatsoever, except by a further agreement in writing, properly executed by all of the parties.

**Binding Effect:** This Agreement shall bind the parties and their respective personal representatives, heirs, next of kin, legatees, distributees, successors and assigns. If any provision in this Agreement shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

**Captions:** The captions of this Agreement are for convenience and reference only, are not a part of this Agreement, and in no way define, describe, extend or limit the scope or intent of this Agreement.

**Construction:** This Agreement shall be construed in its entirety according to its plain meaning and shall not be construed against the party who provided or drafted it.

**Mandatory and Permissive:** "Shall" "will" and "agrees" are mandatory; "may" is permissive.

**Governing Laws:** The laws of the State of Alabama shall govern the validity of this Agreement, the construction of its terms, the interpretation of the rights, the duties of the parties, the enforcement of its terms, and all other matters relating to this Agreement.

**Liability of the City or City Officials:** Notwithstanding any provision hereof to the contrary, the parties agree and acknowledge that the liability and obligations of the City, City officials or City employees as set forth herein are subject to the limitations imposed on municipalities by the Constitution and laws



of the State of Alabama. No present or future official, officer or employee of the City shall ever be personally liable for the performance of any obligations hereunder.

**Non-Discrimination:** The Consultant agrees that in performing the work and services as required herein under this agreement, not to discriminate against any person on the basis of race, color, religion, sex, age or disability. (The Contractor shall fully comply with the Americans with Disabilities Act, the Fair Labor Standards Act and all other applicable laws and regulations).

**Fines and Penalties:** The Consultant shall be solely liable for any and all fines or penalties which may be levied by any governmental authority against the Owner and/or Consultant which are related to the Consultant's operations. The Owner shall deduct the amount of the levied fine or penalty from the contract amount.

**Agreement Date/Counterparts:** The date of this Agreement is intended as and for a date for the convenient identification of this Agreement and is not intended to indicate that this Agreement was necessarily executed and delivered on said date. This instrument may be executed in any number of counterparts, each of which so executed shall be deemed an original, but all such counterparts shall together constitute but one and the same instrument.

**Use of Words and Phrases:** The following words and phrases, where used in this document, shall be given the following and respective interpretations: "Herein" "hereby" "hereunder" "hereof" and other equivalent words refer to this document as an entirety and not solely to the particular portion hereof in which any such word is used.

The definitions set forth in any portion of this Agreement unless the text or context indicates differently shall be deemed applicable whether the words defined are herein used in the singular or the plural. Wherever used herein any pronoun or pronouns shall be deemed to include both singular and plural and to cover all genders.

**Severability:** Each provision of this agreement shall be considered to be severable and, if for any reason, any such provision or any part thereof, is determined to be invalid and contrary to any existing or future applicable law, such invalidity shall not impair the operation of or affect those portions of this



agreement that are valid, but this agreement shall be construed and enforced in all respects as if the invalid or unenforceable provision or part thereof has been omitted.

8 McNaught - 3/14/17  
SIGNATURE DATE

[Signature]  
SIGNATURE DATE  
3/20<sup>th</sup>/2012